No. 23-1060

IN THE

Supreme Court of the United States

RICHARD ROSE, *et al.*,

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

BRIEF *OF AMICI CURIAE* FAIRVOTE, REPRESENTUS, PROTECT DEMOCRACY, AND CAMPAIGN LEGAL CENTER IN SUPPORT OF PETITIONERS

STANLEY J. BROWN
Counsel of Record
PETER W. BAUTZ
HOGAN LOVELLS US LLP
390 Madison Avenue
New York, NY 10017
(212) 918-3000
stanley.brown@hoganlovells.com

Counsel for Amici Curiae

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STATEMENT OF INTEREST

Amici FairVote, RepresentUs, Protect Democracy, and Campaign Legal Center are 26 U.S.C. § 501(c) nonpartisan, nonprofit organizations with missions related to protecting and promoting democracy.[1]

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae* or its counsel made any monetary contribution intended

FairVote's mission is to advance voting reforms that make democracy more functional and representative for every American. To this end, FairVote encourages public officials, judges, and the public to explore fairer and more inclusive election methods. Protect Democracy's mission is to safeguard democracy and the rule of law from authoritarianism and to build more resilient democratic institutions. RepresentUs's mission is to strengthen American democracy by motivating voters and governments to pass laws that lead to better representation and accountability. Campaign Legal Center's mission is to advocate for every eligible voter to meaningfully participate in the democratic process. To that end, Campaign Legal Center aims to protect Americans' voting rights and secure equal access for historically disenfranchised racial minorities under the Constitution and the Voting Rights Act, regularly litigating Section 2 vote dilution cases.

Amici believe the Eleventh Circuit's decision threatens the ability of legislatures and courts alike to choose fitting and appropriate remedies that are otherwise available under the Voting Rights Act of 1965 ("VRA") as amended. *See* 52 U.S.C. § 10301.

Amici have expertise in the impacts of various voting and election methods, and have had *amicus* briefs accepted in this Court and other courts on election law and voting rights issues. *See, e.g.*, *Allen* v. *Milligan*, 599 U.S. 1 (2023); *Moore* v. *Harper*, 600 U.S. 1 (2023); *Brnovich* v. *Democratic Nat'l Comm.*,

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to fund the preparation or submission of this brief. This brief is being filed earlier than 10 days before it is due pursuant to Supreme Court Rule 37.2; thus, the brief itself serves as the required notice.

594 U.S. __ (2021); *Abbott* v. *Perez*, 585 U.S. 579 (2018); *Benisek* v. *Lamone*, 585 U.S. 155 (2018); *Gill* v. *Whitford*, 585 U.S. 48 (2018); *Bartlett* v. *Strickland*, 556 U.S. 1 (2009); *Higginson* v. *Becerra*, 786 F. App'x 705 (9th Cir. 2019); *United States* v. *Vill. of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010).

Amici submit this brief to emphasize the range of options available to plaintiffs, governments, and courts to remedy vote dilution under the VRA and the appropriate time for courts to consider such options. The VRA may measure liability using single-member districts, but nothing in the law confines lawmakers (or courts) to single-member district remedies when an alternative remedy would better fit the State's policy interests. If the Court grants a stay and summarily reverses the Eleventh Circuit, lawmakers and the judiciary will rightly retain the full scope of remedial options available under the law.

STATEMENT OF THE CASE

Petitioners challenged the State of Georgia's statewide, at-large basis for electing members of its five-member Public Service Commission ("PSC"), a Commission that makes critical decisions affecting the lives of all Georgians but has seen the election of only one Black Georgian in its 145-year history. By state law, the PSC is organized into five districts and each district representative must be a resident of that district. Yet, the district representatives are elected by statewide, at-large block plurality voting. Petitioners alleged that this at-large election system results in unlawful vote dilution of the votes of Black voters in violation of Section 2 of the VRA.

