No. 23-1060

In the Supreme Court of the United States

RICHARD ROSE, BRIONTÉ MCCORKLE, WANDA MOSLEY & JAMES "MAJOR" WOODALL,
PETITIONERS
v.
BRAD RAFFENSPERGER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE STATE OF GEORGIA,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS OF THE ELEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

NICOLAS L. MARTINEZ
KATERINA KOKKAS
BARTLIT BECK, LLP
54 W. Hubbard St., Ste. 300
Chicago, IL 60654

XIAO WANG
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903

BRYAN L. SELLS
Counsel of Record
THE LAW OFFICE OF BRYAN L. SELLS, LLC
P.O. Box 5493
Atlanta, GA 31107
(404) 480-4212
bryan@bryansellslaw.com

Counsel for Petitioner

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REPLY BRIEF

The *Gingles* test is difficult to meet. The decision below makes it impossible. If the plaintiffs had not proposed a remedy showing that Black voters in Georgia are "sufficiently large and geographically compact to constitute a majority in a single-member district," they would have lost under this Court's binding precedent. *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). But *because* the plaintiffs did propose such a remedy, they lose under circuit precedent, says the panel below. That cannot be right.

It also "is not the law." *Allen v. Milligan*, 599 U.S. 1, 22 (2023). Neither Section 2 nor this Court's decisions interpreting it countenance the catch-22 that the panel's ruling creates for plaintiffs challenging at-large election schemes. *See* FairVote Amici 8. That ruling is so contrary to this Court's precedents that summary reversal is appropriate. *See Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398 (2022).

The Secretary's only real defense of the panel's decision is that "statewide elections" are different. *See* BIO 18, 27. But they aren't under Section 2; the statute says so, making clear that its protections apply to voting practices imposed "by *any State* or political subdivision." 52 U.S.C. § 10301(a) (emphasis added). The Secretary's assertion to the contrary is textually indefensible.

His remaining arguments for denying certiorari are just as weak. The Secretary largely ignores the blatant conflict between the panel's ruling and this Court's decisions in *Gingles*, which would have come out the other way under the panel's test, and *Milligan*, which fully endorsed *Gingles*'s threshold inquiry that the panel

contorted beyond recognition. That conflict alone warrants review and reversal. *See* Sup. Ct. R. 10(c). So does the circuit split that the panel's decision has deepened by applying the Eleventh Circuit's outlier jurisprudence, for the first time ever, to an administrative and quasi-legislative policymaking body. *Id.* R. 10(a).

This Court should summarily reverse now (or grant plenary review) to rectify the panel's egregious departure from "the *Gingles* threshold inquiry that has been the baseline of our § 2 jurisprudence for nearly forty years." *Milligan*, 599 U.S. at 26 (cleaned up). This Court has stepped in once before to reverse the Eleventh Circuit, defeating any suggestion that this case lacks sufficient importance. It should do so again now.

I. THE DECISION BELOW CONFLICTS WITH *GINGLES* AND *MILLIGAN*.

The Secretary does not dispute that *Gingles* would have come out the other way if this Court had applied the panel's novel standard. And for good reason. The plaintiffs there produced illustrative maps that *did* alter North Carolina's choice of at-large elections for members of its General Assembly, and the district court *did not* give the State's well-supported policy interests insurmountable weight in its analysis. Pet. 20–21. The conflict with the panel's holding here could not be clearer.

Instead, the Secretary takes a page out of Alabama's playbook from *Milligan* and asks this Court to bless an interpretation of Section 2 that reformulates the longstanding *Gingles* test. In the Eleventh Circuit, a plaintiff challenging a State's use of at-large elections can no longer satisfy the first *Gingles* precondition by

showing that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district,"—i.e., exactly what *Gingles*, requires, 478 U.S. at 50—but must now "propose a remedy" that does not "alter" the State's "choice" of "electoral model," Pet. App. 26a–28a.

As the plaintiffs and their amici point out, this Court has never imposed nor endorsed such a requirement. Pet. 20–22; FairVote Amici 10–14. *Gingles* does not require a plaintiff to provide the ultimate remedy to establish liability. *Gingles* and *Milligan* merely require a plaintiff to show that a remedy is possible. *See Milligan*, 599 U.S. at 26; *Gingles*, 478 U.S. at 50 & n.17. Federal courts must then give elected officials an opportunity to devise a remedy, *see Perez v. Perry*, 565 U.S. 388, 393 (2012), and that's exactly what the district court did here, Pet. App. 82a. There are many possible remedies—including some that might have used statewide elections—and the Georgia General Assembly was free to choose among them. *See* FairVote Amici 17–23; GCVEF Amici 7–22. But the panel short-circuited the usual Section 2 process with its new test that decides the question of remedy without the necessary factual record and without having first deferred to the State's political branches.

