No. 22-12593

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

RICHARD ROSE, ET AL.,

Plaintiffs-Appellees,

v.

GEORGIA SECRETARY OF STATE,

Defendant-Appellant,

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

BRIEF OF AMICUS CURIAE THE NATIONAL REPUBLICAN REDISTRICTING TRUST IN SUPPORT OF DEFENDANT-APPELLANT

Jason B. Torchinsky*
**Counsel of Record*
Holtzman Vogel Baran
Torchinsky & Josefiak, PLLC
2300 N Street, NW, Ste 643A
Washington,DC 20037
Phone: (202) 737-8808
Fax: (540) 341-8809
jtorchinsky@holtzmanvogel.com

Brennan A.R. Bowen
Holtzman Vogel Baran
Torchinsky & Josefiak, PLLC
2575 E Camelback Road, Ste 860
Phoenix, AZ 85381
Phone: (540) 341-8808
Fax: (540) 341-8809
bbowen@holtzmanvogel.com

Counsel for Amicus Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I hereby certify that the following persons and entities may have an interest in the outcome of this case:

Bartlit Beck LLP, Counsel for Plaintiff-Appellees

Beranek, Lori, Counsel for Amicus Curiae U.S. Department of Justice

Bowen, Brennan, Counsel for Amius Curiae National Republican Redistricting Trust

Carr, Christopher, Attorney General, Counsel for DefendantAppellant

Clarke, Kristen, Counsel for Amicus Curiae U.S. Department of Justice

Erskine, Kurt R., Counsel for Amicus Curiae U.S. Department of Justice

Georgia Department of Law, Counsel for Defendant-Appellant

Grimberg, Steven D., Judge, U.S. District Court, Northern District of Georgia

Herren, Jr., T. Christian, Counsel for Amicus Curiae U.S. Department of Justice

Hughes, Aileen Bell, Counsel for Amicus Curiae U.S. Department of Justice

Jacoutot, Bryan F., Counsel for Defendant-Appellant

Karlan, Pamela S., Counsel for Amicus Curiae U.S. Department of Justice

LaRoss, Diane, Counsel for Defendant-Appellant

Martinez, Nicolas, Counsel for Plaintiff-Appellees

McCorkle, Brionté, Plaintiff

McGowan, Charlene, Counsel for Defendant-Appellant

Mellett, Timothy F., Counsel for Amicus Curiae U.S. Department of Justice

Morrissette, Wesley, Counsel for Plaintiff-Appellees

Mosley, Wanda, Plaintiff

National Republican Resdicrtcitng Trust

Petrany, Stephen J., Counsel for Defendant-Appellant

Raffensperger, Brad, in his official capacity as Secretary of State of Georgia, Defendant

Rose, Richard, Plaintiff

Sells, Bryan L., Counsel for Plaintiff-Appellees

Sitton, Janie Allison (Jaye), Counsel for Amicus Curiae U.S. Department of Justice

Taylor English Duma LLP, Counsel for Defendant-Appellant

The Law Office of Bryan L. Sells, LLC, Counsel for Plaintiff-Appellees

Torchinsky, Jason, Counsel for Amicus Curiae National Republican Redistricting Trust

Tyson, Bryan P., Counsel for Defendant-Appellant

U.S. Department of Justice, Amicus Curiae

Waldbeser, Drew F., Counsel for Defendant-Appellant

Webb, Bryan K., Counsel for Defendant-Appellant

Willard, Russell D., Counsel for Defendant-Appellant

Woodall, James "Major", Plaintiff

/s/ Jason Torchinsky
Jason Torchinsky

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT C-1

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 1

STATEMENT OF THE ISSUE 3

ARGUMENT 3

I. Proving Caution Is a Prerequisite to a Successful Section 2 Claim 4

A. Section 2's Text Requires Causation—i.e., That an Abridgement of The Right to Vote Be "On Account of Race or Color." 4

B. This Circuit's Jurisprudence Requires Causation 7

C. Since *Gingles*, Courts Have Been Clarifying That Correlation Alone Is Insufficient to Assert a Section 2 Violation 8

II. If Section 2 Requires Only Correlation—And Not Causation—It Effectively Becomes a Codified Preference for One Political Party's Candidates, Which Violates the First Amendment 13

