No. 22-12593

In the

United States Court of Appeals

for the Eleventh Circuit

Richard Rose, et al.,

Plaintiff-Appellees,

v.

Georgia Secretary of State,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.
No. 1:20-cv-02921 — Steven D. Grimberg, *Judge*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I hereby certify that the following persons and entities may have an interest in the outcome of this case in addition to those listed in Defendant-Appellant's opening brief:

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INTRODUCTION

Section 2 "does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates." *Baird v. Consol. City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992). The Supreme Court has made that abundantly clear at least since *Whitcomb v. Chavis*, 403 U.S. 124, 154 (1971), a case that was itself the basis for § 2's text. To extend § 2 vote dilution to situations where the majority simply prefers different policies (as embodied by a different political party's candidates) would create a rule that favors a particular political party, "rather than a rule hedging against racial discrimination." *Thornburg v. Gingles*, 478 U.S. 30, 83 (1986) (White, J., concurring). But § 2 does not guarantee "electoral success," just a playing field free of racial bias. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006).

Thus, for an electoral scheme to "invidiously … cancel out or minimize the voting strength of racial groups," *White v. Regester*, 412 U.S. 755, 765 (1973) (citations omitted), the majority must vote on the basis of *race*, not *political* differences. As the United States admits, the point of requiring proof of *racial* bloc voting is to "ensure[] that Section 2 allows relief only when the minority

group suffers unequal opportunity 'on account of race.'" DOJ.Br.5. If it is *partisan* bloc voting, that proves nothing.

Nevertheless, Plaintiffs and *amicus* United States offer the extraordinary view that bloc voting need not be race-based *at all*. For Plaintiffs, the bare fact that a majority of black voters prefer a different candidate than a majority of white voters establishes racial bloc voting sufficient for a § 2 claim, even if it is clear that the majority simply prefers a different party. This view would transform § 2. No longer would it prevent situations where "intensive racial politics," *Gingles*, 478 U.S. at 101 (O'Connor, J., concurring), interact with a law to "invidiously" cancel out minority votes, *Regester*, 412 U.S. at 765. Instead, it would affirmatively transform all political disagreement *into* racially divisive disputes. The United States explicitly acknowledges that, under this view, black voters can prove a § 2 violation simply because Democrats are "preferable" to black voters and Democrats lose. DOJ.Br.15.

To support that conclusion, Plaintiffs must step past the text of § 2, which requires only equality of "opportunity," not guaranteed political success. They do not even cite *Whitcomb*, 403 U.S. at 153, which explicitly rejects vote dilution where a minority loses simply because they "vote[] predominantly Democratic" in a

Republican stronghold. They assert that, in *Gingles*, Justice White and Justice O'Connor did not mean it when they said that § 2 requires evidence of *racial* voting patterns, not policy disagreement. Plaintiffs mischaracterize or ignore the numerous other courts that have held that voting patterns must be attributable to race, not policy disagreement. Both Plaintiffs and the United States seem to welcome the unconstitutional idea that § 2 is a proportional-representation machine that ensconces Democrats alone into advantageous electoral districts.

With the proper legal standard in place, the district court's ruling cannot stand. Plaintiffs now try to assert, after years of arguing that race and partisanship need not be untangled, that they nevertheless established that race, rather than ordinary partisan disagreement, explains Commission voting patterns. That is not a serious contention. The majority provides *exactly* the same support for white and black candidates. Plaintiffs try to piece together a racial explanation for voting patterns, but their contentions, even if accepted, would not be remotely sufficient to establish the extraordinary notion that Commission elections are racially discriminatory. Statewide Commission elections do not "*cause*[]" Plaintiffs to have less opportunity than others "on

account of race." *Greater Birmingham Ministries v. Sec'y of Ala.*, 992 F.3d 1299, 1330 (11th Cir. 2021).

With respect to remedy, Plaintiffs have little to say. They argue that single-member districts would be practically "feasible," but no one said otherwise. The reason the district court cannot order a quasi-judicial, statewide commission to break itself up into pieces is that it would change the "form of government," not that it would be literally impossible. *Nipper v. Smith*, 39 F.3d 1494, 1532 (1994) (en banc). And neither Plaintiffs nor the United States can point to a single case where a court *has* ordered a statewide, quasi-judicial commission to divide itself up into single-member districts.

Section 2 is supposed to be a protection against racial discrimination, not a freewheeling license for federal courts to reimagine state government to boost a minority's preferred political party. The district court erred in holding otherwise, and this Court should reverse.

ARGUMENT

I. Plaintiffs have not established a § 2 violation because they cannot show that they have lesser opportunity "on account of race."