Gingles and *Milligan* also do not require a plaintiff's illustrative map to comply with all of a State's policy preferences. That was Alabama's argument in *Milligan*, and this Court rejected it. 599 U.S. at 20–22. The State argued there that the plaintiffs' illustrative maps failed to satisfy the first *Gingles* precondition because they did not comply with some of the State's districting guidelines. *Id.* The Court found that argument unpersuasive because "[t]hat is not the law." *Id.* at 22. Yet it *is* the law in the Eleventh Circuit under the panel's test, which gives a

state's policy preference for at-large elections "insurmountable weight" when evaluating a plaintiff's illustrative maps. Pet. App. 20a.

The Secretary completely ignores this obvious conflict with *Milligan*, which he relegates to three short paragraphs at the end of his brief. BIO 29–30. That choice is particularly surprising given what he told this Court two years ago when opposing the plaintiffs' emergency application to vacate the Eleventh Circuit's stay of the district court's injunction. The Secretary noted then that the *Milligan* cases raised "[m]any of the issues" involved here and that "the decision in those actions will put to rest any underlying dispute about the scope of Section 2." Resp. at 17 n.3, *Rose v. Raffensperger*, No. 22A136 (U.S. Aug. 17, 2022). That was true then, and it is true now. *Milligan* did resolve key issues about the scope of Section 2. The panel here just chose not to follow it.

Disregarding these conflicts with *Gingles* and *Milligan*, the Secretary points instead to the plurality opinion in *Holder v. Hall*, 512 U.S. 874 (1994), which the panel itself cited only in dicta. Pet. App. 26a. The Secretary claims that if the plaintiffs here were allowed to satisfy the first *Gingles* precondition with an illustrative map containing single-member districts, then *Holder* would have come out the other way. BIO 28. This argument is a red herring. *Holder* would have come out the same way because the plaintiffs here have *never* challenged the size of the PSC. And if the county in that case had a five-member commission instead of a single commissioner elected at large, then there is no doubt that an illustrative map containing five reasonably configured single-member districts would have satisfied the first *Gingles* precondition. Justice O'Connor effectively said so

herself. *See Holder*, 512 U.S. at 888 (O'Connor, J., concurring) (explaining that "[i]n a challenge to a multimember at-large system, for example, a court may compare it to a system of multiple single-member districts," and describing that benchmark as "self-evident").

II. THE PANEL'S DECISION DEEPENS AN EXISTING CIRCUIT SPLIT.

The Secretary's claim—that "every circuit court that has addressed the issue" presented here has reached the same conclusion, making this a "splitless dispute"—lacks merit for two reasons. BIO 1, 14.

First, to the extent other circuits speak with one voice, it is to hold that the "state['s] interest is to be weighed as part of the totality of the circumstances" analysis, and not as part of the three *Gingles* preconditions, as the panel would have it. *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 870 (5th Cir. 1993) (en banc); *see also Cousin v. Sundquist*, 145 F.3d 818, 833–34 (6th Cir. 1998) ("Tennessee's state interest in at-large elections" is part of "our analysis of the totality of the circumstances." (citation omitted)); *Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213, 243 (2d Cir. 2021) ("The final factor at issue is . . . [that] the District reasonably believed that it was required by state law to use at-large voting."); *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1023 (8th Cir. 2006) ("Finally, the plan should not intrude on state policy any more than is necessary" (cleaned up)); *Sanchez v. Colorado*, 97 F.3d 1303, 1325 (10th Cir. 1996) ("Finally, the court found the policy underlying the state's drawing [of the legislative district] was not tenuous.").

That other circuits are uniform is unremarkable; they are simply applying this Court's well-established understanding (1) "that the State's interest in maintaining an electoral system" is "a legitimate factor to be considered by courts among the 'totality of circumstances' in determining whether a § 2 violation has occurred," *Houston Lawyers Ass'n v. Att'y Gen. of Tex.*, 501 U.S. 419, 426 (1991); and (2) that this totality-of-the-circumstances analysis takes place after a "plaintiff [] demonstrates the three [*Gingles*] preconditions" of "compactness/numerousness, minority cohesion or bloc voting, and majority bloc voting," *Milligan*, 599 U.S. at 18; *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994).