On August 5, 2022, after a five-day bench trial, District Judge Steven D. Grimberg found that the method used to elect members of the PSC "unlawfully dilutes the votes of Black citizens under Section 2 of the Voting Rights Act of 1965 and must change." *Rose* v. *Raffensperger*, 619 F. Supp. 3d 1241, 1247 (2022). That finding was based on a careful analysis of the *Gingles* preconditions and the factors identified in the Senate Report accompanying the 1982 Voting Rights Act amendment ("Senate Factors"). *Id.* at 1258-68. As to the first *Gingles* precondition, the trial 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." *Id.* at 1260-61. The court also found that Black voters were politically cohesive (Respondent admitted that Black voters had been politically cohesive in elections for PSC commissioners since 2012) and that racial bloc voting by the white majority in the State enabled that majority to defeat Black-preferred candidates. *Id.* at 1261.

The trial court went on to consider the Senate Factors and found that they compelled a finding of dilution. Judge Grimberg discussed the evidence concerning a Senate Factor that, in some cases, has probative value in establishing a violation: "whether the policy underlying the * * * use of [a] * * * standard, practice, or procedure is tenuous."[2] *Thornburg* v.

[2] As to the Senate Factors, *Gingles* held that they "will often be pertinent to certain types of [Section] 2 violations, particularly to vote dilution claims." 478 U.S. at 45. *Gingles* instructed lower

Gingles, 478 U.S. 30, 37 (1986) (quoting S. Rep. No. 97-417 at 28-29, 1982 U.S.C.C.A.N. 206-207); *see Rose*, 619 F. Supp. 3d at 1267. As to the purported policy justifications for at-large voting, Judge Grimberg found that they were "not tethered to any objective data" and "lacked foundation entirely." *Rose*, 619 F. Supp. 3d at 1268.

The trial court enjoined Respondent from administering or certifying PSC elections through its current violative system. Addressing the issue of remedy, the court acknowledged that the single-member districting proposed by Petitioners is the standard remedy for a Section 2 dilution violation caused by at-large elections. Nevertheless, the court did not impose that remedy (or any other remedy) on the State. Rather, consistent with the standard practice in formulating Section 2 remedies, the court enjoined the pending election for two Commissioners' seats "until a method for conducting such elections that complies with Section 2 is enacted by the General Assembly [of the State] and approved by the [c]ourt, or is otherwise adopted by the [c]ourt should the General Assembly fail to enact such a method." *Id.* at 1272. In other words, the court left the State free to adopt any remedy it saw fit, so long as that remedy would cure the unlawful dilution of the votes of Black Georgians.

Unfortunately, the legislature never had a meaningful opportunity to remedy the harm. Rather, Respondent quickly appealed, and on August 12, 2022, the Eleventh Circuit issued a *per curiam* stay of

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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." *Id.* at 48 n.15 (emphasis in original).

the lower court's order, thus allowing statewide elections for Districts 2 and 3 to go forward. Thereafter, Petitioners filed an emergency motion with this Court, which, on August 19, 2022, vacated the Circuit's stay of the lower court's order enjoining the pending PSC elections. This Court concluded that the Eleventh Circuit erred in failing to analyze the State's request under traditional stay factors. *Rose* v. *Raffensperger*, 143 S. Ct. 58, 59 (2022).

More than a year later, on November 24, 2023, the Eleventh Circuit reversed the trial court's judgment. The Circuit held that the PSC's statewide electoral structure was deliberately chosen by the State legislature to advance the same policy interests that the lower court had found "not tethered to any objective data." *Rose*, 619 F. Supp. 3d at 1268. Going on to address the *Gingles* preconditions, the court engrafted onto the first precondition a requirement that the plaintiffs must "offer[] a satisfactory remedial plan." App. 8a (quoting *Wright* v. *Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1302 (11th Cir. 2020)); *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 [S]ection 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.").