To prove vote dilution under § 2, a plaintiff must establish that a bloc of voters "invidiously" cancels out his or her vote, *Regester*, 412 U.S. at 765, "on account of race," 52 U.S.C. § 10301. Yet in Plaintiffs and the United States' view, Plaintiffs can establish racial bloc voting merely by showing a divergence in voting patterns between minority and majority voters. That is wrong, and under the correct legal standard, Plaintiffs did not come close to proving racial, as opposed to partisan, bloc voting.

A. To establish vote dilution "on account of race," a plaintiff must prove *racial* bloc voting, not bloc voting attributable to ordinary partisan disagreement.

It should be uncontroversial that, where race-neutral, "partisan" preference determines electoral outcomes, there is no § 2 violation. *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 855 (5th Cir. 1993) (en banc). "[E]ven when election returns in effect short-circuit a minority group's voting power, the electoral structure is not illegal if the defeat represents nothing more than the routine operation of

political factors." *Uno v. City of Holyoke*, 72 F.3d 973, 982 (1st Cir. 1995).

Indeed, that is why, as the United States helpfully explains, the very purpose of the "third *Gingles* precondition," racial bloc voting, is to "ensure[] that Section 2 allows relief only when the minority group suffers unequal opportunity 'on account of race.'" DOJ.Br.5. Put another way, the import of "racially polarized voting," properly understood, is that it suggests "race-conscious politics." DOJ.Br.12 (citing *United States* v. *Marengo Cnty. Comm'n*, 731 F.2d 1546, 1567 (11th Cir. 1984)). For that to be true, racial bloc voting must actually be *racial* bloc voting, not voting attributable to ordinary partisan politics. If voting patterns follow ordinary, race-neutral partisanship, there can be no § 2 violation because there is no injury and minority voters have the same "opportunity" as everyone else. 52 U.S.C. § 10301(b).

Both Plaintiffs and the United States caricaturize the Secretary's position, but there is nothing complicated about the basic point that a plaintiff must prove majority bloc voting *attributable to race*, because the point is to prove that minority voters suffer an injury. The Secretary does not contend, for instance, that Plaintiffs must "disprove any and all … nonracial explanations for voting patterns." Resp.Br.49. The Secretary

might even have a burden of production on this point. Opening.Br.45. But Plaintiffs must still prove that *race* is the basis for voting patterns, which ordinarily would mean excluding partisan divergence, since we would *expect* partisan divergence to explain voting patterns. *Cf., e.g.*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19 (1978) (opinion of Powell, J.) ("[G]ood faith [sh]ould be presumed in the absence of a showing to the contrary."). Likewise, the Secretary does not assert that § 2 claims must fail where race and partisanship are "correlated." DOJ.Br.8. If race is the explanatory factor and *also* correlated with party, § 2 can apply. The question is what happens when partisan disagreements, *not race*, explain voting patterns.

By contrast, Plaintiffs' extreme view, parroted by the United States, is that mere differential voting is sufficient to establish racial polarization. Resp.Br.48-49. Of course, under that rule, there is racially polarized voting in every election where a minority-preferred candidate loses. The United States candidly acknowledges that, under this rule, if the majority votes against black-preferred candidates for the entirely race-neutral reason that those candidates are not Republicans, *that is still a § 2 violation*. DOJ.Br.14-17. Neither Plaintiffs nor the United States marshal any support for the extraordinary view that § 2

"guarantee[s] that nominees of the Democratic Party will be elected … if black voters are likely to favor that party's candidates." *Baird*, 976 F.2d at 361.

1. To start, Plaintiffs have no answer to the plain textual point that *race*, as opposed to ordinary policy disagreements, must "cause" them to have less "opportunity" than other voters. *Greater Birmingham Ministries*, 992 F.3d at 1329-30. As Justice Marshall pointed out long ago, a voting system does not racially discriminate if the minority "community's lack of success at the polls was the result of partisan politics." *City of Mobile v. Bolden*, 446 U.S. 55, 61, 109 (1980) (Marshall, J., dissenting). Another way of putting this is that if black Democratic voters have the same opportunity to elect as white Democratic voters, Asian Democratic voters, Hispanic Democratic voters, and so forth, they have the same "opportunity" as "other members of the electorate." 52 U.S.C. § 10301. "[I]n a majoritarian system, numerical minorities lose elections." *Holder v. Hall*, 512 U.S. 874, 901 (1994) (Thomas, J., concurring) (citations omitted). But there is no injury if that is the operation of ordinary politics where the majority simply votes Republican.