The Eleventh Circuit stands alone in "interpret[ing] the first *Gingles* precondition" to "require plaintiffs to offer a satisfactory remedial plan" that does not alter the state's "chosen model of government." Pet. App. 7a–8a (cleaned up). Summary reversal is appropriate on that basis alone.

Second, in an apparent effort to downplay how out of step the panel's decision is, the Secretary claims the plaintiffs are "try[ing] to manufacture a divide on *when* in the § 2 analysis they should be required to" offer "a workable remedy." BIO 18. It does not, the Secretary says, "matter when a vote dilution plaintiff has to propose a viable remedy." *Id.*

Not so. Here, by putting remedy first, and restricting the plaintiffs from proposing any remedies that change "the state's chosen model of government," Pet. App. 8a, the panel rejected the plaintiffs' claims notwithstanding the district court's detailed findings of compactness, cohesion, racial polarization, and lack of minority representation on the PSC, among other factors, *id.* 58a–64a.

That would not have been the result had this case been brought in the Eighth Circuit, a court on the other end of the split. In *Bone Shirt*, the Eighth Circuit held that "[w]hen a Section 2 violation is found, the district court is responsible for developing a constitutional remedy." 461 F.3d at 1022. Defendants are then "afforded the first opportunity to submit a remedial plan"; if they refuse, the district court may "fashion its own remedy or, as here, adopt a remedial plan proposed by the plaintiffs." *Id.* That describes exactly what Judge Grimberg did here: He heard the evidence, applied *Gingles*, and, on finding a Section 2 violation, gave the Georgia legislature the opportunity to fashion an appropriate remedy. That course of action is the law in the Eighth Circuit. It is against the law in the Eleventh.

Even if the Court were to set aside the precondition-versus-totality-of-circumstances question, a split would remain. That is because *Gingles* itself asks courts to examine whether "the policy underlying the state['s]" use of a voting "practice or procedure" is "tenuous." 478 U.S. at 37 (citation omitted). But this factor, *Gingles* underscores, is not the most important: "[T]he most important Senate Report factors . . . are the 'extent to which minority group members have been elected to public office in the jurisdiction' and the 'extent to which voting in the elections of the state or political subdivision is racially polarized.'" *Id.* at 48 n.15 (citation omitted). *Milligan* affirms that a "single-minded view of § 2," focusing solely on a State's asserted policy interests, "cannot be squared with the VRA[]." 599 U.S. at 26.

The Eighth Circuit, of course, recognized this point in *Bone Shirt*, where it approved a plan that redrew boundaries and transformed one dual-member district into two single-member districts. 461 F.3d at 1018. The

Tenth Circuit has as well, explicitly observing that "some state laws may *necessarily* need to be displaced to permit the effectuation of a federal civil-rights remedy under Section 2." *Large v. Fremont Cnty.*, 670 F.3d 1133, 1144 (10th Cir. 2012). And the Second Circuit, in like manner, has not elevated state interests above any of the other Senate factors. *Clerveaux*, 984 F.3d at 243.

By contrast, the panel here flouted the Court's mandate by giving dispositive weight to the State's interest, based on three circuit cases concerning elections of trial judges that even the Eleventh Circuit recognizes cannot be reconciled with this Court's precedents. Sierra Club Amicus 2–3. More troublingly, the panel extended that aberrant line of cases for the first time to a policymaking body that exercises quasi-legislative functions. *Id.* The metastasizing nature of the panel's error underscores the need for review now.

III. THIS CASE IS AN EXCELLENT VEHICLE.

The Secretary does not dispute that this case presents important questions of federal law that affect millions of voters. Nor does he dispute that those questions are neatly presented and properly preserved here. He claims instead that this Court should not intervene because there aren't many statewide agencies like the PSC and because the panel's decision is supported on other grounds that the panel expressly declined to reach. BIO 19–24. Neither claim has merit.

