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 IN OPPOSITION

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QUESTION PRESENTED

Since *Thornburg v. Gingles*, plaintiffs alleging vote dilution have been required to show that, "in the absence of the challenged structure or practice," minority voters could "elect representatives" of their choice. 478 U.S. 30, 50 n.17 (1986). This means they must propose a "reasonable" and "workable" alternative election scheme "against which to measure the existing voting practice." *Holder v. Hall*, 512 U.S. 874, 880–81 (1994). If there is no alternative, there is no vote dilution. *Id.* at 880.

Here, Petitioners assert that their votes are diluted because Georgia's Public Service Commission, a statewide agency, has statewide elections. Petitioners demanded the Commission's statewide character be abolished and proposed to replace it with five representatives elected from single-member districts. The Eleventh Circuit rejected this demand because Petitioners' "novel proposal" would "replace Georgia's chosen form of government … with a completely different system." Pet.App.16a–17a. That is, Petitioners failed to identify a comparator by which to measure vote dilution, and their claim fails.

The question presented is whether a plaintiff alleging vote dilution has satisfied his burden to propose a reasonable and workable alternative election scheme when the suggested remedy would fundamentally alter the State's chosen form of government.

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INTRODUCTION

Petitioners ask this Court to weigh in on a splitless dispute regarding the distinctive structure of Georgia's Public Service Commission. The Commission is a state agency that regulates utilities. *See* Ga. Const. art. IV, § 1, ¶ I(a). It sets prices, issues permits to construct new energy facilities, regulates infrastructure, and acts as a judicial body for various disputes. It is a constitutionally created agency with statewide jurisdiction, and its five Commissioners are elected by the entire State.

Petitioners filed a claim under Section 2 of the Voting Rights Act, hoping to transform the Commission into a body made up of representatives elected via single-member districts, but the Eleventh Circuit rightly denied that request, and there is no need for further review. Petitioners' proposed remedy would fundamentally alter the form of the agency, transforming it into a sort of second legislature with regional representatives. Instead of Commissioners working on behalf of all Georgians as statewide officials, Petitioners prefer local representatives, beholden to regionalized special interests, who compete with other Commissioners to secure the greatest benefits for their districts.

But, as the panel noted and Petitioners do not dispute, no court has *ever* used § 2 to jettison a statewide election scheme for statewide agency officers, and for good reason. To make out a vote dilution claim, plaintiffs have to establish that their votes are diluted as compared to some "benchmark." *Holder v. Hall*, 512 U.S. 874, 880 (1994); *see also, e.g.*, *Gonzalez v. City of Aurora*, 535 F.3d 594, 598 (7th Cir. 2008) (A court must ask: "Diluted relative to what?").

Plaintiffs have to propose a remedy that would rectify the supposed dilution. *Thornburg v. Gingles*, 478 U.S. 30, 50 n.17 (1986). And to do that, the proposed remedy must involve the same form of government. Nothing in the text of the Voting Rights Act "suggests an intent on the part of Congress to permit the federal judiciary to force on the states a new model of government." *Nipper v. Smith*, 39 F.3d 1494, 1531 (11th Cir. 1994). Plaintiffs cannot, for instance, propose a remedy that would change a single Commissioner into a multi-member commission, because there is no vote dilution if, to prove dilution, you have to change the form of government. *Holder*, 512 U.S. at 881.

Plaintiffs quibble about whether their proposed remedy would in fact alter Georgia's chosen form of government, but their arguments are novel, erroneous, and require no further review. As the Eleventh Circuit explained, the Commission is distinctive: it is a statewide, quasi-legislative, quasi-judicial agency where each of the five Commissioners must reside in particular areas but are elected statewide. *See* Pet.App.3a–4a. The Commission makes decisions for the whole State, and it also adjudicates disputes within the State. Plaintiffs argue that the Commission is not *really* judicial, that the Eleventh Circuit should not have relied on certain testimony, and other such nits, but there is no reason for this Court to dive into disputes about the particular facts of a single state agency.

In any event, there is no split of authority about any of this. Every circuit requires plaintiffs to propose a viable remedy; no circuit lets federal courts rework the basic features of a State's government. Petitioners barely even assert otherwise, and their few cited cases reinforce

the distinction between an average § 2 challenge and their novel challenge to a statewide agency's composition. "[T]raditional" § 2 claims, like those challenging single-member district lines, *do* propose remedies that preserve the basic features of government. Pet.App.10a–12a. That simply is not the case with a challenge to the structure of a state agency.

On top of everything else, this case is a bad vehicle for review. Even if Petitioners were correct on this issue, their claim would fail anyway. To start, they failed to establish that voting in Georgia is racially polarized. They did show that black Georgians tend to vote for Democrats and white Georgians tend to vote for Republicans, but that divergence is explained by voters' *partisan* preferences, not their race. Black voters in Georgia are not losing Commission elections "on account of race." 52 U.S.C. § 10301(a). Asian Democrats, Latino Democrats—everyone who votes for Democrats is in the same boat, so black voters have exactly the same "opportunity" to "participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

Likewise, the district court made numerous errors in its totality analysis. The district court held that multiple factors favored the State, yet ruled against the State because of, *inter alia*, its view that the State needed to *prove* the validity of its policy choices, a legally erroneous burden-shifting regime. *See* Pet.App.59a–75a. So even if Petitioners had a point on the question presented—and they do not—it is not dispositive anyway.

This Court need not act as a court of "first view," *McLane Co. v. EEOC*, 581 U.S. 72, 85 (2017) (quotation

omitted), on Petitioners' novel theory. The petition should be denied.