Plaintiffs' errors multiply as they move into case law. They assert that *Gingles* held that racial bloc voting is present

anywhere that a minority group votes differently from the majority, Resp.Br.48, but as even a cursory reading of the *Gingles* opinions shows, five Justices rejected that view. Justice White could not have been clearer: he did "not agree" that "there is polarized voting" merely because "the majority of white voters vote for different candidates than the majority of blacks." 478 U.S. at 83 (White, J., concurring). That is why he specifically declined to join the plurality portion of the opinion upon which the district court in this case relied—the very portion that would have held that racial causation is not required. Doc. 97 at 31; Opening.Br.29-30. Justice O'Connor, speaking for four Justices, was even more categorical: "I would reject the Court's test for vote dilution." *Gingles*, 478 U.S. at 97 (O'Connor, J., concurring).

The United States tries to draw its unconstitutional view out of Justice O'Connor's *Gingles* concurrence, DOJ.Br.13, but this argument cannot withstand scrutiny, either. Justice O'Connor agreed that an inquiry into racial causation was not necessary to analyze whether "the minority group is politically cohesive and to assess its prospects for electoral success." *Gingles*, 478 U.S. at 100. That much is obviously true. For instance, the Secretary does not doubt that black-preferred candidates do, indeed, tend to *lose* in Commission elections.

But Justice O'Connor did not suggest that one can prove the necessary *racial explanation* for voting patterns merely through such evidence. Indeed, she rejected the *Gingles* majority in its entirety precisely because it would not require the finding of "domin[ant]" "racial politics" that she believed necessary to satisfy § 2. *Id.* at 101. And if greater specificity is required, she explained that she "agree[d] with Justice White that Justice Brennan's conclusion" that racial causation is irrelevant to the polarized voting inquiry "conflicts with *Whitcomb* and is not necessary to the disposition of th[e] case." *Id.* at 101. The United States' attempt to isolate Justice White's view makes no sense, in light of four other Justices specifically adopting it. DOJ.Br.13-14 & n.4.

To be sure, Justice O'Connor gave as an *example* of non-polarized voting the situation where majority voters "reject[]" a minority-preferred candidate for "reasons other than those which made that candidate the preferred choice of the minority group." *Gingles*, 478 U.S. at 100. From this, the United States takes the remarkable position that the majority voting against Democrats, where black voters prefer Democrats, is racial bloc voting. DOJ.Br.13-17. But Justice O'Connor never suggested that one could prove majority racial bloc voting by showing only "divergent" voting patterns. She specifically rejected the notion that mere

partisan divergence could support a § 2 claim, explaining that *Whitcomb* "flatly rejected the proposition that 'any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single member district.'" *Gingles*, 478 U.S. at 98 (quoting *Whitcomb*, 403 U.S. at 156)).

The only thing Plaintiffs get right about *Gingles* is that this inter-Justice dispute did not ultimately control the outcome. But that is precisely because, in *Gingles*, the voting was undisputedly polarized by *race*, not "interest-group politics." *Id.* at 83 (White, J., concurring). The evidence in *Gingles* was that "a high percentage of black voters regularly supported black candidates and that most white voters were *extremely reluctant* to vote for black candidates." *Id.* at 54 (emphasis added). In other words, *actual* racial polarization: the majority was voting against black-preferred candidates not because of their political party but on the basis of race.[1]

[1] For this reason, the contention of Plaintiffs and the district court that voting in Commission elections is more racially polarized than in *Gingles*, Doc. 151 at 37, is blatantly wrong. In *Gingles*, white voters generally declined to vote for black candidates. Here, white voters tend to vote for Republicans.

More telling is that neither Plaintiffs nor the United States even cite *Whitcomb*, one of two cases that § 2 was amended to codify and the very case that Justice O'Connor (and others) relied on to *reject* the idea that mere differential voting patterns are sufficient to establish a § 2 violation. As *Whitcomb* made clear, where black voters lose because they vote "predominantly Democratic" and Republicans tend to win, there is no vote dilution. 403 U.S. at 153. How, then, can Plaintiffs succeed in a § 2 claim without establishing that race, rather than ordinary politics, explains their losses? The former is an injury. The latter is democracy.

Plaintiffs and the United States also have little to say about the persuasive authority arrayed against them. The United States, for instance, tries to downplay *Clements* as a "lone exception," DOJ.Br.10, but that is a bizarre characterization of the case when numerous other circuits have favorably cited it. *See, e.g.*, *Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476, 496 (2d Cir. 1999) (citing *Clements* as "proper[ly]" concluding that there is no § 2 liability where voters support black and white candidates at equal rates); *Uno*, 72 F.3d at 981 (favorably citing *Clements*); *Nipper*, 39 F.3d at 1512 (same).

