No. 19-60133

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSEPH THOMAS, VERNON AYERS, MELVIN LAWSON,

Plaintiffs–Appellees,

v.

PHIL BRYANT, Governor of the State of Mississippi, all in the official capacities of their own offices and in their official capacities as members of the State Board of Election Commissioners; DELBERT HOSEMANN, Secretary of State of the State of Mississippi, all in the official capacities of their own offices and in their official capacities as members of the State Board of Election Commissioners,

Defendants–Appellants.

On Appeal from the United States District Court for the Southern District of Mississippi
USDC No. 3:18-cv-00441-CWR-FKB

AMICI CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF MISSISSIPPI, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, LEAGUE OF WOMEN VOTERS OF MISSISSIPPI & COMMON CAUSE IN SUPPORT OF PLAINTIFFS-APPELLEES FOR AFFIRMANCE ON REHEARING *EN BANC*

Theresa J. Lee
Dale E. Ho
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 284-7359

Joshua Tom
ACLU of Mississippi Foundation
223 East Capitol Street
Jackson, MS 39201
(601) 354-3408

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, the American Civil Liberties Union, the American Civil Liberties Union of Mississippi, the League of Women Voters of the United States, the League of Women Voters of Mississippi, and Common Cause have no parent corporations. The organizations are not subsidiaries or affiliates of any publicly owned corporations, and no publicly held corporation has any form of ownership interest, including ownership of any stock, in any of the organizations.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. In addition to those identified in the briefs of the Plaintiffs-Appellees and Defendants-Appellants, the following persons may have an interest in the outcome of this case:

American Civil Liberties Union (*amicus curiae*)

American Civil Liberties Union of Mississippi (*amicus curiae*)

League of Women Voters of the United States (*amicus curiae*)

League of Women Voters of Mississippi (*amicus curiae*)

Common Cause (*amicus curiae*)

Theresa J. Lee (counsel for *amici curiae*)

Dale E. Ho (counsel for *amici curiae*)

Joshua Tom (counsel for *amici curiae*)

November 29, 2019

Respectfully submitted,

/s/ Theresa J. Lee

Theresa J. Lee
American Civil Liberties Union Foundation
125 Broad St.
New York, NY 10004
(212) 284-7359
tlee@aclu.org

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INTEREST OF AMICI[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately 1.75 million members, dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the U.S. Constitution and our nation's civil rights laws. The ACLU of Mississippi is a statewide affiliate of the national ACLU, with approximately 1,500 members throughout the state. The ACLU Voting Rights Project has litigated more than 300 voting rights cases since 1965, including voting rights cases before this Court in which the ACLU served as an amicus. *E.g.*, *Patino v. City of Pasadena*, No. 17-20030 (5th Cir. 2017); *Veasey v. Abbott*, No 14-41127 (5th Cir. 2015).

The League of Women Voters of the United States (the "League") is a non-profit, non-partisan organization founded in 1920. The League encourages informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy. With state affiliates representing every state and the District of Columbia within the United States, the League also works to register voters, and to

[1] *Amici* submit this brief pursuant to Federal Rule of Appellate Procedure 29(a) with the consent of all parties. Undersigned counsel for *amici curiae* certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

provide voters with election information through voter guides as well as candidate forums and debates. The League of Women Voters of Mississippi ("LWV-MS") is a non-profit, non-partisan organization with five local League chapters throughout the State that encourages the informed and active participation of citizens in government. As part of a one-hundred-year-old national organization, LWV-MS is dedicated to ensuring that all citizens of Mississippi have equal access to the right to vote and are engaged with their local, state, and federal governments.

Common Cause is a nonpartisan democracy organization with 1.2 million members nationwide and local organizations in 35 states, including 3,400 members and supporters of Common Cause Mississippi. For decades, Common Cause has led efforts to pass reforms that make the drawing of voting districts fairer and more transparent, including the successful passage of ballot measures in Arizona, California, Colorado, Ohio, and other states to create processes for drawing districts that empower citizens to be active participants in our own representation.