STATEMENT

A. Governing Legal Framework

Section 2 of the Voting Rights Act prohibits state and local governments from using any "practice" or "procedure" that "results in a denial or abridgement of the right … to vote on account of race or color." 52 U.S.C. § 10301(a). The statute is violated when, "based on the totality of circumstances," members of a minority community "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b). Crucially, while the statute guarantees equality of opportunity, it specifically disclaims a right to proportional representation. *Id.*

Claims of vote dilution allege that a minority group has been "submerg[ed]" within a majority so as to "minimize or cancel out" the minority's voting strength. *Gingles*, 478 U.S. at 46–47. Plaintiffs must satisfy three preconditions. First, they must show that the minority group has "the *potential* to elect representatives in the absence of the challenged structure." *Id.* at 50 n.17. This requires the plaintiff to identify a "benchmark," i.e., an alternative election scheme in which the minority group would have greater political success. *Holder*, 512 U.S. at 881. Second, they must show that the minority group is "politically cohesive." *Gingles*, 478 U.S. at 51. And third, they must show that the majority votes as a racial bloc to defeat the minority group's preferred candidates. *Id.*

Establishing the preconditions is necessary for any successful § 2 claim, but not sufficient. Plaintiffs who do so must then show, by the totality of the circumstances, that the challenged practice "result[s] in unequal access to the electoral process." *Id.* at 46; *see also id.* at 36–37 (identifying the nine factors usually considered at this stage).

B. Factual Background

The Public Service Commission is a state body that regulates utilities across the State of Georgia. Pet. App.3a. It is comprised of five Commissioners, whose responsibilities are "significant" and "wide-ranging." Pet. App.3a. It decides what rates utility providers may charge their customers, controls permits for constructing new power plants, regulates the installation and maintenance of landlines and other communications technologies, and so forth. Pet.App.3a.

The Commission has both "quasi-legislative" and "quasi-judicial" functions. Pet.App.3a. Sometimes, it sets rates, grants permits, and enacts regulations like a legislature or regulatory body would. Other times, it conducts proceedings as an adjudicatory body, with adversarial proceedings. It hears witnesses and allows cross-examination, holds hearings, makes evidentiary rulings, and weighs testimony, just like a court. Pet. App.3a.

Because the Commission is a statewide agency with authority over the whole State, the Commission's five members are chosen through statewide elections, and have been since 1906. Pet.App.3a–5a, 22a. This system

was "deliberately chosen to advance policy interests that the Georgia General Assembly deemed important." Pet. App.4a. It ensures that Commissioners are not beholden to regionalized interests and instead work for the benefit of the State as a whole. Pet.App.4a–5a. This is especially important when it acts in its adjudicative capacity, as it avoids the problem or appearance of "home cooking." *S. Christian Leadership Conf. of Alabama v. Sessions*, 56 F.3d 1281, 1297 (11th Cir. 1995) (en banc).

While Commissioners are elected in statewide elections, they have to reside in one of five different residency districts. O.C.G.A. § 46-2-1(a). That is, a candidate for District 1 Commissioner must live in District 1, but the entire State votes on his candidacy. Pet.App.4a; O.C.G.A. §46-2-1. This hybrid scheme of district residency requirements and statewide elections ensures that the Commission serves the interests of the entire State: without the residency requirement, Commissioners might all reside in one highly populated part of the state (like Atlanta) and thus be tempted to prioritize that area's needs over others.

All current Commissioners are Republicans; four are white and one is black. Trial Tr. at 609, *Rose v. Raffensperger*, No. 1:20-cv-02921 (N.D. Ga. Aug. 9, 2022), ECF No. 158; Popick Expert Rpt. at 9–15, *Rose*, No. 1:20-cv-02921 (N.D. Ga. July 11, 2022), ECF No. 146-8. Republicans have generally prevailed in recent statewide elections. Although other state elections have become more competitive recently, Republicans dominate Commission elections. Republicans have won every Commission seat since David Burgess, a black Democrat, won election in 2000. Trial Tr. at 477–79, *Rose*, No. 1:20-cv-02921 (N.D. Ga. July 5, 2022), ECF No. 141; Pet.App.44a–45a.

Georgia's other elected officials are racially diverse too. One of Georgia's two U.S. Senators is black. And black candidates have won more than a third of the State's congressional seats and roughly a quarter of the state legislature. In other words, black Georgians, who comprise 32% of the State's population, Pet.App.45a, are generally successful and often *more* successful than proportionality would suggest.

C. Proceedings Below

Petitioners, four black voters, filed an action challenging the Commission's statewide structure in July 2020. Although they have never been prevented from voting or registering to vote, they alleged that the Commission's statewide system of election dilutes their votes in violation of § 2 of the Voting Rights Act. Pet. App.12a–13a, 38a–39a. As a remedy, they asked the district court to throw out the Commission's more-than-a-century-old statewide system and implement a new regime of single-member district representatives, including a majority-black district based in Atlanta. Pet.App.13a.

1. Via a motion to dismiss and motion for summary judgment, the Secretary argued that Petitioners' challenge could not succeed because their proposed remedy would fundamentally alter the structure of the Commission. *See* Mot. to Dismiss at 11, *Rose*, No. 1:20-cv-02921 (N.D. Ga. Aug. 14, 2020), ECF. No. 22-1; Mot. for Summ. J., *Rose*, No. 1:20-cv-02921 (N.D. Ga. July 9, 2021), ECF No. 80-1. But the district court denied those motions and set the matter for trial. Pet.App.13a–14a.