The only disagreement among these cases is whether to label the relevant inquiry as part of the third *Gingles* factor or part of the "totality" analysis, and contrary to the United States' contention, DOJ.Br.11, that distinction is minimal. Either way, as these courts have recognized, there is no § 2 violation where ordinary partisanship explains voting patterns—it is not simply one factor among many.

For instance, the First Circuit held "plaintiffs *cannot prevail* on a VRA § 2 claim if there is significantly probative evidence that whites voted as a bloc for reasons wholly unrelated to rac[e]." *Uno*, 72 F.3d at 981 (emphasis added). Judge Tjoflat opined that "[u]nless the tendency among minorities and white voters to support different candidates, and the accompanying losses by minority groups at the polls, are somehow tied to race, voting rights plaintiffs simply cannot make out a case of vote dilution." *Nipper*, 39 F.3d at 1523-24. The Seventh Circuit has repeatedly made clear that there is no § 2 claim where "[v]oters … prefer Republicans but do not necessarily judge their Republicans by color." *Baird*, 976 F.2d at 361. In fact, while the Seventh Circuit has suggested that, as a general matter, "it would be best for district judges to postpone this kind of inquiry to their consideration of the totality of the circumstances," it has also

recognized that courts can engage in this inquiry at either stage, which reinforces that the difference is minimal. *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997). Wherever one engages in this inquiry, it is a dispositive issue that must be addressed.

Plaintiffs and the United States rely on a few cases that only reaffirm the point. In these cases, there was no evidence of a partisan explanation and significant *affirmative* evidence that race, rather than partisanship, explained voting patterns. *E.g.*, DOJ.Br.15-16. In *United States v. Charleston County, S.C.*, 365 F.3d 341, 353 (4th Cir. 2004), for instance, the "County's evidence of partisanship" was "far from persuasive," as its own expert "conceded that minority-preferred minority candidates are defeated more often than minority-preferred white candidates." And in *Goosby*, the court saw no evidence of partisan, as opposed to racial, causation; indeed, Republicans had only once slated a black candidate, and that candidate was not even the preferred choice of black Republicans—he was a "crony." 180 F.3d at 496.

Simply put, Plaintiffs and the United States mistake a disagreement among the circuits as to *when* to engage in this analysis as an endorsement of their view. It is not. The other circuit courts recognize what the text of § 2, *Gingles*, *Whitcomb*,

and the Senate Report require: racial bloc voting, not partisan bloc voting.

2. Plaintiffs and the United States also cannot justify the plainly illegal (and indeed, unconstitutional) consequences of their rule: it would affirmatively grant a racial preference, a partisan preference, and a right to proportionality. Opening.Br.32-33. Plaintiffs deride this as "hyperbole" but have no actual response: if merely proving differential voting is sufficient to create a nearly unrebuttable inference of a § 2 violation, Resp.Br.54-55, Republican-dominated elections alone will be suspect, racial minorities alone will have the right to carve up legislative districts to their liking, and there will be effectively no way to avoid forced proportionality in practice, Opening.Br.32-33. That is not the "exceedingly difficult" burden that § 2 is supposed to require. S. Rep. No. 97-417, at 33 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 211.

Likewise, the United States waves its hand at this problem even as it explicitly asserts that, as long as a racial minority prefers the Democratic party, Democrats must be elected (or else). DOJ.Br.15-17. But "[t]he circumstance that a group does not win elections does not resolve the issue of vote dilution." *LULAC*, 548 U.S. at 428. That is because "the ultimate right of § 2 is equality of

opportunity, not a guarantee of electoral success." *Id.* (citation omitted). When black Democrats and white Democrats and Asian Democrats and Hispanic Democrats all have equal political opportunity, § 2 is plainly satisfied. *See Whitcomb*, 403 U.S. at 154 ("A]re poor [blacks] … any more underrepresented than poor … whites who also voted Democratic and lost … ? We think not.").

If § 2 *did* provide a racial or partisan preference, it would be unconstitutional as applied. Opening.Br.37-39. Plaintiffs respond to this concern in only a footnote, and neither of their points are persuasive.

Plaintiffs first assert that this argument—a statutory interpretation argument going to what § 2 means—is somehow an "affirmative defense" that the Secretary waived by not raising previously. Resp.Br.52 n.3. The constitutional avoidance canon is not an affirmative defense, and regardless, "[o]ffering a new argument or case citation in support of a position advanced in the district court is permissible—and often advisable." *Sec'y, United States DOL v. Preston*, 873 F.3d 877, 883 n.5 (11th Cir. 2017).