The panel, citing a so-called "trifecta" of in-circuit precedents involving judicial elections, *Nipper*, 39 F.3d 1494; *Southern Christian Leadership Conf. of Ala.* v. *Sessions*, 56 F.3d 1281 (11th Cir. 1995) ("*SCLC*"); *Davis* v. *Chiles*, 139 F.3d 1414 (11th Cir.

1998), *see* App. 18a-19a, decided to extend these precedents even further than judicial elections and carve out VRA liability for state regulatory agencies. The panel held that "plaintiffs' remedial plan cannot be fundamentally at odds with the state's chosen model of government." App. 8a. In reaching this conclusion, the panel did not analyze the second and third *Gingles* preconditions, nor did it analyze the Senate Factors required at the *Gingles* totality of the circumstances stage. Rather, quoting *Nipper*, the panel concluded that the first *Gingles* precondition requires "a remedy within the confines of the state's judicial model" and that without such a remedy the plaintiffs could not succeed. *Nipper*, 39 F.3d at 1531.

Thus, because the plaintiffs had used single-member districts to prove their vote dilution claim as required by this Court's precedents, the panel reversed the trial court. Although the Department of Justice noted in its *amicus* brief that alternative remedies exist that potentially allow Georgia to retain a statewide method of election for commissioners while curing the dilution of the votes of Black voters, including modified at-large alternatives such as cumulative voting, limited voting, and the single transferable vote, Brief of *Amicus Curiae* Dep't of Just. at 24-25, *Rose* v. *Raffensperger*, No. 22-12593 (Dkt. 44 Oct. 26, 2022), the Eleventh Circuit did not even acknowledge these other at-large voting methods or the Department of Justice's argument that such alternatives could be considered by the legislature.

SUMMARY OF ARGUMENT

Just as Alabama unsuccessfully sought in *Milligan*, 599 U.S. at 26, to persuade this Court to adopt an interpretation of Section 2 of the VRA "that would

'revise and reformulate the *Gingles* threshold inquiry that has been the baseline of [the Court's Section] 2 jurisprudence' for nearly forty years," a panel of the Eleventh Circuit has sought to do the same by adopting its own, new version of the first precondition set forth in *Gingles,* 478 U.S. 30, and reaffirmed in *Milligan*. The first condition, "focused on geographical compactness and numerosity, is 'needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district.' " *Milligan*, 599 U.S. at 18. In short, that showing is necessary to establish the existence of an injury. And the plaintiffs here did just that. The question of the remedy for that injury is a separate inquiry.

But contrary to the teaching of *Gingles* and *Milligan*, the panel in this case improperly conflated the issues of injury and remedy with respect to the first precondition, making the remedy part of the plaintiffs' prima facie case and requiring that a plaintiff offer a "satisfactory" remedial plan that would preserve the State's "form of government." That creates an untenable catch-22. Plaintiffs must establish that a minority group has the potential to elect a representative in a single-member district to comply with this Court's precedents. But using single-member districts as the benchmark now (evidently) violates Eleventh Circuit precedent because such a map is not "consistent" with state policy. Boiling *Gingles* down into a new, single inquiry is precisely what Alabama proposed in *Milligan*. And it is precisely what should be rejected here.

Amici submit that, while single-member districts could be an appropriate remedy in this case, the trial court appropriately left it first to the Georgia legislature to address the remedy issue. That issue would be decided by the court only if the legislature didn't act at all or if Petitioners claimed that the legislature had not remedied the existing dilution of the votes of Georgia's Black citizens.

But even assuming *arguendo* that compelling state interests support at-large voting for the PSC—an argument that the trial court found unsupported by the facts—the Eleventh Circuit ignored the fact that there are a number of ways to continue at-large voting that could still remedy the State's current dilutive system. Modified at-large alternatives include methods that have been approved by numerous courts and have a long history and tradition of use in the United States such as the single-transferable vote, cumulative voting, and limited voting, while at-large systems that aggregate votes by party in order to enable minority representation have an extensive history internationally. Modified at-large approaches could have been considered by the Georgia legislature to resolve the case.

