No. 23-1060

IN THE

Supreme Court of the United States

RICHARD ROSE, *et al.*,

Petitioners,

v.

BRAD RAFFENSPERGER,
GEORGIA SECRETARY OF STATE

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR GEORGIA CONSERVATION VOTERS EDUCATION FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

BRADLEY HEARD
JACK GENBERG
COURTNEY O'DONNELL
SOUTHERN POVERTY
LAW CENTER
150 East Ponce de Leon
Avenue, Suite 340
Decatur, Georgia 30030

RANDALL T. ADAMS
Counsel of Record
NEEMA JYOTHIPRAKASH
VICTORIA PAVLOCK
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, New York 10022
(212) 756-2019
randall.adams@srz.com

Attorneys for Amicus Curiae

328973

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES iii

INTERESTS OF *AMICUS* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. Introduction 5

II. Cumulative and Limited Voting Systems Can Remedy Vote Dilution 7

i. Members of this Court and the Eleventh Circuit have Endorsed Cumulative and Limited Voting Systems to Remedy Vote Dilution 9

ii. Federal Courts Have Adopted Cumulative and Limited Voting Systems to Remedy Vote Dilution 10

iii. Cumulative and Limited Voting Systems Have a Rich History in American Elections and Have Successfully Remedied Dilution 13

Table of Contents

Page

iv. Cumulative and Limited Voting Systems Can Remedy Vote Dilution by Modifying the Winner-Take-All Feature of At-Large Systems 16

III. Cumulative and Limited Voting Systems Can Remedy Vote Dilution and Are Consistent with Georgia's Stated Policy Interests in Maintaining Its At-Large System 19

CONCLUSION 22

TABLE OF CITED AUTHORITIES

Page

CASES

Allen v. Milligan,
599 U.S. 1 (2023). 2, 3, 6, 21

Baber v. Dunlap,
376 F. Supp. 3d 125 (D. Me. 2018). 7

Bone Shirt v. Hazeltine,
336 F. Supp. 2d 976 (D.S.D. 2004) 6

Bone Shirt v. Hazeltine,
461 F.3d 1011 (8th Cir. 2006) 2

Branch v. Smith,
538 U.S. 254 (2003) 9

United States v. City of Augusta,
No. CV-187-004 (S.D. Ga. 1987) 12

Cottier v. City of Martin,
551 F.3d 733 (8th Cir. 2008), *reh'g en banc granted, opinion vacated on other grounds* (Feb. 9, 2009), *on reh'g en banc*, 604 F.3d 553 (8th Cir. 2010) 10

Dillard v. Baldwin Cnty. Bd. of Educ.,
686 F. Supp. 1459 (M.D. Ala. 1988) 15

Dillard v. Chilton Cnty. Bd. of Educ.,
699 F. Supp. 870 (M.D. Ala. 1988) 11

Cited Authorities

Page

Dillard v. Chilton Cnty. Comm'n,
868 F.2d 1274 (Table) (11th Cir. 1989) 9, 11

Dillard v. Crenshaw Cnty.,
640 F. Supp. 1347 (M.D. Ala. 1986) 11

Dillard v. Town of Cuba,
708 F. Supp. 1244 (M.D. Ala. 1988) 11

Dudum v. Arntz,
640 F.3d 1098 (9th Cir. 2011) 7

Holder v. Hall,
512 U.S. 874 (1994) 7, 9

Hous. Laws. Ass'n v. Att'y Gen. of Tex.,
501 U.S. 419 (1991), *superseded by* 986 F.2d 728
(5th Cir. 1993) 5

League of United Latin Am. Citizens, Council No. 4434 v. Clements
986 F.2d 728 (5th Cir. 1993) 6

Maine Republican Party v. Dunlap,
324 F. Supp. 3d 202 (D. Me. 2018) 7

McGhee v. Granville Cnty.,
860 F.2d 110 (4th Cir. 1988) 15

Cited Authorities

Page

Mo. State Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist., 219 F. Supp. 3d 949 (E.D. Mo. 2016), *aff'd* 894 F.3d 924 (8th Cir. 2018) 10, 12

Moore v. Beaufort Cnty., 936 F.2d 159 (4th Cir. 1991) 10

Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994) 9, 20

Rogers v. Lodge, 458 U.S. 613 (1982) 16

Rose v. Raffensperger, 619 F. Supp. 3d 1241 (N.D. Ga. 2022) 5

Rose v. Sec'y, State of Georgia, 87 F.4th 469 (11th Cir. 2023) 5

Rural W. Tenn. Afr. Am. Affs. Council, Inc. v. Sundquist, 29 F. Supp. 2d 448 (W.D. Tenn. 1998), *aff'd sub nom.*, 209 F.3d 835 (6th Cir. 2000) 5-6

Thornburg v. Gingles, 478 U.S. 30 (1986) 2, 3, 5, 6, 7, 19, 20, 21

Page

United States v. Euclid City Sch. Bd.,
632 F. Supp. 2d 740 (N.D. Ohio 2009). 12, 18