Next, Plaintiffs assert that they do not support the "straw man" argument that "partisan vote dilution" is covered by § 2. Resp.Br.52 n.3. But that is precisely what Plaintiffs advocate. If Plaintiffs can establish a vote dilution claim where the majority

votes along *partisan* lines rather than on the basis of race, then § 2 does not require racial causation for the purported injury. This is the position advocated by Justice Brennan in *Gingles*, the position rejected by five other Justices, and the position that would make § 2 unconstitutional.

Of course, § 2, properly interpreted, *is* constitutional. But Plaintiffs' interpretation would stretch it well beyond legal bounds.

B. Plaintiffs did not establish that race, rather than ordinary partisan politics, explains voting patterns for the Commission.

Under the proper rule, the evidence points only one way. And that makes sense, because Plaintiffs did not try to prove a racial explanation for voting patterns. Opening.Br.43. Plaintiffs' last-ditch attempts to cobble together some evidence on this score do not withstand scrutiny.[2]

[2] Plaintiffs briefly assert that the Secretary "conceded" racially polarized voting, but that is true only if you define racially polarized voting *as Plaintiffs do*. Resp.Br.54. The Secretary was always clear that "the only point of agreement among the experts on statistical evidence is that voting in Georgia is polarized—but Plaintiffs' experts claim it is racial; the Secretary's expert finds it is partisan." Doc. 85 at 2-3; *see also, e.g.*, Doc. 144 at 55-56. And when answering the district court's question about racially polarized voting, the Secretary explained his position, but the district court had long ago defined racially polarized voting

As an initial matter, Plaintiffs try to cloak themselves in the protection of clear-error review, but "[i]n cases in which legal error taints the fact-finding process, factual findings may be given de novo review." *Cooper-Houston v. Southern Ry.*, 37 F.3d 603, 604 n.3 (11th Cir. 1994). The district court explicitly held that Plaintiffs need not prove "that race independent of partisanship explains the discriminatory effect. That is not the law." Doc. 151 at 34. To the contrary, that *is* the law. *See supra* § I; *see also, e.g.*, Opening.Br.39-43. The district court plainly misunderstood racial polarization, believing that Commission elections are somehow more racially polarized than the elections in *Gingles*. *See supra* n.1. The district court held that § 2 *requires* partisan polarization, an error so basic that even Plaintiffs no longer meaningfully defend it. Opening.Br.40-41. Regardless, Plaintiffs' arguments on the evidence are either based on legal errors, points ignored by the district court, or clearly erroneous "findings."

To start, Plaintiffs attempt to reject their *own* evidence that white voters supported black and white candidates at identical rates. Opening.Br.46; Resp.Br.58 n.4. Plaintiffs note that none of

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incorrectly, Doc. 97 at 30-32, so the Secretary was simply dealing with the law as (erroneously) understood by the district court.

the Republican candidates in the relevant time period were black,[3] but that hardly undercuts the point that white voter support for non-Republicans was identical across racial lines. This is the *most* important evidence of partisan, rather than racial, voting. Opening.Br.46-47. Plaintiffs are reduced to protesting that the Secretary should have apparently focused on these numbers to a greater extent in its briefing below. Resp.Br.58 n.4. Even setting aside how irrelevant that complaint is, Plaintiffs' own evidence made clear that white voters give the same support to black and white candidates. What else did Plaintiffs want the Secretary to say?

Plaintiffs also do nothing to detract from the State's statistical evidence showing that political preference, rather than race, is the driving factor behind voting patterns in Georgia. The district court "credit[ed]" Dr. Barber's evidence, even while holding it to be "of limited utility." Doc. 151 at 20. The latter point is legally wrong, *see supra* § I, the former point is uncontested. Plaintiffs attempt to cordon off Dr. Barber's analysis on the basis

[3] Of course, one of the Republican candidates for the 2022 elections was black, but Plaintiffs convinced the district court to cancel those elections (thus retaining Commissioners past their term even though they were, in Plaintiffs' own view, illegally elected), likely because they knew that it would further undermine their case if a black Republican was elected.

that he looked to non-Commission elections, Resp.Br.58-59, but they provide no reason to believe that voting patterns in Georgia statewide and federal elections (for which there was available data) are fundamentally distinct from Commission elections.