Instead, the panel short-circuited the remedial phase and ignored the existence of such alternative remedies. *Amici* respectfully submit that this Court should stay the Eleventh Circuit's mandate pending its resolution of certiorari proceedings, grant the Petitioners' certiorari petition, and either summarily reverse the decision or set the case for full merits briefing this Term. *Amici* submit that while the VRA requires a single-member district as a benchmark to show injury, it does not restrict legislatures, local

jurisdictions, plaintiffs or courts from considering a wide variety of remedial options to ensure that minority voters have an equal opportunity to select commissioners of the PSC in the next election for those offices.

ARGUMENT

I. THE PANEL CONTRAVENED *GINGLES* AND *MILLIGAN* BY CONFLATING SECTION 2 LIABILITY WITH A SECTION 2 REMEDY

Section 2 of the VRA reflects a profound national commitment and solemn promise: that the processes leading to nomination and election of representatives shall be equally open to participation by Black and other protected voters. *Milligan*, 599 U.S. at 13 (citing *White* v. *Register*, 412 U.S. 755, 766 (1973)). *Gingles* and *Milligan* provide a structured framework for ensuring that promise. To succeed in proving a Section 2 violation plaintiffs must satisfy three preconditions. The first, at issue in the instant case, is that "the minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district." *Wisconsin Legis.* v. *Wisconsin Elections Comm'n*, 595 U.S. 398, 402 (2022) (per curiam). "A district will be reasonably configured * * * if it comports with traditional districting criteria, such as being contiguous and reasonably compact." *Milligan*, 599 U.S. at 18. The first *Gingles* factor has a distinct purpose: "to establish that the minority has the potential to elect a representative of its own choice in some single-member district." *Id.* (citing *Growe* v. *Emison*, 507 U.S. 25, 40 (1993)). Indeed, plaintiffs cannot satisfy

the first *Gingles* precondition without showing that it is possible to draw a majority-minority district. *Bartlett*, 556 U.S. at 18-19 (plurality opinion). Unless minorities have "the potential to elect a representative of [their] own choice in some [alternative] single-member district * * * there neither has been a wrong nor can [there] be a remedy." *Growe,* 507 U.S. at 40-41.

In the instant case, the Eleventh Circuit panel did not question that at-large voting diluted Black votes and it did not question that the single-member districts proposed by Petitioners would provide Black voters the potential to elect a commissioner of their own choice. Nor did the State argue (or the panel find) that the potential single-member districts identified by Petitioners did not comport with traditional redistricting criteria. Rather, the Eleventh Circuit refashioned the first *Gingles* precondition to require that plaintiffs identify a Section 2 remedy that would not alter the State's preferred "form" of government—in this case, five districts, each represented by a commissioner who must be a resident of one of the districts but elected in a statewide at-large bloc plurality election. In short, the Eleventh Circuit's analysis bears no resemblance to the inquiry compelled by *Gingles* and *Milligan* and relied upon by litigants for over four decades.

The panel misunderstood what *Gingles* requires. *Gingles* evaluates whether a defendant is *liable* for vote dilution—it does not adjudge the appropriate remedy. This Court has never required a plaintiff to prove the ultimate remedy in a Section 2 case as part of their prima facie burden. Nor has this Court required that a plaintiff's *illustrative* map mirror a

state's redistricting priorities. Indeed, in *Milligan* this Court rejected Alabama's "core retention" arguments, based on its previously used redistricting plan, holding that Section "2 does not permit a State to provide some voters 'less opportunity * * * to participate in the political process' just because the State has done it before. 52 U.S.C. § 10301(b)." *Milligan*, 599 U.S. at 22. Rather, *Gingles* and *Milligan* merely require plaintiffs to show that a remedy is possible. *Id.* at 26-27. Federal courts then allow defendants the first opportunity to select an appropriate remedy, just as the trial court did here. *See Robinson* v. *Ardoin*, 37 F.4th 208, 223 (5th Cir. 2022) ("Illustrative maps are just that—illustrative. The Legislature need not enact any of them."); *Missouri State Conf. of the NAACP* v. *Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 934 (8th Cir. 2018) (holding that plaintiffs are not tied to a specific remedy when attempting to demonstrate that a violation has occurred under Section 2, and, only after a violation is found, should the district court then turn to developing a remedy).