United States v. Marengo Cnty. Comm'n,
731 F.2d 1546 (11th Cir. 1984). 9

United States v. Village of Port Chester,
704 F. Supp. 2d 411 (S.D.N.Y. 2010) . 7, 8, 10, 11, 21, 19

CONSITUTIONS

GA. CONST. art. IV § 1 20

COURT FILINGS

Consent J. & Decree, *United States v. Town of Lake Park*, No. 09-80507 (S.D. Fla. Oct. 26, 2009). 13

Consent Decree, *Weddell v. Wagner Cmty. Sch. Dist.*, No. 02-4056 (D.S.D. Mar. 18, 2003). 13

STATUTES

52 U.S.C. § 10301(a) (2014) 5

Conn. Gen. Stat. Ann. § 9-167a (West 2023). 15

Sup. Ct. R. 37.2 1

Page

Voting Rights Act § 2 . .1, 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 21

OTHER AUTHORITIES

Alternative Voting Methods in the United States, U.S. Election Assistance Comm'n (Apr. 4, 2023), https://www.eac.gov/election-officials/alternative-voting-methods-united-states 14-15

Communities in America Currently Using Proportional Voting, FairVote (Dec. 2009), https://archive.fairvote.org/?page=2101 15

Drew DeSilver *et al.*, *More U.S. locations experimenting with alternative voting systems*, Pew Research Center (June 29, 2021), https://www.pewresearch.org/short-reads/2021/06/29/more-u-s-locations-experimenting-with-alternative-voting-systems/ 13

Richard L. Engstrom, *Cumulative and Limited Voting: Minority Electoral Opportunities and More*, 30 St. Louis U. Pub. L. Rev. 97 (2010) 14

Bernard Grofman *et al.*, *Minority Representation and the Quest for Equality* (1st ed. 1992) 12, 14

Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 Cardozo L. Rev. 1135 (1992). 8, 17

Cited Authorities

Page

Marcia Johnson, *The Systematic Denial of the Right to Vote to America's Minorities*, 11 HARV. BLACKLETTER L.J. 61 (1994) 15

Jurisdictions Using Fair Representation Voting, FAIRVOTE, http://www.fairvote.org/jurisdictions_using_fair_rep#full_list_of_fair_voting_jurisdictions (last visited Apr. 24, 2024) . . .15

Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173 (1989) 11

Arend Lijphart *et al.*, *The Limited Vote and the Single Nontransferable Vote: Lessons from the Japanese and Spanish Examples, in* Gordon E. Baker *et al.*, *Electoral Laws and Their Political Consequences*, 154 (3rd ed. 2003). 17

Linda Maguire, *An Interview With Lani Guinier*, 19 THE FLETCHER FORUM OF WORLD AFFAIRS 99 (Winter/Spring 1995). 18

Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE L.J. 105 (1992) 12-13

Page

Margaret Morales, *Over 300 Places in the United States Have Used Fair Voting Methods*, Sightline Institute (Nov. 8, 2017), https://www.sightline.org/2017/11/08/over-300-places-in-the-united-states-have-used-fair-voting-methods/. . 13, 14

Steven J. Mulroy, Alternative Electoral Systems, *America Votes! Guide to Modern Election Law and Voting Rights*, American Bar Association (2nd ed. 2012) 8

Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 Harv. C.R.-C.L. L. Rev. 333 (1998) 14, 16

Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. Chi. Legal Forum 241 . . . . . 14, 16, 18

Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. Chi. L. Rev. 769 (2013) 13

INTERESTS OF *AMICUS*

Georgia Conservation Voters Education Fund ("GCVEF")[1] is a nonprofit, nonpartisan organization that advocates for climate and environmental justice through policy advocacy, civic engagement and education, and campaign advocacy. The GCVEF is part of a family of organizations, which includes the Georgia Conservation Fund and the Georgia Conservation Voters Action Fund. The GCVEF focuses on educating and mobilizing voters in Georgia on and in support of access to safe, reliable, and affordable energy. The Georgia Conservation Voters Action Fund supports candidates in Georgia who prioritize climate and environmental justice issues. As a result, GCVEF has an interest in ensuring that all Georgians, regardless of race, can fairly participate in electing members to the Georgia Public Service Commission, which regulates electricity in Georgia.

Amicus submits this brief in support of Petitioners' claims that Section 2 of the Voting Rights Act does not require plaintiffs to propose a remedy during the injury phase, let alone one that maintains the state's chosen electoral model, and that a state's asserted policy interests for its choice of at-large elections are not entitled to insurmountable weight. *Amicus* contends that modified

1. No counsel for any party authored this brief in whole or in part, and no counsel or party other than *Amicus Curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record in this case received timely notice of the intent to file this brief, pursuant to Supreme Court Rule 37.2. Additionally, for the Court's information, Brionté McCorkle, one of the Petitioners, is the Executive Director of the Amicus.

at-large remedies like cumulative and limited voting are legally available vote dilution remedies that would maintain an at-large electoral system in Georgia. If the Court grants certiorari and summarily reverses the Eleventh Circuit's decision, then governments, the courts, and Voting Rights Act plaintiffs in the Eleventh Circuit can benefit from the full range of vote dilution remedies.