At trial, the Secretary again argued that Petitioners' proposed remedy failed because it would alter Georgia's form of government. Trial Tr. at 830–37, *Rose*, No. 1:20-cv-02921 (N.D. Ga. July 5, 2022), ECF. No. 143. For instance, the Secretary relied on testimony from each of the current Commissioners. The Commission Chair, Tricia Pridemore, testified that Commissioners "don't fight" over decisions like which districts get new facilities or whether customers in different districts should pay different rates. Pet.App.5a. Instead, they "work in the best interest of the whole state." Pet.App.48a. Single-member districts, on the other hand, would introduce "favoritism and politics into utility regulation." Pet. App.48a. She also explained that the Commission hears cases as an adjudicatory body, such as permitting cases. Pet.App.36a–37a.

The parties also disputed the cause of voting patterns in Georgia. One of Petitioners' experts, Dr. Stephen Popick, produced evidence that (1) a majority of black voters voted for Democrats, (2) a majority of white voters voted for Republicans, and (3) the Democrats consistently lost to the Republicans. Pet.App.42a; Trial Tr. at 245, *Rose*, No. 20-cv-02921 (N.D. Ga. July 5, 2022), ECF. No. 140. This assessment was based on eleven Commission elections between 2012 and 2020. Pet.App.42a; Pet. at 10. He did not consider any other elections. More importantly, he—by his own admission—did not try to distinguish race-based voting patterns from partisan voting patterns. *See* Trial Tr. at 200, 230–31, *Rose*, No. 20-cv-02921 (July 5, 2022), ECF. No. 140. And he acknowledged that black voters have never preferred a Republican in any Georgia election. *Id.* at 245.

By contrast, the Secretary's expert witness, Dr. Michael Barber, *did* investigate the reason for polarization in Georgia elections. To that end, he made two key findings. First, he explained that black voters support Democratic candidates for Commissioner at a consistent rate regardless of the candidate's race. Pet.App.45a–46a. The same was true for white voters: their opposition to Democrats does not change based on the candidate's race. Pet.App.46a. Second, Dr. Barber showed that, when controlling for race, partisanship strongly predicts voting behavior in other statewide and congressional races in Georgia. Trial Tr. at 645–46, *Rose*, No. 20-cv-02921 (N.D. Ga. July 5, 2022), ECF No. 142. These findings strongly suggested that polarization in Georgia was a matter of partisanship, not race. *Id.* at 637–38.

2. The district court ruled in Petitioners' favor. The court rejected the Secretary's argument that Petitioners' claim was beyond the scope of § 2 because it would require fundamental changes to the structure of the Public Service Commission. The court acknowledged the State's interest in a statewide structure, as articulated by Chairperson Pridemore. Pet.App.73a–74a. But, in seemingly circular logic, it ultimately concluded that, because changing to a districted, representative structure was *feasible* (i.e., technically possible), it was a permissible remedy. Pet. App.78a–79a.

On the question of racial polarization, the district court decided that it was "difficult if not impossible to disentangle" partisan explanations from racial explanations. Pet.App.47a. So the court, like Petitioners' expert, didn't even try. It held that, simply because black voters tended to vote for Democrats and non-black voters

tended to vote for Republicans, Petitioners had established racial causation. *See* Pet.App.47a, 57a, 60a–61a.

Finally, the district court considered the Senate Factors. Although it found that some factors favored the Secretary, it concluded that the totality of the circumstances supported a finding of vote dilution. Pet. App.59a–75a. But the district court's analysis of factor two (racial polarization), which it weighed "more heavily," incorporated the same errors that plagued its analysis of polarization at the *Gingles* preconditions stage. Pet. App.59a–62a. And on the question whether the State's policy was "tenuous," it shifted the burden to the State to *prove* a justification for the statewide Commission elections and then decided, with little analysis, that it had failed to do so. Pet.App.72a–74a.

The district court permanently enjoined the Secretary from administering statewide elections for the Public Service Commission. Pet.App.81a–82a. The immediate effect of the injunction was to cancel the impending November 2022 elections for two seats on the Commission. Pet.App.80a–81a. So the district court decided that the Commissioners whose terms would have expired at that election—the very Commissioners who Petitioners argued were elected in violation of § 2—would continue as "holdover[s]" in their positions until an election with single-member districts could be held. Pet.App.80a.

3. The Secretary appealed, arguing that the district court erred by failing to distinguish racial from partisan polarization. *See* Appellant's Br. at 26–49, *Rose v. Sec'y, State of Ga.*, No. 22-12593 (11th Cir. Sept. 19, 2022). The Secretary also reiterated his argument that Petitioners'

proposed remedy would impermissibly alter the structure of the Public Service Commission. *Id.* at 49–59.

The Eleventh Circuit agreed with the Secretary. Petitioners had not satisfied the first *Gingles* precondition because their proposal would, "*for the first time ever*," "dismantle" a statewide organ of government and "replace it with an entirely new districted system." Pet.App.16a, 17a. And that is not a "viable" remedy. Pet.App.17a. The first *Gingles* precondition, the panel explained, requires plaintiffs "to offer a satisfactory remedial plan." Pet. App.7a–8a (alteration adopted and quotation omitted); *see also Gingles*, 478 U.S. at 88 (O'Connor, J., concurring) ("In order to" gauge vote dilution, "a court must have an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system."). And that remedy must be a "reasonable benchmark" to compare against the challenged election scheme. Pet.App.26a (citing *Holder*, 512 U.S. at 880–81). But a benchmark is not reasonable if it would require replacing the challenged system with an entirely new form of government. Pet.App.16a. And Petitioners' proposal—to turn the Commission from a body of statewide officers into a collection of members elected from single-member districts—would do just that. Pet.App.16a.