The panel's approach to the first *Gingles* precondition is indistinguishable from the one that Alabama proposed and this Court rejected in *Milligan*. There, Alabama argued that plaintiffs' illustrative maps were inadequate because they did not protect the community of interest that the state's map protected or preserve the cores of prior districts in the way that the state's map did. Brief for Appellants at 60, 77, *Allen* v. *Milligan*, 599 U.S. 1 (2023) (Nos. 21-1086, 21-1087). The State argued that its map resembled a benchmark based on millions of maps that did not consider race and thus there was no

violation of Section 2. *Id.* at 60-64. But this Court rejected Alabama's attempt to redefine and reduce the totality of circumstances inquiry down to this lone, new, atextual metric. The Court concluded "[t]hat single-minded view of [Section] 2 cannot be squared with the VRA's demand that courts employ a more refined approach. And we decline to adopt an interpretation of [Section] 2 that would 'revise and reformulate the *Gingles* threshold inquiry that has been the baseline of our [Section] 2 jurisprudence' for nearly forty years." *Milligan*, 599 U.S. at 26 (quoting *Bartlett*, 556 U.S. at 16 (plurality opinion)).

So too the Eleventh Circuit would reformulate the *Gingles* inquiry and interpose a new and stunning question: Does the plaintiffs' illustrative benchmark map comply with all of the State's preferred policies? But the first *Gingles* precondition requires no such thing—and state policy preferences do not trump federal law. This Court should reject the Eleventh Circuit's approach as it did Alabama's.

In short, the Eleventh Circuit's rewriting of *Gingles*'s preconditions is clearly contrary to the Court's precedent. It creates a catch-22 for plaintiffs—they are required under *Gingles* and *Bartlett* to draw an illustrative map showing that Black voters can constitute a majority in a single-member district, but if they do, a court can conclude that the first *Gingles* precondition is not satisfied because single-member districts may be contrary to the state's policy preferences. That is not the law.

But even assuming arguendo that Georgia set forth a legitimate justification for at-large voting, the panel has still erroneously conflated the inquiry of injury and remedy. Petitioners proved injury; they

submitted maps as required by *Gingles* and *Bartlett* which showed that the at-large system of bloc plurality voting for commissioners on the PSC dilutes the votes of Black Georgians. Once they provided sufficient evidence to meet the *Gingles* preconditions and the totality of the circumstances analysis—in other words proved injury and a violation of Section 2—the State's policy justification could have been evaluated with the court ultimately deciding whether single-member districts were required or whether alternative remedies could end vote dilution while continuing at-large voting.

The trial court took the appropriate course: it gave the Georgia legislature the first opportunity to address the injury. As discussed, *infra* pp. 15-20, there are many remedies, including but assuredly not limited to single-member districts that can be considered. If the Georgia legislature had formulated a remedy acceptable to Petitioners, that would end the litigation. If not, only then would the trial court address whether single-member districts were necessary or whether another at-large method could ensure that the votes of Black Georgians would be equal to the votes of white Georgians.

By short-circuiting the usual Section 2 process of determining whether there is injury and then devising a remedy, the Eleventh Circuit made a decision on remedy when that issue was not properly before it.

II. THE PANEL ERRED BY APPLYING AND EXTENDING CIRCUIT PRECEDENT ON JUDICIAL ELECTIONS

The Eleventh Circuit rested its decision on a so-called "trifecta" of circuit cases concerning judicial elections: *Nipper*, *SCLC*, and *Davis*. To the extent these cases are consistent with Supreme Court doctrine at all—and they may not be—the application and extension of those cases here would allow the Eleventh Circuit's "exception" to swallow the rule.