SUMMARY OF ARGUMENT

The first *Gingles*[2] precondition does not require Voting Rights Act plaintiffs propose a viable ultimate remedy, nor does it require a proposed remedy give priority to the state's policy choices over ensuring the state's minority residents can equally participate in the political process. Instead, the first precondition in *Gingles* requires plaintiffs to demonstrate that the minority population in question is sufficiently compact and numerous to form a majority in a single district that is reasonably configured. *Allen v. Milligan*, 599 U.S. 1, 18 (2023). In other words, satisfying the first precondition establishes *injury*. Whether or not a proposed remedy would *actually* remedy vote dilution is not assessed at the liability stage, but at the remedial stage. *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006) ("The court may consider, at the *remedial* stage, what type of remedy is possible[,] [b]ut this difficulty should not impede the judge at the liability stage of the proceedings.").

Not only does this Court's long history applying *Gingles* confirm that the time to assess viable remedies is *after* establishing a Section 2 violation, but the existence of

2. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

vote dilution remedies other than single-member districts, such as cumulative and limited voting, illustrates the incompatibility of a viable remedy requirement within the first *Gingles* precondition analysis: whatever plan plaintiffs proffer in an effort to satisfy the first *Gingles* precondition must always be a single-member districts plan, because no other electoral structure could allow plaintiffs to demonstrate that the minority population is sufficiently compact and numerous to form a majority *in a single district*. However, under the Eleventh Circuit's test, plaintiffs cannot advance beyond the first *Gingles* precondition if they proffer (as they must under this Court's precedents) a single-member districts plan to prove vote dilution in an existing at-large system. This double bind would prevent legislatures and courts from ultimately considering vote dilution remedies other than single-member districts at the remedial stage, despite federal courts across the country, including this Court, having endorsed them.

Further, the proper stage to consider the State's asserted interest in its challenged electoral system is during the totality-of-circumstances analysis, *after* determining whether plaintiffs satisfied the three *Gingles* preconditions. Under this Court's precedents, as most recently stated in *Allen*, no single factor in the totality-of-circumstances should be dispositive. 599 U.S. at 26. Georgia's stated reasons for maintaining its existing at-large electoral structure cannot override all the other factors proving that structure dilutes Black voting strength in violation of Section 2. This is especially true when Georgia's purported interest in maintaining its dilutive, at-large electoral structure is undercut by the availability of alternative at-large electoral structures like

cumulative and limited voting that may not dilute Black voting strength.

Amicus argues that compared to the voting system currently in place for Georgia's Public Service Commission ("PSC") elections, electoral structures like cumulative and limited voting may allow Black voters in Georgia to increase their opportunities for representation and should be available for Georgia, the District Court, and Petitioners to consider for three reasons.[3] First, many courts have approved cumulative and limited voting systems to remedy Section 2 vote dilution violations, and these systems have been used throughout the United States for over a century. Second, these electoral structures lower the threshold for representation, which increases the possibility of a minority candidate's successful election. Third, these modified, at-large electoral structures are consistent with Georgia's chosen form of government.

For the foregoing reasons, this Court should grant the Petition and summarily reverse the Eleventh Circuit's decision or set the case for full merits briefing and argument.

3. *Amicus* in no way suggests that a single-member districts system is not an appropriate remedy in this case. Rather, *Amicus* contends that, once Section 2 liability is determined, the State may propose a remedy, that that remedy must be analyzed for its appropriateness in remedying the violation, and that the State may be able to establish that cumulative or limited voting could remedy the Section 2 violation while still preserving its preferred at-large voting method.

ARGUMENT

I. Introduction

Regardless of a state's chosen electoral model, Section 2 of the Voting Rights Act provides a clear directive against any and all practices that "result[] 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) (2014). The district court in this case found that Georgia's chosen electoral model for PSC elections—a statewide, at-large electoral structure—diluted Black voting strength in violation of Section 2's command. Yet, an Eleventh Circuit panel reversed because it did not consider Petitioners' illustrative map for the first *Gingles* precondition to be a viable remedy to cure dilution because the map did not comport with Georgia's stated policy interests in preserving an at-large electoral structure. *Rose v. Raffensperger*, 619 F. Supp. 3d 1241, 1267-68 (N.D. Ga. 2022) ("Dist. Ct. Opinion"); *Rose v. Sec'y, State of Georgia*, 87 F.4th 469, 483-84 (11th Cir. 2023) ("11th Cir. Opinion").

