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

BRIEF OF CONSTITUTIONAL LAW SCHOLARS QUINN YEARGAIN AND ANTHONY MICHAEL KREIS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

Amici are Professor Quinn Yeargain and Professor Anthony Michael Kreis, state constitutional law scholars. Professor Yeargain is currently an Assistant Professor of Law at Widener University Commonwealth Law School, and effective July 1, 2024, will be an Associate Professor of Law at the Michigan State University College of Law. Professor Yeargain's scholarship on matters of state constitutional law has been published in top-ranked law journals, and was recently cited by the Idaho Supreme Court. Professor Yeargain has devoted his academic career to the study of American constitutional law, including the historical and legal development of state constitutions.

As an expert in state constitutional law, Professor Yeargain has a significant interest in ensuring the Georgia Constitution is interpreted consistent with its text, history, and purpose. The authority of the Georgia Public Service Commission ("PSC") is constrained by the Georgia state constitution. Professor Yeargain aims to provide an informed

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or its counsel made a monetary contribution to this brief's preparation or submission. Counsel of record for both parties were provided timely notice of *amici*'s intent to file this brief.

perspective on how relevant constitutional provisions were intended to limit the authority of the PSC—a limitation that has important implications for the balance of power in state government. Professor Yeargain will also provide guidance on the original meaning and purpose behind the constitutional provisions delineating the distinct roles of the legislature and the judiciary.

Professor Kreis is an assistant law professor at Georgia State University College of Law and holds a courtesy appointment with the political science department. Professor Kreis teaches constitutional law and studies the law of democracy and state constitutionalism in American Political Development. Professor Kreis has a particular expertise in the Georgia Constitution. Professor Kreis's scholarly achievements are extensive, with multiple articles published in top-tier law journals, a book, *Rot and Revival: The History of Constitutional Law in American Political Development*, with the University of California Press, and numerous popular media pieces, many of which delve into the intricacies of Georgia constitutional law. He regularly appears in Georgia media outlets to explain matters concerning the structure of the Georgia Constitution and substantive rights in state constitutional doctrine.

As a scholar whose work touches on a variety of matters concerning constitutional law, voting rights, and the Georgia Constitution, Professor Kreis has an

interest in ensuring a proper understanding of the Georgia Constitution's structure and how the constitution's separation of powers relates to the proper enforcement of the Voting Rights Act.

Because the questions before the Court affect the fundamental structure of legislative and judicial power in Georgia, the outcome of this case will have wide-ranging consequences across the state and in states with similar constitutional provisions. Accordingly, Amici submit this brief to urge the Court to ensure that the resolution is faithful to the Georgia Constitution.

SUMMARY OF ARGUMENT

This Court should reverse the judgment of the Eleventh Circuit panel because it runs counter to the framework this Court established in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and misinterprets Section 2 of the Voting Rights Act. Moreover, the panel's decision also reflects a misunderstanding of the Georgia Constitution and the Supreme Court of Georgia's line of caselaw.

First, the panel incorrectly applied *Nipper v. Smith*, 39 F.3d 1494, 1530 (11th Cir. 1994), to the Georgia PSC when determining that it is a quasi-judicial entity and that Petitioner's proposed remedy must operate "within the confines of the state's judicial model." *Id* at 1531. The Georgia Constitution does not grant quasi-judicial power to the PSC. By

deeming the PSC to be a quasi-judicial entity, the panel misinterpreted the caselaw of both this Court and the Supreme Court of Georgia. And although the General Assembly is authorized by Georgia's Constitution to empower an administrative agency like the PSC to exercise quasi-judicial functions, the exercise of such functions does not make the PSC a quasi-judicial, or judicial, entity. Moreover, it is impossible to sufficiently assess the manner in which such quasi-judicial power is exercised to determine whether an entity is quasi-judicial or judicial. As a result, it was inappropriate for the panel to view the PSC as analogous to a judicial entity, and to apply *Nipper* and its progeny, which primarily concern judicial elections.

Second, the panel's decision undermines the ability of voters to bring claims against other statewide, multi-member boards under Section 2 of the VRA. Despite the panel's emphasis on the unique nature of a Section 2 claim against a statewide body, its ruling could affect the ability of voters to bring claims against similarly constituted boards across the country. Further, the panel's emphasis on the "quasi-judicial" nature of the Georgia PSC could limit the ability of voters to bring redistricting claims against similar boards, even when they are elected by district.

For these reasons, Amici urges the Court to grant Petitioners' writ of certiorari.

ARGUMENT

I. The Panel's Determination that the Public Service Commission was a "Quasi-Judicial" Entity Established an Unworkable Standard.