CONCLUSION 18

CERTIFICATE OF COMPLIANCE 19

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

PAGES

CASES

Ala. State Conf. of the NAACP v. Alabama, No. 2:16-CV-731-WKW [WO], 2020 U.S. Dist. LEXIS 18938 (M.D. Ala. Feb. 5, 2020) 13, 14

Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) 2, 5, 11, 12

Chisom v. Roemer, 501 U.S. 380 (1991) 9

Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996).....16

Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992) 9

Davis v. Bandemer, 478 U.S. 109 (1986) 14

Frank v. Walker, 768 F.3d 744 (7th Cir. 2014) 7, 8

Gonzalez v. Arizona, 677 F.3d 383 (9th Cir. 2012).....8

Greater Birmingham Ministries v. Sec'y of State of Ala., 992 F.3d 1299 (11th Cir. 2021).....2, 7, 12

Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005).....3, 10, 17

Lee v. Va. State Bd. of Elections, 843 F.3d 592 (4th Cir. 2016).....8

Lopez v. Abbott, 339 F. Supp. 3d 589 (S.D. Tex. 2018).....14

Merrill v. Milligan, 142 S. Ct. 1358 (2022).....10

Mobile v. Bolden, 446 U.S. 55 (1980) 4, 5

NLRB v. SW Gen., Inc., 580 U.S. 288 (2017).....4

Ohio Democratic Party v. Husted, 834 F.3d 620 (6th Cir. 2016) 8

Robinson et al. v. Ardoin, No. 3:22-cv-211-SDD-RLB (M.D. La. Mar. 30, 2022) 13

Rose v. Raffensperger, No. 1:20-cv-02921-SDG, 2022 U.S. Dist. LEXIS 140097 (N.D. Ga. Aug. 5, 2022) .....*passim*

Rucho v. Common Cause, 139 S. Ct. 2484 (2019) 1, 10, 11, 16

Speech First, Inc. v. Cartwright, 32 F.4th 1110 (11th Cir. 2022) 2, 16

Tex. State Conf. of the NAACP v. Abbott et al., No. 1:21-cv-1006 (W.D. Tex. Nov. 5, 2021).....13

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

CONSTITUTION AND STATUTES

U.S. Const. amend. XV, § 1.....4

52 U.S.C. § 10301 .....*passim*

OTHER AUTHORITIES

Josh Kraushaar,*The Great Realignment*, Axios (July 14, 2022) 14

INTEREST OF AMICUS CURIAE[1]

The National Republican Redistricting Trust, or NRRT, is the central Republican organization tasked with coordinating and collaborating with national, state, and local groups on a fifty-state congressional and state legislative redistricting effort for 2020 and for decades to come. Its mission is threefold: (1) guarantee that redistricting faithfully follows all federal constitutional and statutory mandates; (2) verify that redistricting results in districts that are sufficiently compact and preserve communities; and (3) ensure that redistricting makes sense to voters.

SUMMARY OF THE ARGUMENT

Essentially, this is a *partisan* gerrymandering case—prohibited to be heard in federal courts by *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019)—dressed up as a *racial* gerrymandering case. Relying on *Thornburg v. Gingles*, 478 U.S. 30 (1986), the district court errantly rejected the Georgia Secretary of State's ("Secretary's") argument that polarization in Georgia elections is the result of partisanship rather than race—or, put differently, that Section 2 of the Voting Rights Act ("VRA") requires causation and not merely correlation. Specifically,

[1] Pursuant to Fed. R. App. P. 29(a), no party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amicus curiae, their members, or their counsel contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

the court was incorrect when it found that "nothing in the VRA requires a plaintiff to . . . ensure that the discriminatory effect is caused solely or even predominantly by race as opposed to some other factor." *Rose v. Raffensperger*, No. 1:20-cv-02921-SDG, 2022 U.S. Dist. LEXIS 140097, at *29 (N.D. Ga. Aug. 5, 2022) (emphasis added).