The Eleventh Circuit's opinion erroneously rested its analysis on a singular, elevated factor: Georgia's interests in maintaining its at-large system. This contradicts the Supreme Court's instructions that a state's interests in maintaining a certain electoral system should be "merely one factor to be considered in evaluating the 'totality of circumstances'" and "does not automatically, and in every case, outweigh proof of racial vote dilution." *Hous. Laws. Ass'n v. Att'y Gen. of Tex.*, 501 U.S. 419, 426-27 (1991), *superseded by* 986 F.2d 728 (5th Cir. 1993); *see also Rural W. Tenn. Afr. Am. Affs. Council, Inc. v. Sundquist*, 29

F. Supp. 2d 448, 460 (W.D. Tenn. 1998) ("state's interest in maintaining [its current election system] is simply insufficient alone to overcome the other factors" in totality-of-circumstances analysis.), *aff'd sub nom.*, 209 F.3d 835 (6th Cir. 2000); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1047 (D.S.D. 2004) (finding state interest did not defeat Section 2 liability). Moreover, "[a] substantial state interest is not inherently preclusive of dilution and is not raised to disprove the existence of dilution. Rather, the state's interest is weighed against proven dilution to assess whether such dilution creates § 2 liability." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 871 (5th Cir. 1993).

Furthermore, courts must undergo the totality-of-circumstances analysis of which the state's interest is a factor, *after* determining whether the *Gingles* preconditions are satisfied. *See e.g.*, *Allen*, 599 U.S. at 18 ("a plaintiff who demonstrates the three preconditions must also show, under the 'totality of circumstances,' that the political process is not 'equally open' to minority voters.") (citing *Gingles*, 45 U.S. 30, at 45-46). Despite agreeing that the totality-of-circumstances test follows the three *Gingles* preconditions, the Eleventh Circuit's ruling incorrectly inserted the "strong state interests" factor into the first *Gingles* precondition.[4] 11th Cir. Opinion at 485.

4. The threshold inquiry is whether the plaintiff can establish the following three preconditions: (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district[,]" (2) that the minority group is "politically cohesive[,]" and (3) that sufficient racial bloc voting exists such that the white majority usually defeats the minority's preferred candidate. *Gingles*, 478 U.S. at 50–51.

Therefore, *Amicus* joins Petitioners in asking this Court to reject the Eleventh Circuit's erroneous *Gingles* analysis. As set forth herein, (i) cumulative voting and limited voting are modified at-large electoral structures that can remedy vote dilution and enjoy long-standing acceptance in federal courts and jurisdictions across the country, and (ii) cumulative or limited voting systems align with Georgia's stated policy interest in maintaining an at-large electoral structure.[5]

II. Cumulative and Limited Voting Systems Can Remedy Vote Dilution

In a cumulative voting system, each voter has as many votes as there are open seats up for election. *United States v. Village of Port Chester*, 704 F. Supp. 2d 411, 447 (S.D.N.Y. 2010). For example, Georgia's PSC has five members, and

5. The "single-transferable vote" is another at-large electoral structure that can remedy vote dilution. Under this system, each voter ranks the candidates and voters' first choices are counted for each candidate until a candidate receives enough votes to win. *Holder v. Hall*, 512 U.S. 874, 910 n.16 (1994) (Thomas, J., concurring in judgment, joined by Scalia, J.). Then, the remaining first-choice ballots are transferred to another candidate (usually the second choice on the ballot). *Id.* This system "allows a minority group to concentrate its voting power" and "has the additional advantage of ensuring that 'surplus' votes are transferred to support the election of the minority voters' next preference." *Id.*; *see also Baber v. Dunlap*, 376 F. Supp. 3d 125 (D. Me. 2018) (finding Maine's single-transferable voting system constitutional); *Maine Republican Party v. Dunlap*, 324 F. Supp. 3d 202 (D. Me. 2018) (same); *Dudum v. Arntz*, 640 F.3d 1098, 1112-13 (9th Cir. 2011) (finding no vote dilution in San Francisco's single-transferable voting system).

in 2022, two of those seats were up for election.[6] Dist. Ct. Opinion at 1249. If the 2022 PSC elections had been conducted using cumulative voting, each Georgia voter would have had two votes to allocate to PSC candidates. Voters would have had the option to allocate those two votes to a single candidate, "to express the intensity of [their] preferences," or to allocate one vote each to two different candidates. Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1136 (1992).

In a limited voting system, the total number of votes a voter may cast is less than the total number of seats to be filled. Steven J. Mulroy, Alternative Electoral Systems, *America Votes! Guide to Modern Election Law and Voting*, AMERICAN BAR ASSOCIATION, 1 (2nd ed. 2012). For example, if five commissioner seats were up for election, voters would only be allowed to vote for four, or three, or two candidates. Unlike cumulative voting, voters may not give more than one vote to a candidate.

Cumulative and limited voting are clearly viable options to remedy vote dilution as (i) members of this Court and the Eleventh Circuit have endorsed cumulative and limited voting, (ii) federal courts across the country have upheld cumulative and limited voting as viable remedies to cure vote dilution, (iii) these remedies have a historic presence in American elections, and have proven effective in electing minority candidates, and (iv) they modify traditional at-large electoral systems to

6. The number of seats up for election could be increased by eliminating staggered terms. *See, e.g., Village Of Port Chester*, 704 F. Supp. 2d at 447.

provide minority populations with an opportunity to elect candidates of choice.

i. Members of this Court and the Eleventh Circuit have Endorsed Cumulative and Limited Voting Systems to Remedy Vote Dilution.