Amici have a significant interest in the outcome of this case and in other cases concerning laws that impede on individuals' equal opportunity to participate in the political process and exercise their right to vote. The ACLU and its affiliates have litigated vote dilution claims under Section 2 of the Voting Rights Act throughout the country. *See, e.g.*, *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924 (8th Cir. 2018); *Large v. Fremont Cty.*, 670

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ARGUMENT

Section 2 of the Voting Rights Act ("VRA") prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . 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). Subsection 2(b) provides that a violation of Section 2's prohibition on discriminatory results "is established if . . . [minority voters] 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). The "essence" of a successful claim under this statute "is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). The Supreme Court and each of the Circuit Courts of Appeals, including this one, have all regularly applied the standard first laid out in *Gingles* and then specifically applied to single-member districts in *Growe v. Emison*, 507 U.S. 25, 40 (1993), and beyond, in assessing such claims.

In addition to barriers to voting itself, Section 2 prohibits "vote dilution," practices that minimize or cancel out the voting strength of racial or language minority voters. The Supreme Court has made clear that "[n]o single statistic provides courts with a shortcut to determine whether a set of single-member

districts unlawfully dilutes minority voting strength." *Johnson v. DeGrandy*, 512 U.S. 997, 1020–21 (1994). In some circumstances, it is "possible for a citizen voting-age majority to lack real electoral opportunity." *League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 428 (2006). Accordingly, this Court and all but one of the Courts of Appeals to have considered the question have determined that plaintiffs are not prohibited from bringing a vote dilution claim simply because minority voters constitute a bare statistical majority of a district or jurisdiction. *See Salas v. Sw. Tex. Junior Coll. Dist.*, 964 F.2d 1542, 1549 (5th Cir. 1992); *Monroe v. City of Woodville*, 881 F.2d 1327, 1333 (5th Cir. 1989); *Zimmer v. McKeithen*, 485 F.2d 1297, 1300 (5th Cir. 1973); *see also infra* at 9–10.

In light of this consistent authority, the district court did not commit legal error by refusing to accord dispositive weight to the fact that Black voters comprise a bare numerical majority (50.77%) of the voting-age population of the challenged district. As the district court did not "misread[] the governing law," *DeGrandy*, 512 U.S. at 1022, in its identification and application of long-standing Supreme Court and Circuit precedent, "the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution." *Gingles*, 478 U.S. at 79. Given the district court's findings that Black voters are electorally

disadvantaged under the totality of the circumstances, its holding that Black voters in District 22 lack equal electoral opportunity was not erroneous.

Furthermore, there can be no dispute that a Section 2 violation can be made solely on the basis of the results of the challenged law, without any showing of intent. *See, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009); *DeGrandy*, 512 U.S. at 1009 n.8, 1010; *Salas*, 964 F.2d at 1549. The fact that the district challenged in this case—Senate District 22—was drawn in such a way that African Americans constitute a bare statistical majority of the voting age population, but not a "numerical, *working* majority of the voting age population" in practice, *Bartlett*, 556 U.S. at 13 (emphasis added), does not mean that plaintiffs must establish discriminatory intent in order to succeed on their claim. Contrary to Defendants' apparent argument, En Banc Brief for the Appellants at 34, *Thomas v. Bryant*, No. 19-60133 (Oct. 23, 2019) [hereinafter Br.], courts always assess vote dilution claims under Section 2's results standard under the same totality of the circumstances test under which no single statistic is dispositive. The particular facts of this case do not somehow convert the Plaintiffs' claims into ones of intentional discrimination, and Section 2 does not require such a showing.

I. SUPREME COURT PRECEDENT AND THE LAW OF THE CIRCUIT MAKE CLEAR THAT THE TEST FOR ASSESSING VOTE DILUTION UNDER SECTION 2 REMAINS THE SAME REGARDLESS OF THE SIZE OF THE MINORITY POPULATION IN A CHALLENGED DISTRICT.

Since *Gingles*, the Supreme Court has "interpreted [Section 2's] standard to mean that, under certain circumstances, States must draw 'opportunity' districts in which minority groups form '*effective* majorit[ies].'" *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018) (quoting *LULAC*, 548 U.S. at 426) (emphasis added). For a claim of vote dilution in a single-member district, the Supreme Court has held that, first, the minority group must show "that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *LULAC*, 548 U.S. at 425 (quoting *DeGrandy*, 512 U.S. at 1006–07 (quoting *Growe*, 507 U.S. at 40 (in turn quoting *Gingles*, 478 U.S. at 50–51))). Second, the minority group must demonstrate "that it is politically cohesive." *Id*. And third, the minority group must establish "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* These preconditions do not change when assessing one single-member district, a handful of such districts, an entire state-wide plan, or at-large voting. *Cf. Bartlett*, 556 U.S. at 19 (declining to "depart from the uniform interpretation of § 2 that guided federal courts and state and local officials for more than 20 years").