Reading Section 2 as requiring only racially correlated disparities, as opposed to disparities caused "on account of race or color," 52 U.S.C. § 10301(a), runs contrary to the text of the VRA. It also ignores the Supreme Court's developing jurisprudence on the issue. *See, e.g. Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2337 (2021). Worse still, it flouts this Court's clear instruction that "the challenged law must have caused the denial or abridgement of the right to vote on account of race." *Greater Birmingham Ministries v. Sec'y of State of Ala.*, 992 F.3d 1299, 1330 (11th Cir. 2021).

Moreover, interpreting Section 2 sans a causation requirement would effectually create an impermissible statutory preference, here, for Democratic candidates. *See Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1127 (11th Cir. 2022) (prohibiting the government from picking winners and loser in the marketplace of ideas). This Court's duty of constitutional avoidance, therefore, militates in favor of the interpretation that Section 2 requires causation, not merely

correlation. *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1227–28 (11th Cir. 2005). For these reasons, this Court should reverse.

STATEMENT OF THE ISSUE

Whether the district court erred when it found that Section 2 claims do not require proof of causation.

ARGUMENT

The district court errantly rejected the Secretary's argument "that Plaintiffs' votes are not being diluted 'on account of race or color' because . . . the polarization that exists in Georgia elections is the result of partisanship rather than race." *Rose*, 2022 U.S. Dist. LEXIS 140097, at *28. The court, relying on *Gingles*, 478 U.S. 30, disregarded this causation argument, reasoning that "[i]t is the *result* of the challenged practice . . . that matters." *Rose*, 2022 U.S. Dist. LEXIS 140097, at 29. What's more, the court ruled that "nothing in the VRA requires a plaintiff to . . . ensure that the discriminatory effect is *caused solely or even predominantly* by race as opposed to some other factor." *Id.* at 33 (emphasis added). This interpretation of Section 2 flies in the face of the statute's plain text and is in tension with recent jurisprudence.

The VRA does not exist to protect any political party. But, here, it has been applied in a way that denies the Republican Party's—and all non-Democrat Party's—First Amendment rights because the currently existing correlation

between the Black vote and the Democratic Party will result in protections for one political party if the decision below is not reversed.

I. Proving Caution Is a Prerequisite to a Successful Section 2 Claim.

A. Section 2's Text Requires Causation—*i.e.*, That an Abridgement of The Right to Vote Be "On Account of Race or Color."

Section 2 of the VRA provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote *on account of race or color*." 52 U.S.C. § 10301(a) (emphasis added). The totality of the circumstances analysis in subsection (b) requires courts to assess the "equa[l] open[ness]" of a state's political process and whether minority voters have "less opportunity" to "participate in the political process and to elect representatives of their choice." *Id.* § 10301(b). Moreover, Section 2's "on account of race" language mirrors and gives effect to the nearly identical language found in the Fifteenth Amendment. *See Mobile v. Bolden*, 446 U.S. 55, 60–61 (1980); *see also* U.S. Const. amend. XV, § 1.

Because it is "a cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute," *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 304 (2017) (citation omitted), the phrase "on account of race"

must be a prerequisite to a finding of discriminatory effect as demonstrated by the totality of the circumstances, with race—not party preference—being the causal factor underlying the demonstrated effect. Indeed, Sections 2(a) and 2(b) of the VRA must be read together to understand what state action's they prohibit. *See Brnovich,* 141 S. Ct. at 2337 (explaining that Sections 2(a) and 2(b) each inform how the other should be read).

Section 2(a) clearly restricts its scope only to laws that impact the voting rights of racial minorities because it only bans those voting qualifications or prerequisites to voting that deny or abridge the voting rights of citizens "on account of race or color." A Section 2 cause of action would never get a White Wyoming Democrat or White Vermont Republican past the courthouse door because it was not designed to protect those voters. Rather, it was targeted at the specific problem of intentional discrimination against *racial minorities* in state voting processes. *See Mobile*, 446 U.S. at 60–61.