All three of these cases involved unique issues arising in judicial elections. In *Nipper*, the Eleventh Circuit *en banc* found that the relief sought by the plaintiffs would undermine the administration of justice in the trial courts. The court pointed to the "unique nature of judicial elections" in Florida, which combined merit appointments with contested nonpartisan elections. *Nipper*, 39 F.3d at 1535. And the decision focused on the unique role of the judicial branch in carving out a special exception to liability. *Id.* at 1543.

As the trial court said in this case: "Although the PSC's functions are considered both 'quasi-legislative' and 'quasi-judicial,' it is by and large an administrative body with policy-making responsibilities that make it qualitatively different than courts." App. 74a. In other words, none of the concerns about merit selection and the judicial role that animated *Nipper* apply in this case.

More fundamentally, the Eleventh Circuit's purported "rationale" for applying and extending *Nipper* here draws an already-questionable line of cases into further doubt. After all, if any change to

state law creates an "insurmountable" barrier to liability because it entails changing the State's "chosen form of government," then what is left?

Indeed, the final case in the so-called trifecta saw this writing on the wall. In *Davis*, the panel was "troubled" that circuit law appeared to directly conflict with Supreme Court precedent. 139 F.3d at 1423. As the panel noted, "[t]he Supreme Court has clearly and repeatedly held that Section Two applies to state judicial elections" and has "explicitly stated that * * * 'the State's interest in [at-large election] does not automatically, and in every case, outweigh proof of racial vote dilution.' " *Id.* (quoting *Houston Lawyers Ass'n* v. *Att'y Gen. of Tex.*, 501 U.S. 419, 427 (1991)). Instead, the state's interest is "merely one factor to be considered in evaluating the 'totality of the circumstances.' " *Id.*

The Senate Report was no less clear: "[E]ven a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." S. Rep. No. 97-417, at 29 n.117.

Here, the district court properly applied the law, as enacted by Congress and interpreted by this Court. The district court credited testimony of one of Petitioners' experts that this was " 'one of the clearest examples of racially polarized voting' he has ever seen." *Rose*, 619 F. Supp. 3d at 1262 (quoting Trial Tr. 183:20-23, 198:12-17). And the district court, properly weighing the totality of circumstances, held that "the Secretary's linkage concern, which the Court does find deserves some weight, * * * does not outweigh the interests of Black Georgians in not

having their votes for PSC commissioners diluted." *Id.* at 1268.

In short, the Eleventh Circuit's reasoning effectively creates a bright-line rule categorically exempting state bodies from federal law. There is no textual, historical, or precedential basis for this carve out. Congress drew no such distinction. This Court has drawn no such distinction. And the district court, rightly, drew no such distinction.

This Court should not permit the Eleventh Circuit to continue flouting its precedents.

III. THE PANEL FAILED TO RECOGNIZE THAT SEVERAL AT-LARGE REMEDIES WOULD BE AVAILABLE TO THE GEORGIA LEGISLATURE IN ADDITION TO DISTRICTED REMEDIES

The Eleventh Circuit's decision to short-circuit the remedial phase meant that it failed to consider that there are numerous available remedies to cure vote dilution under Section 2, beyond single-member districts.

As discussed *supra* pp. 10-11, cases brought under Section 2 of the VRA typically proceed in two phases: the first phase determines if there is vote dilution; if vote dilution is found, then the case proceeds to a remedial phase. *See, e.g.*, *Ferguson-Florissant Sch. Dist.*, 894 F.3d at 934 (holding that plaintiffs are not tied to a specific remedy when attempting to demonstrate that a violation has occurred under Section 2, and, only after a violation is found, should the district court then turn to developing a remedy). Typically, federal courts allow the relevant governing body a chance to attempt to remedy the vote dilution

prior to a court stepping in if the proposed remedy does not alleviate the vote dilution. *See, e.g.*, *Wise* v. *Lipscomb*, 437 U.S. 535, 539-540 (1978); *Ferguson-Florissant Sch. Dist.*, 894 F.3d at 934.