Members of this Court and the Eleventh Circuit have endorsed modified at-large voting systems as a potential remedy to Section 2 violations. *See Branch v. Smith*, 538 U.S. 254, 309-10 (2003) (O'Connor, J., concurring in-part, joined by Thomas, J.) ("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"); *Holder*, 512 U.S. at 910 (Thomas, J., concurring, joined by Scalia, J.) ("nothing in our present understanding of the Voting Rights Act … limit[s] … the authority of federal courts … from instituting a system of cumulative voting [or other transferable voting system] as a remedy under § 2."); *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1560 n.24 (11th Cir. 1984) (listing cumulative voting as an alternative voting method for "effective minority participation."); *Nipper v. Smith*, 39 F.3d 1494, 1559 (11th Cir. 1994) (Hatchett, J., dissenting, joined by Kravitch, P.) (endorsing limited and cumulative voting schemes to redress vote dilution claims); *see also Dillard v. Chilton Cnty. Comm'n*, 868 F.2d 1274 (Table) (11th Cir. 1989) (affirming cumulative voting scheme to remedy Section 2 claim).

ii. Federal Courts Have Adopted Cumulative and Limited Voting Systems to Remedy Vote Dilution.

Beyond this Court and the Eleventh Circuit, multiple federal courts have ordered cumulative and limited voting schemes as remedies for Section 2 violations. In fact, "[t]here is no case law that rejects cumulative voting as a lawful remedy under the Voting Rights Act. . . . Federal courts have repeatedly mentioned cumulative voting as a remedial option[.]" *Village of Port Chester*, 704 F. Supp. 2d at 448; *see also Mo. State Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist.*, 219 F. Supp. 3d 949, 957 (E.D. Mo. 2016) ("cumulative voting has been adopted as a remedy in a number of Section 2 cases"), *aff'd*, 894 F.3d 924 (8th Cir. 2018).

The Fourth and Eighth Circuits have found limited and cumulative voting to be adequate remedies to cure vote dilution. *See Moore v. Beaufort Cnty.*, 936 F.2d 159, 164 (4th Cir. 1991) (striking down challenge to a limited voting scheme to remedy a Section 2 voter dilution claim in North Carolina, as limited voting scheme was not "so contrary to state or federal policy that it cannot be enforced."); *Cottier v. City of Martin*, 551 F.3d 733, 745 (8th Cir. 2008) (upholding cumulative voting scheme to remedy section 2 violation), *reh'g en banc granted, opinion vacated on other grounds* (Feb. 9, 2009), *on reh'g en banc*, 604 F.3d 553 (8th Cir. 2010).

Numerous federal district courts have also approved cumulative or limited voting systems in Section 2 cases. The Middle District of Alabama, for example, has consistently

approved limited and cumulative voting to remedy vote dilution. In *Dillard v. Crenshaw County*., 640 F. Supp. 1347 (M.D. Ala. 1986), the court concluded that at-large systems in five Alabama counties intentionally diluted Black voting strength in violation of Section 2. *Id.* at 1362. The *Dillard* litigation resulted in at least two dozen court-approved settlements providing for cumulative or limited voting schemes, one of which was affirmed by the Eleventh Circuit. *See e.g.*, *Dillard v. Chilton Cnty. Bd. of Educ.*, 699 F. Supp. 870, 876 (M.D. Ala. 1988), *aff'd sub nom. Dillard v. Chilton Cnty. Comm'n*, 868 F.2d 1274 (Table) (11th Cir. 1989); *Dillard v. Town of Cuba*, 708 F. Supp. 1244 (M.D. Ala. 1988); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 Harv. C.R.-C.L. L. Rev. 173, 227 (1989). *In Town of Cuba*, for instance, the court approved settlements in two towns in Alabama, explaining that limited voting schemes are "not illegal or against public policy [, as the] court has uncovered nothing in federal constitutional or statutory law that prohibits such schemes," and that they represent a "fair and equitable resolution" that "offers all [B]lack citizens [] the potential to elect candidates of their choice." 708 F. Supp. at 1246.

In addition, the Southern District of New York, in *Village of Port Chester*, adopted a cumulative voting plan to remedy the dilution of Hispanic voting strength in elections of the village's governing Board. 704 F. Supp. 2d at 453. Reasoning that "[t]here is no case law that rejects cumulative voting as a lawful remedy under the Voting Rights Act," the court found the proposed cumulative voting plan remedied the Section 2 violation by "[giving] Hispanics a genuine opportunity to elect a representative

of their choice." *Id.* at 448-50. Although a cumulative voting plan had never been used in villages in the state before, with its order, the court also implemented an educational program to help voters understand cumulative voting and to educate them on their strategic options. *Id.* at 453.