Changing from a statewide system to single-member districts, the panel explained, "would clearly affect the inner-workings of the [Commission] because Commissioners would be serving a new constituency—their respective districts rather than the State as a whole." Pet.App.22a–23a. Commissioners would face greater pressure from "localized special interests" in their respective districts. Pet.App.23a.

The panel was clear, however, that it was not holding that "plaintiffs could never prevail when asserting a Section 2 vote dilution claim against a statewide body." Pet.App.26a. "Instead, [the panel] merely reaffirm[ed] the principle that plaintiffs must propose a remedy within the confines of the state's chosen model of government when bringing such a claim." Pet.App.26a.

REASONS FOR DENYING THE PETITION

The petition does not warrant review for at least three reasons. *First*, this decision, based on the unique characteristics of Georgia's Public Service Commission, implicates no split of authority or other reason to grant review. The Eleventh Circuit's decision straightforwardly applied both its own precedent and this Court's, both of which require § 2 plaintiffs to propose a workable comparator. Petitioners' novel contrary theory is wrong, but even if that is contestable, it is *novel*, and there is no reason for this Court to wade in now.

Second, the question presented is not even dispositive. For one, Petitioners failed to show that any purported lack of black electoral success in Commission elections is "on account of race," 52 U.S.C. § 10301(a), rather than partisanship. Black voters in Georgia have the same opportunities as everyone else, as evidenced by the extraordinary success of black and black-preferred candidates across the State. Black voters do largely prefer *Democrats*, however, and Democrats have been unsuccessful in Commission elections. That is a straightforward case of partisan disagreement, not a lack of equal opportunity "on account of race." *Id.* Moreover, Petitioners failed to show that the totality of circumstances

favors a finding of vote dilution. The district court's contrary conclusion was riddled with errors—factual and legal—including impermissibly shifting burdens onto the State. There is little reason to intervene in this case on a question that is not outcome-determinative.

Third, the Eleventh Circuit's decision was correct. Section 2 requires plaintiffs to propose an alternative election scheme in which they could elect representatives of their choice. *See Gingles*, 478 U.S. at 50 n.17; *Holder*, 512 U.S. at 880. But there is nothing in the text of § 2 suggesting that federal courts have the power to fundamentally redesign state governments. Nor is there any "workable standard" they could use to choose between different forms of government, even if they wanted to. *Holder*, 512 U.S. at 881. So Petitioners' proposal to chop up the Commission into single-member representative districts must fail.

I. The question presented is factbound, splitless, and unlikely to recur.

The Eleventh Circuit's decision is a straightforward application of this Court's vote dilution caselaw, and every circuit requires § 2 plaintiffs to propose a valid remedy. Petitioners barely even try to suggest there is a split of authority, because there isn't one. Plus, Georgia's Public Service Commission is a unique institution. In other cases, with other government bodies, the outcome may be different, and there is no reason to intervene here, specifically.

A. There is no split in authority. Every court requires § 2 plaintiffs to propose a feasible remedy that does not alter the State's chosen form of government.

The Eleventh Circuit's decision here was a straightforward application of § 2. The panel held that, because switching from statewide to district-by-district elections would fundamentally change the Public Service Commission, Petitioners failed to propose a viable remedy and therefore could not make out a prima facie case of vote dilution. Pet.App.7a–8a, 22a–23a, 25a–26a. That is exactly how this Court has said vote dilution claims should be evaluated, and every circuit court that has addressed the issue has said the same.

Start with this Court's cases. In *Gingles*, the Court held that § 2 requires a plaintiff alleging vote dilution to show that the relevant minority group is large enough and compact enough that it *could* form the majority of a voting district and elect its preferred representative but is unable to do so under the *existing* electoral map because its votes are submerged within (i.e., diluted by) the majority. 478 U.S. at 50–51. As the Court later explained in *Holder*, this means a plaintiff must offer a "reasonable alternative" election scheme for use as a "benchmark against which to measure the existing voting practice." 512 U.S. at 880. If there is no viable alternative, the existing electoral scheme by definition does not dilute anyone's voting power. *Id.* at 881. And if the plaintiff's proposed alternative is not actually workable—for example, if it would fundamentally alter the form of government by converting a single-member commission into a multimember commission, as the plaintiffs in *Holder* proposed—then they have failed

to provide a meaningful benchmark and cannot succeed on their vote dilution claim. *Id.* at 881–82.

The Eleventh Circuit's decision here is just an application of that principle. "Under *Holder*," the Eleventh Circuit has explained, federal courts "may insist that a state … operate a governmental structure fairly," but they may not "alter the state's form of government." *Nipper*, 39 F.3d at 1532. "Similarly, here, plaintiffs have not provided a principled reason why a [Commission] comprising single-member districts should be picked as the benchmark." Pet.App.26a.

Contrary to Petitioners' half-hearted argument for a circuit split, Pet. at 22–24, the Eleventh Circuit's rule reflects the unchallenged consensus among the federal courts. Even before *Holder*, the Fifth Circuit rejected a challenge to at-large judicial elections in Texas because electing judges in single-member districts would change the "office's structure and function." *League of Utd. Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 869 (5th Cir. 1993). "The decision to make jurisdiction and electoral bases coterminous … is a decision of what *constitutes* a state court judge," and "the people of Texas have at least a substantial interest in defining the structure and qualifications of their judiciary." *Id.* at 872. So too here; the statewide electoral system is a "defining feature" of the Public Service Commission, and the people of Georgia have a "strong interes[t]" in preserving that structure. Pet.App.23a, 26a. That is especially true since the Commission *acts* in a judicial capacity in numerous instances. Pet.App.3a, 27a.