Under *Thornburg v. Gingles*, 478 U.S. 30 (1986), plaintiffs bringing claims under the Voting Rights Act are required to demonstrate that the minority group in question is "sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district." *Allen v. Milligan*, 599 U.S. 1, 18 (2023). The Eleventh Circuit has interpreted this requirement to mean that plaintiffs must "offer[] a satisfactory remedial plan." *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1302 (11th Cir. 2020). The Eleventh Circuit has elaborated, in a line of caselaw beginning with *Nipper v. Smith*, that in evaluating "whether the remedy a plaintiff seeks is a feasible alternative to the challenged electoral system, a state's interest in maintaining the challenged system is a legitimate factor to be considered." *Southern Christian Leadership Conference v. Sessions*, 56 F.3d 1281, 1294 (11th Cir. 1995). The panel applied *Nipper* and its progeny, reasoning that a remedial plan "cannot be fundamentally at odds with the state's chosen model of government," and determined that Georgia's remedial request lacked viability. *Rose v. Sec'y*, 87 F.4th 469, 475 (11th Cir. 2023). While *Nipper* and its progeny primarily—if not exclusively—are applied in

the judicial context, the panel in this case held that "these decisions would still have equal force because the PSC is a 'quasi-judicial' administrative body." *Rose*, 87 F.4th at 484 (quoting *Tamiami Trail Tours v. Ga. Pub. Serv. Comm'n*, 99 S.E.2d 225, 233 (Ga. 1957) [hereinafter *Tamiami Trail*]). However, the idea that Georgia's PSC is analogous enough to a judicial entity such that *Nipper* and its progeny should apply misunderstands both the Georgia Constitution and Georgia case law and, in so doing, creates an unworkable standard.

A. The Georgia Public Service Commission Is Distinct From Other Georgia State Judicial Entities.

Although the PSC "hears . . . cases, holds hearings, listens to witnesses, makes evidentiary rulings, and weighs testimony from stakeholders to come to a decision," *Rose*, 87 F.4th at 473, in comparing the PSC to other Georgia state judicial entities, it is evident that the ways in which Georgia's courts are independent—and designed to prevent "home cooking," for example, *Nipper*, 39 F.3d at 1544—are completely inapplicable to PSC elections.

For example, Georgia state judicial elections are deliberately intended to be nonpartisan and non-ideological, and are frequently uncontested, in marked contrast to PSC elections, which are decidedly partisan and frequently contested. Ga. Code § 21-2-139 (2022). Furthermore, Georgia state judicial

candidates are explicitly prohibited from "mak[ing] statements or promises that commit the candidate with respect to issues likely to come before the court that are inconsistent with the impartial performance of the adjudicative duties of judicial office." Ga. Code Jud. Cond. 4.2(A)(2). There are no such requirements for PSC candidates. State judicial candidates also have educational and professional practice requirements, Ga. Const. art. VI, § 7, ¶ 2(a), which guarantees that qualified candidates are selected, while there are no analogous requirements for PSC candidates.

Moreover, there is no clear way to measure how "judicial" an entity must be for it to be sufficiently "quasi-judicial" such that *Nipper* and its progeny would apply. Indeed, the features of the PSC identified by the panel as supporting its characterization as "quasi-judicial" are, in fact, applicable to many non-judicial entities. For example, although the PSC "hears . . . cases, holds hearings, listens to witnesses, makes evidentiary rulings, and weighs testimony from stakeholders to come to a decision," *Rose*, 87 F.4th at 473, the same is also true of school boards, county commissions, and state legislatures, as virtually all of these entities exercise some form of "quasi-judicial" power for the exact same purpose. Based on the characterization of one aspect of their power alone as "quasi-judicial," other state and local entities could be insulated from VRA lawsuits under the Eleventh Circuit's holding.

At the local level, county commissions and school boards—two of the most common elected bodies in the United States—exercise a combination of executive, judicial, and legislative powers. In contexts that are analogous to the question presented in *Tamiami*, state courts around the country have commonly characterized school boards' powers as "quasi-judicial." *E.g.*, *Canney v. Bd. of Pub. Instruction*, 278 So.2d 260, 263–64 (Fla. 1973); *Western Area Bus. & Civic Club v. Duluth Sch. Bd. Indep. Dist.*, 324 N.W.2d 361, 364–65 (Minn. 1982); *Brown v. Bd. of Educ.*, 928 P.2d 57, 70–71 (Kan. 1996); *Hernandez v. Hayes*, 931 S.W.2d 648, 654 (Tex. Ct. App. 1996). Likewise, county commissions' powers have been similarly construed—especially when making decisions regarding zoning. *E.g.*, *Broward Cnty. v. G.B.V. Int'l*, 787 So.2d 838, 844–45 (Fla. 2001); *Oyen v. Lawrence Cnty. Comm'n*, 905 N.W.2d 304, 306 (S.D. 2017). However, "[t]he characterization of a decisional-making process by a School Board as 'quasi-judicial' does not make the body into a judicial body." *Canney*, 278 So.2d at 263.