Likewise, in *Ferguson-Florissant School District*, the court adopted a cumulative voting system to remedy a Section 2 violation in a Missouri school district election. 219 F. Supp. 3d at 961. The court reasoned that cumulative voting was a lawful method to cure the vote dilution while also "giv[ing] deference to state policy judgments . . . [and] the School District's priorities" by maintaining the existing at-large electoral system. *Id.*

Lastly, in *United States v. Euclid City School Board*, the court adopted a limited voting system to remedy a dilutive at-large school board election system. 632 F. Supp. 2d 740 (N.D. Ohio 2009). The court reasoned that cumulative and limited voting systems were legally acceptable Section 2 remedies that "provide[] a cohesive minority group increased opportunity relative to a traditional voting system," before selecting the limited voting system based upon its reasoning that limited voting would be easier for voters to understand. *Id.* at 755-57.

Through consent decrees, courts have also approved settlements of voting rights actions that implemented cumulative and limited voting systems. In fact, the Southern District of Georgia approved a Section 2 case settlement adopting a limited voting system to be used in Augusta, Georgia. Bernard Grofman et al., *Minority Representation and the Quest for Equality* 126 (1st ed. 1992) (citing *United States v. City of Augusta*, No.

CV-187-004 (S.D. Ga. 1987), settled out of court); Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE L.J. 105, 137 (1992). More recently, the Southern District of Florida approved a settlement of a Section 2 enforcement action against the Town of Lake Park, Florida that implemented a limited voting system. Consent J. & Decree, *United States v. Town of Lake Park,* No. 09-80507, at 4-5 (S.D. Fla. Oct. 26, 2009); *see also* Consent Decree, *Weddell v. Wagner Cmty. Sch. Dist.*, No. 02-4056, at 3-4 (D.S.D. Mar. 18, 2003) (adopting cumulative voting plan).

iii. Cumulative and Limited Voting Systems Have a Rich History in American Elections and Have Successfully Remedied Dilution.

Legislatures and local governments across the country have successfully implemented cumulative and limited voting systems. For example, cumulative voting elected the Illinois state house for more than a century, and it is the method of choice for towns and counties across Alabama, Texas, and South Dakota. Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 835 (2013); Margaret Morales, *Over 300 Places in the United States Have Used Fair Voting Methods*, SIGHTLINE INSTITUTE (Nov. 8, 2017), https://www.sightline.org/2017/11/08/over-300-places-in-the-united-states-have-used-fair-voting-methods; Drew DeSilver et al., *More U.S. locations experimenting with alternative voting systems*, PEW RESEARCH CENTER (June 29, 2021), https://www.pewresearch.org/short-reads/2021/06/29/more-u-s-locations-experimenting-with-alternative-voting-systems/.

Further, cumulative voting boasts impressive results from the standpoint of racial and ethnic minority representation. In the late 1980s and early 1990s, "[w]henever minority candidates ran under a cumulative voting system, they won for the first time in decades (or for the first time ever)." Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 349 (1998). For example, since 1988, in Chilton County, Alabama, voters have used cumulative voting to elect members of the County's principal political bodies, the County Commission and the Board of Education. Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL FORUM 241, 242. In the first election held under cumulative voting, "Bobby Agee became the first [B]lack representative to be elected to the Chilton County Commission since Reconstruction." *Id.* at 272. Similarly, implementing cumulative voting in the Village of Port Chester, New York resulted in voters electing the first Latino to the Board of Trustees in 2010. Richard L. Engstrom, *Cumulative and Limited Voting: Minority Electoral Opportunities and More*, 30 ST. LOUIS U. PUB. L. REV. 97, 99 (2010). In South Dakota, in the 1990s and 2000s, 30-45% of the population was Native American in some districts, yet Native Americans' preferred candidates rarely won elections. After implementing cumulative voting, Native American candidates won. Morales, *supra*.

Limited voting has been used since 1871 in the United States, and it is used in school board, county commission, and city council elections across Pennsylvania, Connecticut, North Carolina, and Alabama. Grofman, *supra*, 125; *Alternative Voting Methods in the United States*, U.S. ELECTION ASSISTANCE COMM'N, at 5 (Apr. 4,

2023), https://www.eac.gov/election-officials/alternative-voting-methods-united-states; *Communities in America Currently Using Proportional Voting*, FAIRVOTE (Dec. 2009), https://archive.fairvote.org/?page=2101. Philadelphia has used limited voting since 1951 for its seven at-large city council seats. *Id.* Since 1871, by law, all counties in Pennsylvania (except some with home rule powers) must use limited voting to elect county commissioners. *Jurisdictions Using Fair Representation Voting*, FAIRVOTE, http://www.fairvote.org/jurisdictions_using_fair_rep#full_list_of_fair_voting_jurisdictions (last visited Apr. 24, 2024). In Connecticut, limited voting has been required for all local school board elections since 1959. *See* Conn. Gen. Stat. Ann. § 9-167a (West 2023).