In the wake of *Holder*, more circuits converged on the same position. The Sixth Circuit, like the Eleventh, has said that a plaintiff who offers an "inappropriate" remedy loses even if they otherwise "me[e]t the *Gingles* pre-conditions or satisf[y] the totality of the circumstances test." *Cousin v. Sundquist*, 145 F.3d 818, 831 (6th Cir. 1998); *see also Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1025 (8th Cir. 2006) (Gruender, J., concurring) (observing that "a plaintiff's claims fail as a matter of law" if "no proper and workable remedy exists" within the "context of the challenged system" (quotation omitted)). In *Sanchez v. Colorado*, the Tenth Circuit, quoting an earlier Eleventh Circuit case, held that plaintiffs win on a vote dilution claim only if they "can fashion a permissible remedy in the particular context of the challenged system." 97 F.3d 1303, 1311 (10th Cir. 1996) (quoting *Nipper*, 39 F.3d at 1531).

Indeed, federal courts regularly reject vote dilution claims where plaintiffs fail to propose a remedy that maintains the basic features of the challenged system. *See, e.g.*, *Reed v. Town of Babylon*, 914 F. Supp. 843, 866–67 (E.D.N.Y. 1996); *Mallory v. Ohio*, 38 F. Supp. 2d 525, 576–78 (S.D. Ohio 1997); *Lowery v. Deal*, 850 F. Supp. 2d 1326, 1335–36 (N.D. Ga. 2012); *Christian Ministerial All. v. Sanders*, 4:19-cv-00402, 2023 WL 4745352, at *21–22 (E.D. Ark. July 25, 2023).

Petitioners, on the other hand, have not identified *any* case in conflict with the Eleventh Circuit's decision. They point to two circuit court decisions, but neither has anything material in common with this case. *See* Pet. at 22 (citing *Bone Shirt*, 461 F.3d at 1016, 1018; *Large v. Fremont County*, 670 F.3d 1133, 1145 (10th Cir. 2012)).

Bone Shirt merely required South Dakota to create an additional majority-Indian legislative district in a plan that *already* included single-member districts. 461 F.3d at 1024. Before the litigation, South Dakota used a hybrid system of dual- and single-member districts. Most legislative districts "elected two members of the state house," but the plan also included single-member districts. *Id.* at 1016. The Eighth Circuit merely required South Dakota to redraw its district lines to create a third majority-Indian single-member house district. *Id.* at 1024. And adding one more single-member district to a plan that already has them does not "dismantle" and "replace" the system like Petitioners seek to do here. Pet.App.17a. The case obviously would not have "come out the other way if the Eighth Circuit had applied the Eleventh Circuit's rule," Pet. at 24 n.3, because the court's remedy explicitly satisfied the rule. As Judge Gruender's concurring opinion noted, the remedy—adding one more district—preserved "the particular context of the challenged system." 461 F.3d at 1025 (quoting the Eleventh Circuit's decision in *Nipper*, 39 F.3d at 1530–31).

And *Large v. Fremont County* plainly *supports* the decision below. There, the federal court imposed a remedy *specifically allowed* by state law. Native American voters challenged the at-large election system of Fremont County's five-member board of Commissioners. 670 F.3d at 1135–36. Two remedies were proposed: (1) creating five single-member districts or (2) creating one single-member district with a Native American majority and otherwise maintaining the at-large election system. *Id.* at 1136. The Tenth Circuit rejected the hybrid scheme precisely because it was "not authorized under Wyoming law." *Id.* On the other hand, Wyoming law specifically *permitted*

single-member districts in county commission elections. *Id.* And federal courts, the Tenth Circuit affirmed, should not impose remedies that unnecessarily conflict with state law. *Id.* at 1148.

Petitioners go on to invoke a parade of supposed horribles, *see* Pet. at 22–23, 30–31 (claiming the Eleventh Circuit's rule would preclude § 2 challenges to local governments), but their parade falls flat. The Eleventh Circuit just applied the same rule that all the circuits—and this Court—apply. As the panel below noted, there is a considerable difference between what Petitioners are trying to do here (convert a statewide, quasi-judicial agency from statewide elections to single-member districts) and "traditional Section 2 vote dilution case[s]," like *Large*, that challenge at-large elections "used by governmental subunits *within* a state." Pet.App.10a (emphasis added). "[A]t the county level, there is little risk of provincialism due to the county's size." Pet.App.24a. But "there is much greater potential for divisive problems to arise across an entire state." Pet.App.24a. Likewise, a State's subunits are, by definition, based on line drawing by a higher body. The borders of a State, however, are not subject to the choice of the State's voters.

Finally, perhaps recognizing that the circuits are against them on *whether* plaintiffs must offer a workable remedy, Petitioners try to manufacture a divide on *when* in the § 2 analysis they should be required to do so. *See* Pet. at 23 (suggesting the "State's interest in maintaining its electoral system" is better considered as part of the "totality-of-circumstances analysis"). But as the panel explained, it does not matter when a vote dilution plaintiff has to propose a viable remedy; the "critical" point is that,

if they don't, their claim fails. Pet.App.8a; *see also Cousin*, 145 F.3d at 831 (noting that, without a viable remedy, plaintiffs fail even if they otherwise satisfy *Gingles* and the totality of the circumstances test).