State legislatures' "quasi-judicial" powers are frequently established by the texts of state constitutions. One such exercise occurs in the context of impeaching and removing state officials. In fact, in some states, the state senate is listed in the state constitution as a "court of impeachment." La. Const. art. VI, § 139; Idaho Const. art. V, §§ 2–3; Ky. Const. § 109; N.H. Const. pt. 2, § 38; N.M. Const. art. VI, § 1;

N.C. Const. art. IV, § 1; Okla. Const. art. VII, § 1; Tex. Const. art. XV, § 3; Wis. Const. art. VII, § 1; Wyo. Const. art. III, § 18. In other states, even where not so listed, courts have construed the impeachment and removal power as "quasi-judicial" or "judicial" in nature. *Krasner v. Ward*, 2023 Pa. Commw. Unpub. LEXIS 25, at *28–32 (Pa. Commw. Ct. Jan. 12, 2023); *People ex rel. Robin v. Hayes*, 82 Misc. 165 (N.Y. Sup. Ct. 1913).

In addition, legislatures exercise "quasi-judicial" power in "judging" the elections and qualifications of their own members, *see, e.g.*, Ga. Const. art. III, § 4, ¶ 7 ("Each house shall be the judge of the election, returns, and qualifications of its members . . . "); *Barry v. United States*, 279 U.S. 597, 613 (1929) (describing the U.S. Senate's power to "judge of the elections, returns, and qualifications of its own members" as "not legislative but judicial in character"), and in punishing members and non-members alike for contempt (including with the power to jail such members). *See, e.g.*, Ga. Const. art. III, § 4, ¶ 7 ("Each house . . . shall have the power to punish them [its members] for disorderly behavior or misconduct by censure, fine, imprisonment, or expulsion[.]"); *id.* ¶ 8 ("Each house may punish by imprisonment, not extending beyond the session, any person not a member who shall be guilty of a contempt by any disorderly behavior in its presence or who shall rescue or attempt to rescue any person arrested by order of either house."); *Groppi v. Leslie*, 404 U.S. 496, 499–

501 (1972) (analogizing legislative power to punish to judicial power).

Courts have analogized other powers of the legislature, like the legislative veto, as quasi-judicial in nature as well. *See, e.g., INS v. Chadha*, 462 U.S. 919, 960 (1983) (Powell, J., concurring) ("When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers."). Under the panel's logic, the exercise of these "quasi-judicial" powers by the General Assembly could render it a "quasi-judicial" body—which could then invoke *Nipper* and its progeny and hobble potential Section 2 challenges to the methods used to elect the legislature. While such a strategy might be unlikely, and would be appropriately rejected by this Court in any event, the unclear line drawn by the Eleventh Circuit could very well incentivize that kind of manipulative behavior.

B. The Panel Incorrectly Construed *Tamiami Trail*.

In *Tamiami Trail*, the Supreme Court of Georgia *did not* refer to the PSC as a "quasi-judicial" entity, which is how the panel opinion framed the quote. Instead, it made clear that "an administrative body such as the Public Service Commission may, in matters which come before it for determination, perform quasi-judicial functions as well as quasi-

legislative functions." *Tamiami Trail*, 99 S.E.2d at 233.

The context in which *Tamiami Trail* was decided was materially different from the context in which the panel below made its decision. The question in *Tamiami Trail* was whether a PSC procedure was adequately "judicial" or "quasi-judicial" such that "the parties whose rights are adjudicated are entitled to the protection afforded by judicial forms of procedure." *Tamiami Trail*, 99 S.E.2d at 233. Specifically, "[t]he question in this case is whether, under the authority conferred upon the [PSC] under the Code sections, the Commission may lawfully adopt a rule permitting the introduction of evidence before it of ex parte affidavits." *Id.* at 232–33. Specifically, though the Commission "perform[s] quasi-judicial functions as well as quasi-legislative functions," the "distinction between the two types of functions has been deemed of importance because where a proceeding is judicial or quasi-judicial in nature, the parties whose rights are adjudicated are entitled to the protection afforded by judicial forms of procedure." *Id.* at 233. While in *Tamiami*, the focus was on whether a function performed by the PSC could be deemed "judicial" or "quasi-judicial," the panel in this case makes such a determination with respect to the entity itself.