On the first, the Secretary is wrong that the panel's decision affects only the PSC. As the plaintiffs and their amici note, the decision below has no such legitimate limiting principle. Pet. 22–23, 30–31; Con Law Scholars

Amici 6–10, 18. For decades, it has been blackletter law that a federal court may enjoin a State from using at-large elections that result in unlawful racial vote dilution and, if the State fails to adopt a remedy that complies with Section 2, may order single-member districts drawn as the remedy. Pet. 21 n.2. Every time a court has done so, it required the "States to restructure" their chosen electoral model. BIO 25. There is nothing "novel," "extreme," or "avant-garde" about that. *Id.* at 20.

Gingles, for example, was a challenge to North Carolina's chosen electoral model in the same way that this case is. Pet. 20–22. But if the rule is, as the Eleventh Circuit posits, that *any* modification to a State's chosen electoral model defeats a Section 2 claim no matter what, *Gingles* would have come out the other way. Under the panel's reasoning, there is nothing to stop Georgia from adopting the same unlawful scheme that the Court struck down in *Gingles*. Nor could anything stop Georgia from having its entire state legislature elected at large. Such a maneuver, which would clearly violate Section 2 under this Court's precedents, would be immune from challenge under the panel's reasoning.

As a result, this case implicates far more than just the PSC or the myriad statewide agencies like it across the country. *See* Con Law Scholars Amici 13 n.2. Any Section 2 challenge to at-large elections at any level, so long as they have some arguable basis in state law (as almost all do), can now be defeated at the outset simply because a plaintiff made the required showing under the first *Gingles* precondition, which under the panel's reasoning would necessarily alter the State's chosen electoral model. Failing to intervene now to reverse the decision below risks an "avalanche" of States retreating to at-large

election schemes at all levels of government that would dodge the oversight Congress intended when it drafted and enacted Section 2. *Id.* at 18.

The Secretary dismisses these risks as a "parade of supposed horribles." BIO 18. To do so, he must argue that the panel's reasoning is somehow limited to "statewide elections." *Id.* But if that's true, summary reversal is just as appropriate because Section 2 applies to voting practices imposed "by *any State* or political subdivision." 52 U.S.C. § 10301(a) (emphasis added). There is no exception for statewide elections. And only Congress—not an Eleventh Circuit panel—can create one.

The Secretary's second "vehicle" argument fares no better. BIO 21–24. It also betrays the weakness of the panel's actual decision by focusing solely on arguments—i.e., whether "the district court's finding of racial vote dilution" and its careful weighing of the Senate Factors were "clearly erroneous"—that the panel expressly did "not consider." Pet. App. 16a n.11. The Secretary talks out both ends when he warns the Court to "not act as a court of first view," BIO 3 (quotations omitted), but then asks the Court to do just that in denying certiorari based on arguments the panel never addressed. These arguments are irrelevant to the questions presented and not properly before this Court.

Even if they were, these arguments do not present a barrier to review. The district court properly rejected them in a thorough, 64-page decision on grounds that were not clearly erroneous. Much of the plaintiffs' overwhelming evidence of racial vote dilution was undisputed, and the district court's crediting the testimony of the plaintiffs' witnesses over the Secretary's

is not grounds for reversal. *See* Pet. 7–15. And in a decision after the district court's order in this case, Judge Branch, who authored the panel's decision below, joined an opinion with Judge Grimberg, the district judge in this case, rejecting the same race-versus-partisanship argument the Secretary now makes. *See Ga. State Conf. of the NAACP v. Georgia*, No. 1:21-cv-05338-ELB-SCJ-SDG, 2023 WL 7093025, at *19 (N.D. Ga. Oct. 26, 2023) (rejecting the Secretary's argument that "even if a minority group votes in a cohesive manner and the majority votes as a bloc, Plaintiffs cannot meet their Section 2 burden because these factors are attributable to partisan politics, not race"). The Secretary's repackaging of that losing argument here deserves no more of this Court's attention.

CONCLUSION

This Court should grant certiorari and summarily reverse or set the matter for plenary review.

Respectfully submitted,

NICOLAS L. MARTINEZ
KATERINA KOKKAS
BARTLIT BECK, LLP
54 W. Hubbard St., Ste. 300
Chicago, IL 60654

XIAO WANG
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW SUPREME
COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903

BRYAN L. SELLS
Counsel of Record
THE LAW OFFICE OF BRYAN L.
SELLS, LLC
P.O. Box 5493
Atlanta, GA 31107
(404) 480-4212
bryan@bryansellslaw.com

Counsel for Petitioners

June 4, 2024