The cases Petitioners cite on this point do not say otherwise. To be sure, *Gingles* instructs that courts should wait until the totality-of-the-circumstances phase to consider "whether the policy underlying" the challenged practice "is tenuous." 478 U.S. at 37, 45 (quotation omitted). And the cited cases do just that. *See* Pet. at 23. But that question (whether governments have a *good reason* for using the challenged electoral practice) is different from the remedial question at the center of the Eleventh Circuit's decision here (whether the practice can be abandoned without *altering the structure of the government itself*). For example, in *Holder*, where plaintiffs sought to transform a county's sole Commissioner into a five-Commissioner board, this Court did not ask whether the county had a good "policy" argument for the one-Commissioner system. *See* 512 U.S. at 880–82. It rejected the proposed transformation outright, because it would have changed the entire structure of the commission for "no principled reason." *Id.* at 881. No circuit disagrees with that approach, and there is no split for this Court to resolve.

B. Georgia's Public Service Commission is a distinctive elective body.

Certiorari is inappropriate for another reason: this is a factbound dispute revolving around an unusual governmental body. Even Petitioners acknowledge the distinctiveness of Georgia's scheme. *See* Pet. at 6; Pet.

App.23a n.14. There are not many (if any) other quasi-judicial, statewide agencies with statewide elections and particular residency requirements.

In other words, Petitioners ask this Court to review a decision affecting, in all likelihood, only a single commission in a single State. That is the narrowest kind of error correction. Despite Petitioners' sky-is-falling rhetoric, the Eleventh Circuit's decision will not "have a cascading effect far beyond the reach of this case." Pet. at 4. It certainly will not affect challenges to local governments that employ at-large elections. *Contra* Pet. at 31. To the contrary, the decision below specifically acknowledged that single-member districts are often permissible remedies for vote dilution in local elections. *See* Pet.App.24a.

On the other hand, to the extent they argue that *every* statewide body must use single-member districts to elect its members, *see* Pet. at 30–31, it is Petitioners who are pushing an extreme, novel theory that no court has accepted. This Court should not be the very first to analyze Petitioners' avant-garde ideas.

In sum, Petitioners ask this Court, "*for the first time ever*," to hold that statewide elections for a state agency somehow dilute minority voting power. Pet. App.16a. And for that never-before-found violation, they request a novel remedy, urging the court to "replace Georgia's chosen form of government" by switching out five statewide Commissioners for five representatives beholden to separate districts. Pet.App.16a. No court has ever awarded relief on such a claim, and there is no need for this Court to do so now. Indeed, if Petitioners

were somehow correct that the Eleventh Circuit's decision here will precipitate a rash of federal courts rejecting valid challenges to at-large election systems, *see* Pet. at 30–31, that is all the more reason to deny certiorari here. If there is some error to correct, it will arise again. But there isn't, and it won't.

II. This case is a poor vehicle to address Petitioners' arguments.

Whether or not Petitioners are correct in their contention that federal courts can use § 2 to reshape a statewide governing body, it does not matter. The Secretary should prevail anyway, for at least two independent reasons: (1) Petitioners failed to show that black-preferred candidates in Georgia lose "on account of race" rather than ordinary partisan politics, 52 U.S.C. § 10301(a), and (2) the totality of the circumstances favors the Secretary, especially after correcting the district court's legal errors. There is no reason to grant review in this posture.

1. Statutory text and caselaw both make clear that vote dilution claims under § 2 fail unless the plaintiff can show that minority voters lose elections because of *race*. Start with the text. Section 2 prohibits the use of any voting practice or procedure that "results in" the denial or abridgment of the right to vote "on account of race or color." *Id.* So a plaintiff must show that a challenged law—like a particular electoral scheme—causes them to have less voting opportunity *because of* their race. *See Greater Birmingham Ministries v. Sec'y of State for the State of Ala.*, 992 F.3d 1299, 1330 (11th Cir. 2021); *Burrage v. United States*, 571 U.S. 204, 211 (2014) ("'Results from'

imposes … a requirement of actual causality." (quotation omitted)); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (explaining that "on account of" means "because of" and requires but-for causation).

In other words, the text of § 2 does not "guarantee" that minority-preferred candidates will win every election. *League of Utd. Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006) ("*LULAC*") (quotation omitted). It simply ensures an equal playing field when it comes to race. If minority voters lose elections for non-racial reasons (like ordinary, colorblind partisan politics), there is no § 2 violation because they have precisely the same opportunity as "other members of the electorate." 52 U.S.C. § 10301(b).

So, to prove that the majority votes "as a bloc … to defeat the minority's preferred candidate," *Gingles*, 478 U.S. at 51, plaintiffs have to show that *race* causes the problem, not ordinary partisanship. Racial minorities have the same "obligation to pull, haul, and trade to find common political ground" that affects all voters. *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994). Justice White emphasized this point in *Gingles* itself, explaining that the key question is whether elections change based on *race*, not simply whether white voters and black voters tend to prefer different candidates. 478 U.S. at 83 (White, J., concurring). Indeed, he denied the lead opinion a majority on this very point. *Id.* at 82. Section 2, he said, requires more than the basic fact that "the majority of white voters vote for different candidates than the majority of the blacks." *Id.* at 83. Otherwise, § 2 would be triggered every time minority groups lose elections, but that isn't right because, in a democracy, "numerical minorities lose elections." *Holder*, 512 U.S. at 901 (Thomas, J.,

concurring). Holding otherwise would be taking a side in "interest-group politics rather than a rule hedging against racial discrimination." *Gingles*, 478 U.S. at 83 (White, J., concurring).