Like cumulative voting, in jurisdictions that have used limited voting, it has resulted in successful outcomes for minority candidates. Granville County, North Carolina, first implemented a limited voting system for its school board elections as a result of a vote dilution claim. Marcia Johnson, *The Systematic Denial of the Right to Vote to America's Minorities*, 11 HARV. BLACKLETTER L.J. 61, 78 n. 135 (1994); *McGhee v. Granville Cnty.*, 860 F.2d 110 (4th Cir. 1988). The County had a 39.5% Black registered voter population, and no Black candidate had been elected to the Board in modern history. After instituting a limited voting system, Black candidates won three of the five board seats up for election. Johnson, *supra*, at 78 n. 135. Likewise, in Alabama, after the *Dillard v. Baldwin County Board of Education*, 686 F. Supp. 1459 (M.D. Ala. 1988) litigation challenging vote dilution across the state, fourteen jurisdictions implemented limited voting systems in settlements. Johnson, *supra*, at 78 n. 135. Subsequently, Black candidates had resounding success, winning in thirteen of those fourteen jurisdictions. *Id.*

iv. Cumulative and Limited Voting Systems Can Remedy Vote Dilution by Modifying the Winner-Take-All Feature of At-Large Systems.

Cumulative and limited voting systems can remedy vote dilution by modifying the winner-take-all feature of at-large electoral systems. In traditional at-large elections, candidates run on a statewide basis, which "enable[s] the same statewide majority to control all seats." Pildes & Donoghue, *supra*, at 252. Essentially, an at-large system "allow[s] a cohesive voting bloc with 51% of the vote to control 100% of the seats." Mulroy, *The Way Out*, at 338. Indeed, in 1842, the concern that majoritarianism could diminish minority representation led Congress to require for the first time that states create districts for congressional elections. Pildes & Donoghue, *supra*, at 252-53. Similar concerns exist here, where Georgia's statewide system for electing PSC candidates diminishes minority representation by maintaining a winner-take-all majoritarianism. *See* Dist. Ct. Opinion at 1250 (as of 2021, 53.1 percent of Georgia's active voters are white and 29.4 percent are Black); *see also Rogers v. Lodge*, 458 U.S. 613, 616 (1982) ("[a]t-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district."). Cumulative and limited voting systems may cure this defect while preserving the statewide structure that Georgia's legislature chose for PSC elections.

Cumulative and limited voting systems numerically lower the threshold for representation. This effect is known

as the "threshold of exclusion,"[7] which is "the number of votes which cannot be denied representation under the most adverse conditions." Guinier, *supra*, at 1136 n. 3. For example, in a limited voting system, if five commissioner seats are up for election, and voters are allowed to vote for only one seat, or if three seats are up for election and voters can vote for only one seat, a candidate would be guaranteed election by obtaining 16.66 percent and 25 percent of the vote, respectively. Under a cumulative voting system, the results are the same if either five or three seats were up for election: a candidate would need to receive 16.66% or 25% of the vote, respectively, to guarantee election. Reaching this threshold of exclusion is likely achievable in PSC elections for Black voters, given 29.4 percent of active Georgia voters identify as Black, and Black voters have voted cohesively at rates greater than 94% in recent PSC elections. Dist. Ct. Opinion at 1250, 1253.

Compared to traditional at-large voting, cumulative and limited voting systems lower the threshold of exclusion to the "smallest cohesive minority group that

7. Specifically, a threshold of exclusion formula is used to calculate the amount of the vote needed to elect a minority candidate in a limited or cumulative voting system. For a limited voting system, the threshold of exclusion formula is $(v / (v + m)) * 100\%$, in which m represents the number of seats up for election and v is the number of votes each voter can cast. Arend Lijphart et al., *The Limited Vote and the Single Nontransferable Vote: Lessons from the Japanese and Spanish Examples*, *in* Gordon E. Baker et al., *Electoral Laws and Their Political Consequences*, 157 (3rd. ed. 2003). For cumulative voting, the threshold of exclusion is calculated as $1 / (1 + s)$, where s is the number of seats to be filled. Guinier, *supra*, at 1136 n. 3.

can control one seat under different voting systems even if the majority (1) is uniformly hostile to the minority's preferences and (2) distributes its own votes cohesively enough to maximize the majority's effort to defeat minority-supported candidates." Pildes & Donoghue, *supra*, at 241.[8] By lowering the threshold for minority groups to successfully express their voting preferences to below 51 percent, cumulative and limited voting may remedy vote dilution where a minority group is sufficiently compact and numerous to form a majority in a single district without a minority opportunity district itself being the remedy.

Cumulative and limited voting systems can also empower Black Georgians because "it is a way of enabling voters who feel that they are a politically cohesive minority to vote strategically to acquire representation for their 'minority group interests.'" Linda Maguire, *An Interview With Lani Guinier*, 19 THE FLETCHER FORUM OF WORLD AFFAIRS 99, 102 (Winter/Spring 1995); *see Euclid City Sch. Bd.*, 632 F. Supp. 2d at 755 ("[i]t is clear enough why, generally speaking, either [cumulative or limited voting] provides a cohesive minority group increased opportunity relative to a traditional voting system … if minority voters coalesce around a single candidate, that candidate will win so long as certain numerical conditions [] are met."). In fact, "experts recognize that the opportunity to elect a candidate of choice tends to dramatically increase voter

8. The threshold of exclusion is "calculated on the assumption that the hostile majority distributes its votes optimally among the right number of white candidates; any deviation of the majority from perfectly cohesive voting of this sort lowers the practical election threshold for minority-supported candidates." Pildes & Donoghue, *supra*, at 241.

registration and turnout in the minority community." *Village of Port Chester*, 704 F. Supp. 2d at 451.