Although Section 2 was later amended to eliminate the intent requirement, the class of individuals protected by the statute—namely, minority voters whose rights have been abridged or denied "on account of race or color"—has never changed. After Section 2(a) clearly established *whose* rights the statute was designed to protect, the 1982 amendment (codified as Section 2(b)) explained *how*

a violation of those rights could be established: The totality of the circumstances test.

Section 2(b) requires plaintiffs to show that "the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a)," 52 U.S.C. § 10301(b)—*i.e.*, minority voters who have been impacted by a law *because of* their race. But the statute does not leave litigants in the dark about how to prove a violation. Section 2(b) explains that unequal openness to participation can be demonstrated by showing that plaintiffs "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.*

Of course, there are many reasons a voter (including a minority voter) could have "less opportunity" than other voters within their state to elect the representative they would prefer, but the most prominent reason is partisanship. As Wyoming Democrats and Vermont Republicans can attest, millions of Americans live within states or political subdivisions where the partisan voting trends of their neighbors diverge from their personal political preferences. Section 2 was designed to equalize minority access to the political process by prohibiting state laws that denied or abridged their voting rights *on account of their race*, but it was clearly never intended to guarantee the success of an individual partisan candidate simply

because that candidate's political party is favored by minority voters who bring the claim (or, conversely, because that candidate is *disfavored* by White voters). *See Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014).

B. This Circuit's Jurisprudence Requires Causation.

In *Greater Birmingham Ministries*, this Court addressed a Section 2 challenge to Alabama's voter ID law, where plaintiffs alleged that "disparate voter ID possession rates and disparate burdens placed on minority voters"—such as "travel disparities, socioeconomic disparities, and lack of Spanish-language materials," which are the kind of disparities that are correlated with race but not "on account of race"—constituted evidence sufficient to prove a Section 2 violation. 992 F.3d at 1329. Although this Court determined that "minority voters in Alabama are slightly more likely than white voters not to have compliant IDs" and therefore to be burdened by the challenged law, it nevertheless held that "the plain language of Section 2(a) requires more" than this racially disparate impact. *Id.* at 1330. The two-part test in this Circuit is simple:

> First, the challenged law has to "result in" the denial or abridgement of the right to vote. Second, the denial or abridgement of the right to vote must be "on account of race or color." In other words, the challenged law must have *caused* the denial or abridgement of the right to vote on account of race.

Id. Both showings are essential to prove a violation, and this test succeeds in giving meaningful effect to every word of Section 2.

Other circuits agree with this Court's causation requirement. In upholding a Virginia voter ID law against a Section 2 challenge, the Fourth Circuit affirmed that a demonstration of disparate impact is not enough when plaintiffs fail to establish the necessary causal link. *See Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016) ("We conclude that § 2 does not sweep away all election rules that result in a disparity in the convenience of voting."). The Sixth Circuit came to a similar conclusion in upholding Ohio's twenty-nine-day early-voting-period against a Section 2 challenge, holding that Section 2 plaintiffs must demonstrate that the specific law they are challenging, "as opposed to non-state-created circumstances[,] *actually makes voting harder*" for minority voters. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 631 (6th Cir. 2016) (emphasis in original). The Seventh and Ninth Circuits, likewise, agree. *See Frank*, 768 F.3d at 753–54; *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc) ("Although proving a violation of § 2 does not require a showing of discriminatory intent, only discriminatory results, proof of 'causal connection between the challenged voting practice and a prohibited discriminatory result' is crucial." (citations omitted)).

C. Since *Gingles*, Courts Have Been Clarifying That Correlation Alone Is Insufficient to Assert a Section 2 Violation.

The *Gingles* Court created a two-fold dilemma that courts have since wrestled with: It read a conditional guarantee of proportional representation into

Section 2 and read the "on account of race or color" language seemingly out of the statute altogether. *See Gingles*, 478 U.S. at 63. The second and third *Gingles* factors focus solely on the *political* cohesiveness of a given racial minority and the relevant White majority, but they never require the reviewing court to investigate the necessary racial *cause* of any disparate effect. *Id.* In fact, the plurality opinion expressly disclaimed causation as relevant in any way. *See id.* (holding that "the reasons black and white voters vote differently have no relevance to the central inquiry of § 2"). But if it were true that causation was irrelevant, then the "on account of race" language in Section 2(a) would be superfluous, and "courts should disfavor interpretations of statutes that render language superfluous," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992).