Despite § 2's clear focus on racial causation, the district court in this case concluded that Petitioners could satisfy *Gingles* simply by showing that the majority of black Georgians tend to vote for different candidates than the majority of non-black Georgians. *Rose v. Raffensperger*, 584 F. Supp. 3d 1278, 1294–95 (N.D. Ga. 2022) (summary judgment order). So the court didn't even *try* to distinguish racial causation from ordinary, colorblind partisan politics. *Id.* That was error; black Georgians have the same electoral power and access as Latino or Asian or white Georgians. The candidates who fail tend to be *Democrats*, wholly regardless of race—voting patterns show *no* sensitivity to the race of the candidate, but extreme sensitivity to whether the candidate is a Republican. *See* Trial Tr. at 643–46, *Rose*, No. 1:20-cv-02921 (N.D. Ga. July 5, 2020), ECF No. 142.

Petitioners largely conceded that there was no evidence of *racial* causation, just partisan differences between black and white voters. *See* Appellees' Br. at 46–63, *Rose*, No. 22-12593 (11th Cir. Oct. 19, 2022). Their only real response was the (quite circular) argument that partisan differences between black and white voters are evidence of racial polarization because partisan differences are (somehow) caused by race. *See id.* at 59.

2. Even if Petitioners could clear the *Gingles* preconditions without evidence of genuinely racial polarization, they would still have to show, "based on the

totality of the circumstances," that the political process in Georgia is not equally open to black voters. 52 U.S.C. § 10301(b). This analysis generally focuses on nine factors identified in the 1982 Senate Report accompanying the amendment of § 2. *See Gingles*, 478 U.S. at 44–45. Here, the district court found that some of these factors favored Petitioners, while others favored the Secretary, ultimately concluding that the factors support a finding of vote dilution. *See* Pet.App.59a–75a. But as the Secretary explained on appeal, the district court's analysis was shot through with legal errors. *See* Appellant's Br. at 60–63, *Rose*, No. 22-12593 (11th Cir. Sept. 19, 2022).

For example, echoing the error in its *Gingles* preconditions analysis, the district court held that factor two (racial polarization) favors Petitioners because black and white voters tend to vote for different candidates. The court again refused to consider evidence that partisanship, not race, drives those voting patterns. Pet.App.60a. Other errors plagued the court's analysis of the remaining factors: the court relied on outdated information, improperly shifted the burden of persuasion onto the Secretary, and discounted the State's legitimate interests in ensuring that Public Service Commissioners are accountable to the whole State rather than separate districts. Pet.App.62a–75a.

So even if Petitioners prevailed before this Court, their claim would fail for several other reasons. The Court should deny the petition.

III. The Eleventh Circuit's decision was correct.

The Eleventh Circuit's rule tracks with settled precedent and common sense. There can be no vote

dilution if the only way to "establish" it would be to fundamentally alter the State's form of government. That is not vote dilution, because nothing has been diluted compared to anything else.

A. Courts cannot use § 2 to dismantle and replace a State's government.

This Court has emphasized that electoral schemes do not violate § 2 just because minority voters lose elections. *See, e.g.*, *LULAC*, 548 U.S. at 428 ("The circumstance that a group does not win elections does not resolve the issue of vote dilution."). Section 2 guarantees equality of opportunity, not victory. *De Grandy*, 512 U.S. at 1014 n.11.

And there is "nothing in the Voting Rights Act" that "suggests an intent on the part of Congress to permit the federal judiciary to force on the states a new model of government." *Nipper*, 39 F.3d at 1531. Even if federal courts *wanted* to compel States to restructure their governments, they'd find it a difficult task, as "there is no objective and workable standard" in the statute that courts could use to choose between alternative models of government. *Holder*, 512 U.S. at 881. So, to satisfy § 2, the plaintiff must identify a "reasonable alternative" election scheme, *id.* at 880, that preserves the essential features of the State's chosen model of government, *Nipper*, 39 F.3d at 1531. If there is no such alternative, then there is no vote dilution—to *dilute* a vote means you need a comparator, and with no comparator, there can be no dilution. *Gonzalez*, 535 F.3d at 598 ("Diluted relative to what benchmark?").

Applying that rule to this case, Petitioners' claim fails. The people of Georgia have decided that the Public Service Commission—a quasi-legislative, quasi-judicial agency "with statewide authority and statewide responsibilities—should be elected on a statewide basis." Pet.App.22a. Turning it into a collection of representatives elected from single-member districts would "fundamentally change [its] structure and operations." Pet.App.22a. Commissioners would be responsible to "their respective districts rather than the State as a whole," and consequently would be more susceptible to "localized special interests." Pet. App.23a.

Plus, because the Commission is a quasi-judicial body that functions in many ways like a court, it is important that the Commissioners be and appear impartial. The Commission "holds hearings, listens to witnesses, makes evidentiary rulings, and weighs testimony from stakeholders." Pet.App.27a. It uses these adversarial proceedings to make decisions about utility rates, whether to permit power plant construction, and whether to assess punitive fines. Pet.App.36a–37a. Electing Commissioners from discrete parts of the State could give the appearance of bias and "home cooking." Pet.App.27a.

Petitioners quibble with (1) the Eleventh Circuit's determination that the Public Service Commission is a quasi-judicial body and (2) the weight assigned by the Eleventh Circuit to the State's interest in preserving the statewide nature of the Commission. *See, e.g.*, Pet. at 27–28. But the Eleventh Circuit's decision does not rest entirely on the judicial nature of the Commission; it turns on "a broader concern" about the limits of federal courts' power under § 2 and the States' interest in preserving

their basic "form of government." *Nipper*, 39 F.3d at 1532. In any event, that Petitioners' disagreement with the Eleventh Circuit turns on case-specific factual disputes—like the Commission's judicial function—just confirms it is not a candidate for this Court's review.