As the Supreme Court of Georgia has made clear, the Georgia Constitution "vests all legislative power in the General Assembly. It vests all judicial power in

the courts. It commands that these powers remain forever separate and distinct." *Thompson v. Talmadge*, 41 S.E.2d 883, 890 (Ga. 1947). To that end, the Court has explained that administrative agencies both perform "some activities which are legislative in nature and thus have been dubbed as quasi-legislative duties," and those of a "judicial coloring," such that they are "considered to be acting in a quasi-judicial capacity." *Bentley v. Chastain*, 249 S.E.2d 38, 40 (Ga. 1978) (quoting *Dep't of Nat. Res. v. Linchester Sand & Gravel Corp.*, 334 A.2d 514, 522 (Md. 1975)). The Georgia Constitution expressly authorizes the General Assembly to "authorize administrative agencies"—like the Public Service Commission to exercise quasi-judicial powers. Ga. Const. art. VI, § 1, ¶ 1. However, the General Assembly's power does not extend to creating judicial bodies outside of the judiciary itself. *See Sentence Review Panel v. Moseley*, 663 S.E.2d 679, 682–83 (Ga. 2008). And, in any event, the exercise of quasi-judicial power by administrative agencies "is not the same and, therefore, is distinguishable from the exercising of the 'judicial powers' of this State[.]" *Bentley*, 249 S.E.2d at 40 (quoting *Linchester Sand & Gravel Corp.*, 334 A.2d at 522).

As a result, there is a significant distinction between performing a *function* that could be described as "judicial" or "quasi-judicial" and *being an entity* that is, itself, "judicial" or "quasi-judicial." "It is clear . . . that it is the nature of the act to be performed

rather than the office, board, or body that performs it, that determines whether or not it is the discharge of a judicial or quasi-judicial function." *Southeastern Greyhound Lines v. Ga. Pub. Serv. Comm'n*, 181 S.E. 834, 837 (Ga. 1935) (quoting 11 C.J. 121, § 68). "A particular administrative body may at times exercise judicial or quasi-judicial functions and at other times exercise administrative, ministerial, or legislative functions." *Starnes v. Fulton Cnty. Sch. Dist.*, 503 S.E.2d 665, 667 (Ga. Ct. App. 1998).

II. The Panel Decision Undermines the Ability of Voters to Bring Section 2 Claims Against Other Multi-member Boards.

Multi-member boards such as the PSC are a common structure implemented by states across the country.[2] While Section 2 claims seeking to convert boards elected statewide to district-level elections are rare, recognition of the underlying claim is essential not only to stemming the ease with which state governments can implement dilutive voting practices,

[2] For example, other than Georgia, the states of Alabama, Arizona, North Dakota, Oklahoma, South Dakota, and Texas each have public service commissions that are elected at large. Outside of the PSC context, analogous entities include four education-related boards in Michigan, including the State Board of Education and separate boards of university regents for the University of Michigan, Michigan State University, and Wayne State University, as well as the Office of Hawaiian Affairs in Hawaii.

but also to maintaining existing protections against vote-dilution from similarly constituted boards.[3]

Failure to recognize individual citizens' rights to bring a Section 2 claim in the statewide context would undermine the ability to bring lawsuits against these boards when they *are* elected by district. And states' continued experimentation with the creation of different forms of government and elected bodies capable of administering novel policies and governing institutions indicates that the use of such multi-member boards is likely to continue. Moreover, the panel's determination that Section 2 of the VRA may not be used to challenge the dilutive voting practices of a statewide election system that is then left to stand will incentivize the further use of such systems in order to circumvent the law and discriminate "on

[3] *See generally United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1552 (11th Cir. 1984); *Sanchez v. Bond*, 875 F.2d 1488, 1489–90 (10th Cir. 1989); *Badillo v. City of Stockton*, 956 F.2d 884, 885–86 (9th Cir. 1992); *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1385 (8th Cir. 1995); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 938 (7th Cir. 1988); *Clarke v. City of Cincinnati*, 40 F.3d 807, 808 (6th Cir. 1994); *Washington v. Tensas Par. Sch. Bd.*, 819 F.2d 609, 610–12 (5th Cir. 1987); *Holloway v. City of Va. Beach*, 42 F.4th 266, 270–71 (4th Cir. 2022); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1102, 1111–12 (3d Cir. 1993); *Goosby v. Town Bd. of Hempstead*, 180 F.3d 476, 481 (2d Cir. 1999); *Uno v. City of Holyoke*, 72 F.3d 973, 977–78 (1st Cir. 1995).

account of race or color" while providing no recourse to those individuals being discriminated against.