Plaintiffs erroneously trumpet the view that race is the most likely "predictor" of "party affiliation," and thus racial polarization and partisan polarization are somehow the same thing. Resp.Br.60. But predictive value is not necessarily causal—one can predict the position of stars based on the position of other stars, even though one does not *cause* the other. And because the evidence shows that the majority gives the same support to black and white candidates, Plaintiffs' attempt to tar the majority as acting based on race simply holds no water. Moreover, if the Court were to accept Plaintiffs' argument that race indelibly determines policy preferences and that § 2 is therefore triggered by mere differences in political viewpoint, *all* partisan disagreement would be transformed into racial disagreement. Such an "approach would project a bleak, if not hopeless, view of our society." *NAACP, Inc. v. City of Niagara Falls, N.Y.*, 65 F.3d 1002, 1016 (2d Cir. 1995). Nothing in § 2 supports this view.

Plaintiffs next argue that "partisan identification" does not perfectly align with voter polarization, and so this somehow

undercuts the notion that partisan preference, rather than race, explains elections. Resp.Br.56-57. But the question is not whether voters *identify* as Republicans or Democrats, it is whether they *vote* along partisan lines. Plenty of voters who do not identify with either party nonetheless tend to vote for one party because they prefer its policy positions. That white Republican affiliation is a bit lower than white voting percentage for Republicans is evidence of independents voting for Republicans, not "racial bias in the voting community." *Nipper*, 39 F.3d at 1497 (plurality op.).

Plaintiffs also rely on the supposedly "fatal" point that, after the 2016 elections, polarization purportedly increased without an increase in party identification. Resp.Br.57. But that is simply, objectively, wrong. White voter support for Democratic (i.e., black-preferred) candidates does not show any appreciable change post-2016. Doc. 146-8 at 11. White voter support for Republican (i.e., white-preferred) candidates actually goes slightly *down* post-2016. *Id.* at 12 (showing that average support dropped from 82.35% to 78.83%). Although black voter support for Democrats did see an uptick after 2016, *id.* at 11, that has nothing to do with whether the *majority* blocks candidates on account of race. No matter how politically cohesive the minority is, if the majority votes on race-neutral, partisan lines, there has been no injury. (Not to mention

that the likely explanation for even that shift in black voter support is Donald Trump's election as president, not a sudden increase in racialized voting.)

Finally, Plaintiffs reassert that a few races had Libertarians run in the place of Democrats, but that is irrelevant. Opening.Br.48. The Republican majority votes for Republicans, and the Democratic minority votes *against* Republicans, and the majority does not differentiate between non-Republicans. *See* Doc. 146-8 at 13-14 (showing essentially identical white voter support across Republicans and across non-Republicans). It would be relevant if the majority refused to support a black or black-preferred *Republican*, but there is no evidence whatsoever to support that view.[4]

* * *

Plaintiffs and the United States reveal their partisan goal when they fret that it will be *hard* to prove racial polarization if one cannot simply assume it based on differential voting patterns.

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[4] Plaintiffs, seemingly recognizing that they did not, in fact, put on any evidence establishing a racial explanation for voting patterns, point to the wholly unexplored testimony of a fact witness who briefly mentioned her recollection of contested Republican primaries. Resp.Br.61. One Plaintiff's anecdotal understanding regarding a limited segment of races does not a case make.

E.g., DOJ.Br.16-17. That is not true. If voters were voting differently based on race, it would show up in their voting differently for candidates of different races. It would show up in primaries. It would show up in nonpartisan elections. The reason it does not show up here is that Commission elections are decided by ordinary political concerns, not race. That Plaintiffs cannot find evidence for racial bloc voting goes to the failure of their claim, not any difficulty in proving such a claim where race actually *does* "dominate" the political process. S. Rep. at 33.

II. Single-member districts would transform Georgia's chosen form of government.

Plaintiffs do not contest that "[f]ederal courts may not … alter the state's form of government" in choosing a remedy in vote-dilution cases. *Nipper*, 39 F.3d at 1532. They argue, instead, that single-member districts would not alter Georgia's chosen form of government because such a system is "feasible." But feasibility is not the test, and single-member districts are not an appropriate comparator that would retain Georgia's chosen model of government for the Commission.

A. The question is not whether a different voting practice is *feasible*. A federal court could not require an infeasible remedy even if wanted to. Rather, a federal court can grant a remedy

under § 2 only if it confirms that vote dilution has actually occurred. And that analysis, in turn, requires an "objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice." *Holder*, 512 U.S. at 881. That is, to determine that votes were actually diluted, the court must first ask: "[d]iluted relative to what benchmark?" *Gonzalez v. City of Aurora, Illinois*, 535 F.3d 594, 598 (7th Cir. 2008). It is not enough that, in some imaginable counterfactual, minority voters might have greater electoral power. The federal court must have a "principled reason" for choosing that "benchmark." *Holder*, 512 U.S. at 881.