Petitioners also say the Eleventh Circuit's decision conflicts with *Gingles* and other vote dilution cases, but their objections fall flat. First, they *overstate* the scope of the decision to argue that it would preclude a finding of vote dilution "in every case," for both statewide and local bodies. Pet. at 29. Not so; as the panel explained, plaintiffs alleging vote dilution can prevail so long as they "propose a remedy within the confines of the state's chosen model of government." Pet.App.26a. That low bar will have no effect on "traditional Section 2 vote dilution case[s]" seeking to redraw single-member district lines, Pet.App.10a, because those remedies don't require changes to the basic structure of government. *See supra* 18. Nor will it affect challenges to local government elections, where there is less "risk of provincialism" because the jurisdiction is smaller, Pet. App.24a, and the lines are necessarily drawn by the State (unlike a State's own, immutable borders, which are beyond the State's control).

Petitioners also misread *Gingles* itself. If they were correct that *Gingles* requires nothing more than "the literal ability … to draw single-member districts," then the first *Gingles* requirement would be rendered toothless. *Nipper*, 39 F.3d at 1531. Plaintiffs could *always* imagine a scheme with more single-member districts, even if it required—as it would here, where the current scheme has no districts *at all*—changing the form of government altogether. But that just begs the question posed by the

first *Gingles* precondition: if the "existing [form] of the governmental body precludes a plaintiff from satisfying the first prong of *Gingles*" because it is impossible to add more districts, the plaintiff may not "circumvent" that barrier simply by "hypothesiz[ing] some other political structure under which the first *Gingles* precondition would be met." *Concerned Citizens for Equal. v. McDonald*, 63 F.3d 413, 417 (5th Cir. 1995); *see also McNeil v. Springfield Park Dist.*, 851 F.2d 937, 946 (7th Cir. 1988) (noting this would "create a voting rights violation where none presently exists").

This Court has already rejected Petitioners' logic. In *Holder*, the plaintiffs argued that a county's one-commissioner structure constituted vote dilution because, if the county had *five* commissioners each elected from a single-member district, minority voters would prevail in one of those districts. 512 U.S. at 881. The Court rejected that argument because there was "no principled reason" for compelling the county to abandon its one-commissioner structure (under which there was no vote dilution) in favor of a five-commissioner districted structure (which would have *created* a vote dilution problem). *Id.* at 881. But if Petitioners here were correct that § 2 plaintiffs satisfy the first *Gingles* threshold simply by imagining a different political structure in which minority voters find greater success because the form is different, *see* Pet. at 20–21, *Holder* would have come out the other way.

Finally, Petitioners try to skirt the many flaws in their case by noting that the district court did not specifically *require* Georgia to adopt single-member districts for the Commission. It simply instructed Georgia to choose a "new manner" of selecting Commissioners that complies

with § 2. Pet. at 2–3. But that just puts the cart before the horse. Section 2 plaintiffs must propose a reasonable alternative election scheme in order to prove vote dilution in the first place. *See Holder*, 512 U.S. at 880–81. If the alternative isn't reasonable, then there is no vote dilution. Courts can't *assume* vote dilution in the abstract, simply because minority voters lose elections, and then import that conclusion backwards into the *Gingles* preconditions. (Not to mention that Petitioners never made this argument previously, anyway.)

B. *Allen v. Milligan* has no bearing on this case.

It is perhaps understandable that Petitioners rely heavily on this Court's recent decision in *Allen v. Milligan*, 599 U.S. 1 (2023). They hope the Court will equate Georgia's Public Service Commission with Alabama's Congressional map, wash, rinse, and repeat. But *Milligan* has nothing to do with the question here and is entirely consistent with the Eleventh Circuit's decision, as that court already explained.

Milligan involved a challenge to a single-member district scheme; the plaintiffs *never* asked the court to change Alabama's form of government. *Id.* at 16–17. Here, by contrast, Petitioners challenge the structure of the Commission itself. Pet.App.2a. And unlike Alabama's proposed "race-neutral benchmark," which would have imposed a new obstacle for § 2 plaintiffs to overcome, the Eleventh Circuit in this case has not "grafted" anything onto the traditional *Gingles* test. *Milligan*, 599 U.S. at 33. The need to propose a viable remedy and comparator is already part of the first *Gingles* precondition as federal courts (including this one) have applied it for decades. *See* Pet.App.7a–8a, 16a n.11.

If anything, *Milligan* supports the Eleventh Circuit's rule. Per *Milligan*, the reason why the first *Gingles* precondition must focus on a specific map adduced by the plaintiff, rather than a race-neutral map generated by computers, is because "[d]eviation from [the plaintiff's] map shows it is *possible* that the State's map has a disparate effect on account of race." 599 U.S. at 26. Then the rest of the *Gingles* framework (the second and third preconditions and the totality-of-the-circumstances test) kicks in to determine "whether that possibility is reality." *Id.* Here, it is impossible to alter the election scheme as Petitioners desire without fundamentally redesigning the Public Service Commission. *See* Pet.App.17a, 25a–26a. So there is no "*possib[ility]*" that the Commission's statewide election scheme "has a disparate effect on account of race." *Milligan*, 599 U.S. at 26.

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At bottom, Petitioners assert that a single-member district representative scheme is a comparator for the Commission because it could, theoretically, be employed. "But it is one thing to say that a benchmark can be found, quite another to give a convincing reason for finding it in the first place." *Holder*, 512 U.S. at 882. Georgia's Public Service Commission is a statewide agency, elected statewide. No court has ever previously held what Petitioners have asked federal courts to hold here, and this Court need not dive in to address their novel theories.

CONCLUSION

For the reasons set out above, this Court should deny the petition.

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Respectfully submitted,

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