Had the Eleventh Circuit properly permitted the trial court to proceed with the remedial phase, the question of whether single-member districts could or should be imposed in this case may never have arisen at all. Indeed, there are many potential remedies available to states and localities that could address vote dilution claims. Some modified at-large remedies in use across the United States today include:

- **The single-transferable vote**, which is also known as preferential voting, is an electoral system in which voters rank candidates in order of preference. *See Holder* v. *Hall*, 512 U.S. 874, 910 n.16 (1994) (Thomas, J., concurring in the judgment); *see also* Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. Rev. 1867, 1893-95, 1911-16 (1999). Under this framework, a ballot is initially counted for the voter's first choice candidate, but could be transferred to a second or later choice during tabulation if its top choice is either elected with more votes than the threshold of votes needed to win or is eliminated for being in last place.
- **Cumulative voting** is an electoral system whereby voters may cast as many votes as there are open seats, which they can distribute among the candidates. *Holder*, 512 U.S. at 909 n.15 (Thomas, J., concurring in the judgment). Voters can give all their votes to one candidate

or distribute them among several. *Id.* "The system thus allows a numerical minority to concentrate its voting power behind a given candidate without requiring that the minority voters themselves be concentrated into a single district." *Id.*

- **Limited voting** is an electoral system in which voters can only cast fewer votes than there are seats to be elected. When voters are only permitted to cast one vote regardless of the number of seats to be elected, the system is also known as the single non-transferable vote. Steven J. Mulroy, *Coloring Outside the Lines: Erasing "One-Person, One-Vote" & Voting Rights Act Line-Drawing Dilemmas by Erasing District Lines*, 85 Miss. L. J., 1271, 1292-93 (2017).

There is a long tradition in this country of utilizing alternatives to single-member districts for elections. *See, e.g.*, *Holder*, 512 U.S. at 897-98 (Thomas, J., concurring in the judgment) ("[T]here is no principle inherent in our constitutional system, or even in the history of the Nation's electoral practices, that makes single-member districts the 'proper' mechanism for electing representatives to governmental bodies or for giving 'undiluted' effect to the votes of a numerical minority."). Since the start of the twentieth century, dozens of American municipalities have utilized the single-transferable vote method. Andrew Spencer et al., *Escaping the Thicket: The Ranked Choice Voting Solution to America's Redistricting Crisis*, 46 Cumb. L. Rev. 377, 410 (2016). Cumulative voting is used in dozens of municipalities. Richard L. Engstrom, *Cumulative and Limited Voting: Minority Electoral*

Opportunities and More, 30 St. Louis U. Pub. L. Rev. 97, 98 (2010). As is limited voting. Mulroy, 85 Miss. L. J. at 1292-93.[3]

Indeed, several members of this Court have recognized that remedies for illegal vote dilution under the VRA are not confined to single-member districts. Justice Thomas has noted that "nothing in our present understanding of the Voting Rights Act places a principled limit on the authority of federal courts that would prevent them from instituting a system of cumulative voting as a remedy under [Section] 2, or even from establishing * * * representation based on transferable votes." *Holder*, 512 U.S. at 910 (Thomas, J., concurring in the judgment). Similarly, Justice O'Connor recognized that "a court could design an at-large election plan that awards seats on a cumulative basis, or by some other method that would result in a plan that satisfies the Voting Rights Act." *Branch* v. *Smith*, 538 U.S. 254, 310 (2003) (O'Connor, J., concurring in part and dissenting in part).