Shortly after deciding *Gingles*, the Supreme Court began clarifying that it did not believe *all* voting restrictions that have a racially disproportionate effect constitute Section 2 violations. *See, e.g.*, *Chisom v. Roemer*, 501 U.S. 380, 383–84 (1991) (noting that the 1982 VRA amendments "make clear that *certain* practices and procedures that result in the denial or abridgment of the right to vote are forbidden" (initial emphasis added)(emphasis removed)). Thus, although the addition of Section 2(b) expanded the scope of prohibited state action beyond that which was motivated by a racially discriminatory intent, it did not widen the aperture to encompass *all* state actions that have a racially disparate effect. Indeed,

federal appellate courts—including this one—have long recognized the intermediate nature of the change wrought by Section 2(b). *See Johnson*, 405 F.3d at 1227–28 (holding that while "a plaintiff could establish a [Section 2] violation without proving discriminatory intent," it nevertheless "does not prohibit all voting restrictions that may have a racially disproportionate effect").

The Supreme Court's first hint that the second and third *Gingles* factors rested on shaky jurisprudential ground came in *Rucho v. Common Cause*, 139 S. Ct. 2484. In that case, which was brought under the First Amendment and Equal Protection Clause, the Court held that partisan gerrymandering claims are not justiciable in federal court because there exists no judicially manageable standard for determining how much partisan motivation in redistricting is too much. *Id.* at 2508. For a successful Section 2 claim under *Gingles*, however, a minority group must "show that it is politically cohesive," and that "the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." 478 U.S. at 51. Thus, *Gingles* essentially requires Section 2 plaintiffs to produce evidence that *Rucho* held federal courts are not competent to evaluate, and these dueling precedents coexist in uneasy tension.[2]

[2] The Supreme Court will likely wrestle with this tension at the October 4, 2022 oral argument in *Merrill v. Milligan*, 142 S. Ct. 1358 (2022). *See* U.S. Supreme Court, For the Session Beginning October 3, 2022, https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalOctober2022.pdf.

Two years after deciding *Rucho*, the Court in *Brnovich v. Democratic Nat'l Comm.* reviewed a Section 2 challenge to Arizona's precinct voting rule and ballot harvesting restrictions. 141 S. Ct. at 2330. The majority confirmed that the Court's "statutory interpretation cases almost always start with a careful consideration of the text, and there is no reason to do otherwise" when analyzing Section 2. *Id.* at 2337. The Court then quoted the "on account of race or color" language of Section 2(a) and noted that the it "need not decide what this text would mean if it stood alone because §2(b), which was added to win Senate approval, explains what must be shown to establish a §2 violation." *Id.* This confirms that Section 2(b)'s totality of the circumstances test cannot be properly interpreted when divorced from the confines of the Section 2(a) condition that any injury be *on account* of the voter's race.

What's more, the test the Court advanced as relevant to the totality of the circumstances inquiry—in the time, place, and manner context—implicitly recognizes the centrality of causation. The Court first explained that "equal opportunity helps to explain the meaning of equal openness" in Section 2(b), confirming that Section 2 is focused on ensuring equality of access and not an equalization of electoral outcomes. *Id.* at 2338. It then identified five factors pertinent to the analysis, among them the overall size of the burden imposed by the challenged law and the size of any disparities in the law's impact on racial

minority groups. *Id.* at 2339–40. Regarding the latter, the Court noted that, "[t]o the extent that minority and non-minority groups differ with respect to employment, wealth, and education, even neutral regulations, no matter how crafted, may well result in some predictable disparities in rates of voting." *Id.* at 2339. Residential sorting patterns and statewide partisanship—though not inherently racial—are also sufficiently correlated with race to sometimes affect a minority group's ability to elect its preferred candidate. But the truth remains that factors which are merely correlated with race do not mean a law operates "on account of race." The *Brnovich* factors clearly reflect an understanding of Section 2 premised on something more than disparate impact alone, but less than invidious intent—namely, a requirement that any disparate impact be *caused* by the race of the affected voters.