Sometimes, "the benchmark for comparison in a § 2 dilution suit is obvious." *Id.* at 880. Gerrymandered single-member districts can be compared to "reasonably compact districts." *LULAC*, 548 U.S. at 430. The "effect of an anti-single-shot voting rule … can be evaluated by" comparison to "the system without that rule." *Holder*, 512 U.S. at 880-81.

But when the § 2 challenge is to the size or form of a government body, picking a benchmark is impossible. Perhaps a five-member commission might be preferable to a three-member commission, but what is the "principled reason" for picking that "size … over another?" *Id.* at 881. There are many "alternative

electoral structure[s]" that a state could theoretically adopt for any given public office. *Nipper*, 39 F.3d at 1533; *see also Davis v. Chiles*, 139 F.3d 1414, 1423 (11th Cir. 1998) (identifying a number of potential benchmarks for at-large judicial elections).

The United States itself makes this point. It argues that the "state legislature [could] conceive of" and adopt alternative remedies like "cumulative voting, limited voting, or ranked-choice voting." DOJ.Br.24-25. Precisely: there are many theoretical electoral models that Georgia *could* have selected. But the question is whether the district court has a principled basis for choosing the particular comparator by which to measure vote dilution. *Davis*, 139 F.3d at 1423; *Nipper*, 39 F.3d at 1531.

Not only did the district court refuse to limit itself to a "remedy within the confines of the state's [electoral] model," *Nipper*, 39 F.3d at 1531, it did not even *try* to offer a "principled reason" for the comparator it chose. That was reversible error.

B. The district court's chosen comparator—single-member districts—fundamentally transforms not only the way Georgia selects Commissioners, but also the way the Commission would operate. Plaintiffs contend that single-member districts are the "required remedy" here, suggest that Georgia has the burden to *prove* otherwise, and then insist that Georgia does not truly care

about the at-large nature of the Commission's elections anyway. Resp.Br.64-72. Wrong on all counts.

Plaintiffs (and the United States) do not provide a single example of a court ordering that statewide elections be transformed into single-member district elections. They rely exclusively on challenges to multi-member, purely legislative bodies elected from non-statewide districts. Resp.Br.71; DOJ.Br.19-20. But standard remedies for "one type of election"—"representatives in multimember legislative bodies"—do not necessarily apply to "qualitatively different type[s] of elections." *Nipper*, 39 F.3d at 1529. When single-member districts transform a state's chosen model of government, that comparator is inappropriate. *See Nipper*, 39 F.3d at 1543-45; *Davis*, 139 F.3d at 1423-24. Simply repeating that single-member districts are "required" does not make them so. Resp.Br.64.

Both Plaintiffs and the United States largely ignore this Court's controlling, *en banc* opinion in *Nipper*. The United States suggests that opinion is "non-precedential," which is plainly wrong. *See* 39 F.3d at 1547 (Edmonson, J., concurring). Plaintiffs cite *Nipper* only once, when they erroneously argue that *Nipper* and *Davis* are limited to judicial elections. Resp.Br.68. Both those cases take the "principled benchmark" requirement from the

Supreme Court's reasoning in *Holder*, which has nothing to do with judicial elections. *See Nipper*, 39 F.3d at 1531; *Davis*, 139 F.3d at 1421. The more important point, however, is that both *Nipper* and *Davis* focus on the "State's interest in maintaining an electoral system," *Nipper*, 39 F.3d at 1541 (citation omitted), which of course requires federal courts to first determine what the essential features of the State's "current electoral system[]" actually *are*. *Id.*

In *Nipper* and *Davis*, the state had chosen a model—at-large elections—that maintained "a link between a trial judge's jurisdiction and the judge's elective base." *Id.* at 1542 (citation omitted). That structural feature was important because it "preserve[d] judicial accountability," *id.* at 1543, promoted "judicial independence," *id.* at 1544, and prevented "even the appearance" of "home-cooking biases," *Davis*, 139 F.3d at 1421 (citation omitted). Nothing about the Court's reasoning is limited that particular electoral context.

Anyway, Georgia's chosen electoral system for the Commission *does* share essential features with the judicial electoral systems this Court has previously upheld. Plaintiffs do not deny that the Commission is quasi-judicial, they just note that it also performs quasi-legislative functions. Resp.Br.18, 69. That is

true but overstated. As Chairman Pridemore explained, "[e]verything we do at the Commission is like a court proceeding." Doc. 157 at 107. The Commission has a sprawling "docket[]," which consists of "cases." *Id.* The Commission resolves those cases via "hearings" where testimony is heard, evidence is admitted (or excluded), witnesses are cross-examined, and adversarial presentations are made. *Id.* The Commission then issues binding opinions. Doc. 151 at 8.