In fact, numerous courts across the country have adopted alternatives to single-member districts to remedy vote dilution under the VRA. *See* Justin Levitt, *Alternative Voting Systems Adopted as Remedies in Voting Rights Litigation* (Mar. 26, 2024), *available at* https://perma.cc/4F9T-NKMC; FairVote,

[3] Outside of these methods, approaches that aggregate votes by party can also enable minority representation while retaining at-large elections, which have an extensive record of use internationally. *See* Andrew Reynolds, *Electoral Systems and the Protection and Participation of Minorities* 13 (2006), *available at* https://perma.cc/2WH2-TBFL.

Section 2 VRA Case Remedy Library, Infogram, *available at* https://perma.cc/33WN-2JPT.

To cite a few examples:

- In *United States* v. *City of Eastpointe*, No. 417CV10079TGBDRG, 2019 WL 2647355 (E.D. Mich. June 26, 2019), the court entered a consent judgment and decree whereby the city, a suburb of Detroit, agreed that its at-large bloc plurality election system for its city council members likely violated Section 2 of the VRA and found that the single-transferable vote was a legally acceptable way to remedy the improper vote dilution.
- In *Village of Port Chester*, 704 F. Supp. 2d 411, the court found that the village's at-large bloc plurality method for electing its six-member board of trustees improperly diluted the votes of Hispanic voters. At the remedy phase, the court held that the village's plan to use at-large elections with cumulative voting was a legally acceptable way to remedy the improper vote dilution.
- In *United States* v. *Town of Lake Park*, No. CV 09-80507, 2009 WL 10727593 (S.D. Fla. Oct. 26, 2009), the court entered a consent judgment and decree whereby the town agreed that its use of at-large bloc plurality elections to elect its commissioners illegally diluted the votes of Black residents and agreed to implement limited voting for the four-person commission instead.

As the examples described above and in the Levitt and FairVote tables make clear, the VRA does not

limit Petitioners, the State, or the district court to a single-member district remedy.

In light of this, *amici* believe that a stay followed by summary reversal is especially appropriate in this case to ensure that the parties have sufficient time to remedy the improper vote dilution occurring in Georgia. By jumping the gun in this case, the Eleventh Circuit cut short the State legislature's opportunity to fashion a remedy (whether a single-member district or not), and cut short the district court's role in evaluating whether the State's preferred remedy was sufficient.

The United States correctly identified the inappropriate procedural posture for an appellate ruling on the proper remedy in its *amicus* brief before the Eleventh Circuit—something the Eleventh Circuit simply ignored in its race to render a verdict on a remedy that had not even been selected yet. *See* App. 1a-30a. The United States noted that

> [a]lthough the district court's opinion clearly anticipates single-member districts going forward, its injunction does not impose that remedy. * * * To the extent that the state legislature can conceive of an alternative to both the current election method and single-member districting that complies with Section 2, nothing in the court's order precludes it from adopting that plan. For example, the state legislature may consider [modified at-large voting] to remedy the Section 2 violation here while retaining an at-large method of electing Commission members.

Brief of *Amicus Curiae* Dep't of Just. at 24-25 (No. 22-12593) (citation omitted).

Amici agree with the United States that the proper time to consider the legal sufficiency of the remedy is at the remedy stage, after the State has been given an opportunity to propose its own remedy—one that could draw from a variety of potential options to end the improper vote dilution in Georgia.

If Georgia truly has an interest in preventing provincialism while also avoiding improper vote dilution, it could have adopted a modified at-large system that would permit it to maintain an at-large system while also remedying its violation of Section 2 of the VRA. Because of the Eleventh Circuit's premature ruling, neither Georgia nor the district court were permitted to explore potential remedies.

CONCLUSION

For all the foregoing reasons, *amici* respectfully urge the Court to grant the Petitioners' motion for a stay and summarily reverse the Eleventh Circuit's decision.

Respectfully submitted,

STANLEY J. BROWN
Counsel of Record
PETER W. BAUTZ
HOGAN LOVELLS US LLP
390 Madison Avenue
New York, NY 10017
(212) 918-3000
stanley.brown@hoganlovells.com
Counsel for Amici Curiae