* * * *

To summarize, the second and third *Gingles* factors ignore an essential analytical step required by the text of Section 2: Inquiring whether the demonstrated effect occurs "on account of race." This Court has correctly filled that jurisprudential gap by requiring plaintiffs to prove that the challenged law "caused the denial or abridgement of the right to vote *on account of* race." *Greater Birmingham Ministries*, 992 F.3d at 1330 (emphasis added). However, the district court here rejected that foundational requirement and the statutory language, erring

as a matter of law. *See Rose*, 2022 U.S. Dist. LEXIS 140097, at *28–29. For this reason, the Court should reverse.

II. If Section 2 Requires Only Correlation—And Not Causation—It Effectively Becomes a Codified Preference for One Political Party's Candidates, Which Violates the First Amendment.

Section 2 of the VRA was meant to equalize minority rights in voting, *see supra* pp. 9–11; instead, here, it has become a cudgel wielded against any state law that fails to advance the institutional interests of the Democratic Party in Georgia. That party relies on the high correlation between the race of Black voters and their support for Democrat candidates to allege "race discrimination" in many cases where the inability of Democratic candidates to win elections is more a result of the decline of the Democratic Party in Georgia than racial discrimination.[3]

For example, as chronicled in *Ala. State Conf. of the NAACP v. Alabama*, "despite large spending disparities, losing [B]lack candidates receive a slight edge in their share of the vote over losing [W]hite candidates." No. 2:16-CV-731-WKW [WO], 2020 U.S. Dist. LEXIS 18938, at *128 (M.D. Ala. Feb. 5, 2020). Thus, as the district court in that case found, Democratic candidates, regardless of race, receive similar levels of overall support (and Black Democratic candidates may even have a slight advantage over White Democrats), "[b]ut the notion that

[3] Similar claims have been brought by Democratic Party-allied voters in Louisiana and Texas. Complaint, *Robinson et al. v. Ardoin*, No. 3:22-cv-211-SDD-RLB, (M.D. La. Mar. 30, 2022), *stayed by*, 597 U.S. 3396 (2022); Complaint, *Tex. State Conf. of the NAACP v. Abbott et al.*, No. 1:21-cv-1006 (W.D. Tex. Nov. 5, 2021).

African-American candidates lose solely because of their skin color is not supported by the evidence." *Id.* And in Texas, a federal district court concluded similarly with respect to statewide judicial candidates, Hispanic or Latino identity, and partisan affiliation. *See Lopez v. Abbott*, 339 F. Supp. 3d 589, 619 (S.D. Tex. 2018). That court concluded that, in Texas, Hispanic Republicans performed statewide nearly identically to White Republicans, and Hispanic Democrats performed statewide nearly identically to White Democrats. *Id.* at 612–13.

The second and third *Gingles* factors are two sides of the same coin: one requires a showing of minority group political cohesion, and the other a showing of majority group (*i.e.*, White) political cohesion. *Gingles*, 478 U.S. at 51. At their core, the second and third *Gingles* factors perpetuate the dangerous myth that race and partisanship are not only correlated, but causated. This view of race and party is incorrect.[4] *See Davis* v. *Bandemer*, 478 U.S. 109, 156 (1986) (O'Connor, J., concurring) ("[W]hile membership in a racial group is an immutable characteristic, voters can—and often do—move from one party to the other or support candidates from both parties."). Justice O'Connor identified the danger in such an approach in her opinion concurring in the judgment in *Gingles* itself, joined by Chief Justice Burger and Justices Powell and Rehnquist: "Nothing in . . . the language and

[4] One need only read a sampling of major newspapers to find, for example, that Hispanic voters in many areas of the country are shifting rapidly towards Republicans. *See, e.g.*, Josh Kraushaar, The Great Realignment, Axios (July 14, 2022) https://www.axios.com/2022/07/14/republicans-democrats-hispnanic-voters.

legislative history of § 2 supports the Court's creation of this right to usual, roughly proportional representation on the part of every geographically compact, politically cohesive minority group that is large enough to form a majority in one or more single-member districts." *Gingles*, 478 U.S. at 99 (O'Connor, J., concurring). Interpreting Section 2 to require such proportionality—in a world in which certain minority groups in some states or regions typically favor one particular political party—will redound to the political benefit of that party by ensuring that the electoral environment is structured in a way that guarantees it some success.