A. The Panel's Decision Will Negatively Affect Voters' Ability to Bring Claims Against Similarly Constituted Boards.

The panel in this case emphasized the novelty of Petitioners' Section 2 claim, stating that " . . . plaintiffs ask us to find—*for the first time ever*—that statewide elections constitute vote dilution under Section 2" and that " . . . plaintiffs' proposed remedy asks us to wade into uncharted territory" in order to " . . . dismantle Georgia's statewide PSC system and replace it with an entirely new districted system. But we have never gone this far." *Rose*, 87 F.4th at 479 (emphasis in original).

While the panel noted that it "do[es] not mean to suggest that Section 2 plaintiffs could never prevail when asserting a Section 2 vote dilution claim against a statewide body," *id.* at 484 (emphasis added), the panel clearly viewed the novelty of the case as a basis to deny the remedial relief. But the panel's logic is circular. In finding that a claim is too novel to be cognizable, such novelty is only further perpetuated by a ruling that precludes future claims from similarly situated voters. Indeed, while this may be one of the first times such a claim has been made under Section 2 of the VRA, there is at least one other claim pending currently that challenges the use of statewide

elections for members of the Arkansas Supreme Court.

Further, the panel overstates the novelty of Petitioners' proposed remedy, given that single-member districting is the "standard remedy for a Section 2 violation caused by at-large districts." *See Wise v. Lipscomb*, 437 U.S. 535 (1978) (finding that in at-large districts, courts generally should "employ single-member districts when they impose remedial plans"). Petitioners request only that the statewide method of electing the PSC's members shift to align with its district-based treatment in other contexts, such as the time and manner of PSC elections, Ga. Code Ann. § 46-2-1(c) (2022). The panel also overstates the potential implications of a ruling favorable to Petitioners, given that the state legislature could adopt and implement other remedies such as ranked-choice voting.

Underscoring the panel's ruling is its potentially broad application to preclude vote dilution claims brought against other statewide boards, including, for example, one such board within the Eleventh Circuit's jurisdiction: Alabama's 3-member Public Service Commission. However, the panel's ruling would preclude such a claim even if Alabama's Public Service Commission had in fact violated the VRA by "deny[ing] or abridg[ing] the right of any citizen of the United States to vote on account of race or color." Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965). And the 11

other statewide, multi-member boards using statewide elections also would be affected by the decision to preclude Section 2 claims from being brought in this context. The panel's decision in this case would thus significantly limit the breadth of the VRA.

B. The Panel's Decision Could Limit the Ability of Voters to Bring Redistricting Claims Against Similar Boards.

Across the country, a number of states elect their public utility commissions, state boards of education, university boards of regents, or similar entities by district. With some notable exceptions,[4] decennial redistricting has taken place for these boards. While redistricting litigation involving these boards is comparatively rare, many state legislatures have redrawn these districts with the knowledge that the VRA and one-person, one-vote requirements apply in full force, while state courts that have handled redistricting litigation have operated on similar assumptions.

However, many of these boards have the same kind of arguably quasi-judicial powers that the PSC

[4] Mississippi's Transportation Commission and Public Service Commission districts, which are synonymous with its Supreme Court districts, haven't been redrawn since the 1980s, and Montana's Public Service Commission's districts were not redistricted between 2003 and 2022. *See* Quinn Yeargain, *Shadow Districts*, 45 Cardozo L. Rev. 405, 448 (2023).

has and virtually all of them have adjudicative authority that could be plausibly described as "quasi-judicial." If the panel's "quasi-judicial" analogy applies to non-statewide boards too, it could lead to an avalanche of exemptions from compliance with the one-person, one-vote requirements established by this Court. *Reynolds v. Sims*, 377 U.S. 533, 566 (1964). The failure to require such governmental structures to comply with the VRA and one-person, one-vote requirements would not go unnoticed, and states across the country could seek to circumvent the law by implementing similar quasi-judicial structures and arguing, as defendants do here, that their actions are compelled and sanctioned by state interests. But state interests are not insulated from judicial review "when state power is used as an instrument for circumventing a federally protected right," and the principle underlying the panel's ruling encourages state action that would flout both the VRA and the foundational ruling set down in *Reynolds*.

CONCLUSION

The panel's decision serves both to establish an unworkable standard in evaluating the extent to which similarly comprised boards violate Section 2 of the Voting Rights Act and to chill the ability of similarly situated voters to bring future redistricting claims under the Voting Rights Act. For these foregoing reasons, this Court should grant certiorari and reverse the panel's decision.

Respectfully submitted,

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