III. Cumulative and Limited Voting Systems Can Remedy Vote Dilution and Are Consistent with Georgia's Stated Policy Interests in Maintaining Its At-Large System.

In addition to being legally accepted and potentially effective vote dilution remedies, cumulative and limited voting systems align with Georgia's stated policy objectives. The weight of Georgia's policy interest is assessed as part of the totality-of-circumstances test, where it is fair to consider the availability of alternatives to Georgia's chosen electoral model that satisfy Georgia's stated goals. *See Gingles*, 478 U.S. at 44-45.

Cumulative and limited voting are consistent with the policy interests that Georgia presented in defense of its at-large voting system—specifically, that an at-large structure "allows commissioners to 'work in the best interest of the whole state.'" Dist. Ct. Opinion at 1255. The Eleventh Circuit reasoned that statewide elections would serve Georgia's policy interests by "allow[ing] each commissioner to prioritize the 'best interest[s] of the whole state' without logjams from regionalized disputes," so that commissioners can "focus on the needs of the entire State," and that the PSC can be insulated "from localized special interests." 11th Cir. Opinion at 474, 483. Whereas, on the other hand, single-member districts could lead to "home cooking," or elected officials being too closely linked to their constituents, which would undermine fairness. *Id.* at 483. The Eleventh Circuit did not articulate any public policy of Georgia that cumulative or limited voting

would undermine. On the contrary, Justice Hatchett of the Eleventh Circuit (dissenting, joined by Justice Kravich) previously reasoned that, because limited voting maintains the at-large structure, it "strongly diminish[es]" the problem of elected officials "being too closely linked to their political constituencies," and "abolishes the discriminatory effect of multi-member at-large elections by removing the possibility of minority vote dilution." *Nipper*, 39 F.3d at 1559. Because cumulative and limited voting would preserve statewide elections for each PSC seat, they align with Georgia's stated interest in allowing PSC commissioners to focus on the whole state and avoid its concern that commissioners elected from a single district would favor the interests of their electoral base.[9]

In light of the fact that cumulative and limited voting maintain Georgia's at-large structure while potentially remedying its dilutive effect, it is fair to consider whether Georgia's rejection of these modified at-large structures renders "the policy underlying [its] use of [its at-large electoral model] . . . tenuous." *Gingles*, 478 U.S. at 37. Assuming *arguendo*, Georgia's policy interest for its challenged at-large structure is nevertheless substantial, such interest still cannot be given insurmountable weight against evidence of vote dilution and thereby preclude *any* remedial modifications to Georgia's PSC electoral system—especially when cumulative and limited voting may be viable remedies that would not "fundamentally

9. The Georgia legislature also has not prohibited cumulative or limited voting—the Georgia Constitution simply requires that the PSC be "elected by the people." GA. CONST. art. IV § 1, ¶ I(a); *see also Village of Port Chester*, 704 F.Supp.2d at 449 ("the Court does not find that cumulative voting is prohibited by New York law just because the law is silent on the issue.").

change" the PSC's structure. 11th Cir. Opinion at 482. Cumulative and limited voting systems have successfully remedied, or prevented, vote dilution in this country for over a century and have been upheld in the face of numerous challenges.

The very fact that viable vote dilution remedies not dependent on single-member districts exist demonstrates that the Eleventh Circuit erroneously conflated liability and remedy. Cumulative and limited voting systems show that the first *Gingles* precondition does not impose a viable remedy requirement on Section 2 plaintiffs seeking to establish liability through proffering a single-member districts plan. Instead, the purpose of the first *Gingles* precondition is to establish injury by showing that "the minority has the *potential* to elect a representative of its own choice in some single-member district." *Allen*, 599 U.S. at 18 (emphasis added). Only after the *Gingles* preconditions and the totality-of-circumstances analysis is satisfied can Georgia, the District Court, and Petitioners evaluate remedies to the now-proven vote dilution. The Eleventh Circuit erred by preventing the parties from doing so. Following a Section 2 violation finding (and only following such a finding), all parties should be given an opportunity to consider cumulative and limited voting as remedies.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari and summarily reverse the Eleventh Circuit's decision or set the case for full merits briefing and argument.

Respectfully submitted,

Dated:April 26, 2024

Bradley Heard
Jack Genberg
Courtney O'Donnell
Southern Poverty
Law Center
150 East Ponce de Leon
Avenue, Suite 340
Decatur, Georgia 30030

Randall T. Adams
Counsel of Record
Neema Jyothiprakash
Victoria Pavlock
Schulte Roth & Zabel LLP
919 Third Avenue
New York, New York 10022
(212) 756-2019
randall.adams@srz.com

Attorneys for Amicus Curiae