Georgia has thus chosen an electoral model—at-large elections—that ensures impartiality and independence in adjudicating these cases. Opening.Br.54-56. A move to single-member districts would fundamentally alter that chosen structure.

The United States argues that Georgia has already created five "residency districts" for Commissioners, and so elected Commissioners from those districts would not alter the model of government. DOJ.Br.22-23. But the residency requirement itself ensures that Commissioners will serve the entire state. Without the residency requirement, the Commissioners might all live in a single area (e.g., Atlanta) and thus be tempted to prioritize that region's energy needs over other areas in the state. But because the Commissioners must live across the state, they are

incentivized to serve the state's best interests, as a whole. Transforming those residency districts into electoral districts would pervert those incentives.

Plaintiffs also argue that the state must *prove*—perhaps via "policy statement[s]" or "legislative history"— that Georgia had this interest in mind when it selected at-large districts. Resp.Br.65, 69. Wrong again. To begin, that kind of extra-textual evidence is a notoriously poor guide into why a particular model might have been chosen. *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). But even setting that aside, it does not matter whether Georgia's chosen model of government is prudent or ill-considered. Nor does it matter whether the chosen model is the *only* one which could work, or if the state might have reasonably chosen others. The decision about which model of government to adopt is a quintessential sovereign determination. Federal courts cannot intrude on that sphere in the name of vote dilution because they "lack legal standards" to do so. *Nipper*, 39 F.3d at 1531.

And to the extent it matters, Georgia's constitution requires that Commissioners be elected "by the people." Ga. Const. Art. IV, § I, para. I(a). Georgia thus cared enough about this feature of the Commission's electoral system to *constitutionalize* it. Yet the

district court held—without briefing, argument, or certification—that its chosen remedy does not conflict with Georgia's constitution. Opening.Br.58-59. Plaintiffs have no real defense of the district court's decision to skip Georgia courts and decide this state constitutional question for itself. Instead, they insist that this constitutional issue is irrelevant. Resp.Br.72-76. But the district court did not think it was irrelevant, and whatever Plaintiffs think of Georgia's constitution, federal courts should defer to Georgia state courts, not Plaintiffs, on this point.[5]

* * *

At bottom, Plaintiffs ask this Court to ignore *Holder*, *Nipper*, and *Davis*. They make this clear when they argue that a district court has not created a new system of government unless it "add[s] a branch of government, move[s] a power from one branch to another, create[s] a new office or impose[s] new requirement on officeholders," alters the Commission's "jurisdiction" or otherwise "changes how any of the three branches must conduct themselves." Resp.Br.70 (quoting Stay Op. at 29-30 (Rosenbaum,

[5] Nor did the Secretary abandon this argument. Resp.Br.72. The Secretary raised the argument before the trial court at summary judgment, thus giving the court "opportunity to recognize and rule on" the argument—indeed, the court *did* rule on it. *Gennusa v. Canova*, 748 F.3d 1103, 1116 (11th Cir. 2014) (citation omitted).

J., dissenting)). Respectfully, there is a reason that Plaintiffs can cite only a single dissenting opinion in support of that argument. None of the proposed remedies in *Holder*, *Nipper*, or *Davis* would have produced these kinds of changes. They did not alter jurisdiction, create new offices, or transfer power to other political actors. But they were still impermissible comparators because they disregarded "the particular context of the challenged system" in favor of a "new system" fashioned from the district court's "imagination." *Nipper*, 39 F.3d at 1531. The district court did the same here, and this Court should reverse.

III. The district court also erred in examining the totality of the circumstances.

Under § 2, there has to be a discriminatory "result[]," not just a result that certain minority voters dislike. 52 U.S.C. § 10301. Plaintiffs barely discuss the totality of the circumstances, but if the Court were to reach the question, the district court's analysis cannot stand. Opening.Br.60. The district court treated the Senate Factors more like a checklist than a holistic appraisal of whether "racial politics … dominate" Commission elections. S. Rep. at 33. No reasonable factfinder could come to the district court's conclusion without making the many errors the district court below made. So although the Court need not reach this phase of

the analysis, if it did, there is only one answer to the question whether black voters have equal *opportunity* to elect their preferred candidates in Commission elections. That answer is yes.

CONCLUSION

For the reasons set out above, this Court should reverse the judgment of the district court.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2022, I served this brief by electronically filing it with this Court's ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

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