The example presented by the instant case is illustrative; when a bloc of minority voters—such as Black voters in Georgia—vote for a single party at rates upwards of 97%, *see Rose*, 2022 U.S. Dist. LEXIS 140097, at *13, the second and third *Gingles* preconditions are transformed from a method for minority voters to effectuate their rights into an unapologetic mechanism for electing more Democrats. There is no requirement that state legislatures redistrict in a way that maximizes Democratic vote share. Yet, plaintiffs are permitted to advance *that very argument* by simply dressing up their gripe about partisan representation as a Section 2 claim of racial vote dilution.

The entanglement of the race of voters and their preference for a certain party's candidates—as is the case here, *id.* at *13–18—must be untangled because

leaving them intertwined, in effect, becomes shroud for protection of one political party. Essentially, this case is a partisan gerrymandering case—prohibited to be heard in federal courts by *Rucho*—dressed up as a racial gerrymandering claim. The district court, here, refused to engage in such disentanglement and therefore erred. *Id.* at *18 ("The Court finds that the interplay between race and partisanship is difficult if not impossible to disentangle. But . . . the Court is unconvinced that such disentangling is necessary or even relevant to the vote dilution analysis.").

The effect of the district court's error here—and the general error of conflating of race and party—is the protection of one political party above others and, by extension, the protection of its ideas above others. This partisan protectionism is a violation of core First Amendment rights, and not justiciable in federal court. *See Rucho*, 139 S. Ct. at 2508 (holding that partisan gerrymandering is a non-justiciable political issue); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996) ("The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees." (citations omitted)); *Speech First, Inc.*, 32 F.4th at 1127 ("In prohibiting only one perspective, [the government] targets 'particular views taken by' students, and thereby chooses winners and losers in the marketplace of ideas—which it may not do" (citations omitted)).

Thus, interpreting Section 2 without its textual causation requirement—i.e., "on account of race"—results in an avoidable constitutional question. But "[i]t is a long-standing rule of statutory interpretation that federal courts should not construe a statute to create a constitutional question unless there is a clear statement from Congress endorsing this understanding." *Johnson*, 405 F.3d at 1229. Therefore, the Court must "first address whether one interpretation presents grave constitutional questions whereas another interpretation would not, and then examine whether the latter interpretation is clearly contrary to Congressional intent." *Id.*. Interpreting Section 2 to include its causation requirement avoids the constitutional question. And, as explained *supra* p. 8–11, the clear intent of Congress was for Section 2 claims to require causation, as evidence by its inclusion of "on account of race or color." 52 U.S.C. § 10301(a).

Therefore, the district court erred by deciding this case in a way that raises serious constitutional questions when it could have decided on alternative grounds.

CONCLUSION

For the aforementioned reasons as well as those articulated by Appellants, the Court should reverse the decision below.

Respectfully submitted,

Jason B. Torchinsky*
*Counsel of Record
Holtzman Vogel Baran
Torchinsky & Josefiak, PLLC
2300 N Street, NW, Ste 643-A
Washington, DC 20037
Phone: (202) 737-8808
Fax: (540) 341-8809
jtorchinsky@holtzmanvogel.com

Brennan A.R. Bowen
Holtzman Vogel Baran
Torchinsky & Josefiak, PLLC
2575 E Camelback Road, Ste 860
Phoenix, AZ 85381
Phone: (540) 341-8808
Fax: (540) 341-8809
bbowen@holtzmanvogel.com

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 4,065 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman size 14-point font with Microsoft Word.

Dated: September 22, 2022

/s/ Jason Torchinsky
Jason Torchinsky

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

/s/ Jason Torchinsky
Jason Torchinsky