The Court's recognition that Section 2 requires districts with "effective" and not just numerical majorities makes clear that a single-member district where minority voters make up the voting-age majority may still, "under certain circumstances," invoke Section 2's protections. This is so because, as the Supreme Court has recognized, it is "possible for a citizen voting-age majority to lack real electoral opportunity," *LULAC*, 548 U.S. at 428, as "political participation" is often "depressed where minority group members suffer effects of prior discrimination." *Gingles*, 478 U.S. at 69.

It is unclear whether Defendants are arguing (1) that, under Section 2's results standard, there is *per se* bar on challenges to single-member districts with a numerical majority, (2) that challenging a single-member district with a bare numerical majority of the protected group necessitates a different first *Gingles* precondition, or (3) that the presence of a numerical majority makes it impossible to demonstrate vote dilution under the totality of the circumstances. Regardless, each one of these arguments must fail in light of Supreme Court and Circuit precedent.

A. A Bare Majority of the Voting-Age Population Is Not a Bar to Proving Vote Dilution.

Following the direction of the Supreme Court that a single statistic is not dispositive, this Court has rejected the *per se* rule urged by Defendants here—that is, that plaintiffs are prohibited from bringing a vote dilution claim under

Section 2's results standard when racial or language minority voters constitute a bare numerical majority of the voting-age population of a district. *See Salas*, 964 F.2d at 1547 ("Unimpeachable authority from our circuit has rejected any per se rule that a racial minority that is a majority of a political subdivision cannot experience vote dilution." (quoting *Monroe*, 881 F.2d at 1333)).[2] Other Courts of Appeals have almost uniformly followed the same approach. *See Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.* ("*FFSD*"), 894 F.3d 924, 934 (8th Cir. 2018) ("In short, minority voters do not lose VRA protection simply because they represent a bare numerical majority within the district.")[3]; *Pope v. Cty. of Albany*, 687 F.3d 565, 575 n.8 (2d Cir. 2012) ("[T]he law allows plaintiffs to challenge legislatively created bare majority-minority districts on the ground that

[2] En banc consideration is necessary to "secure or maintain uniformity of the court's decisions." Fed. R. App. P. 35(a). Nearly every Court to have considered the question of whether plaintiffs can bring a claim of vote dilution when the minority group constitutes a bare statistical majority of the population has decided the same way, following the precedent of this Circuit. As there has been no intervening decisions of the Supreme Court indicating that the Court's earlier precedent should be overruled and because the panel decision is uniform with the earlier decisions of this Court, it should be affirmed en banc. *Cf. United States v. Jackson*, 825 F.2d 853, 857–60 (5th Cir. 1987) (en banc) (reconsidering Circuit precedent only where in conflict with Supreme Court precedent and weight of authority from other Circuits); *United States v. Reyna*, 358 F.3d 344, 349–50 (5th Cir. 2004) (en banc) (reconsidering Circuit precedent only where ample intervening Supreme Court precedent undermined the reasoning of earlier Circuit precedent).

[3] The State's assertion that *Jeffers v. Beebe*, 895 F. Supp. 2d 920 (E.D. Ark. 2012), with its per se rule that the plaintiffs could not make out a Section 2 claim because they had a numerical majority, is still good law because the Eighth Circuit, considering the same issue six years later, failed to mention *Jeffers*, Br. at 32 n.20, is flatly wrong. As the members of this Court are well-aware, a Circuit Court, in announcing a rule of law is not required to discuss every contrary ruling by a district court. It is the district courts that must heed the decisions of the Circuit Court; it is not up to the Circuit to find and expressly discuss every closed, contrary district court case.

they do not present the 'real electoral opportunity' protected by Section 2."); *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1041 (D.C. Cir. 2003) ("Vote dilution claims must be assessed in light of the demographic and political context, and it is conceivable that minority voters might have 'less opportunity . . . to elect representatives of their choice' even where they remain an absolute majority in a contested voting district."); *Meek v. Metro. Dade Cty.*, 908 F.2d 1540, 1546 (11th Cir. 1990) (reaffirming *Zimmer*, 485 F.2d at 1300, following Circuit reorganization, rejecting the conclusion that vote dilution could not be proven where racial minority was "a majority of the total population of the parish"); *see also Valladolid v. City of Nat'l City*, 976 F.2d 1293, 1294 (9th Cir. 1992) (determining that the first *Gingles* precondition was met in a challenge where Black and Hispanic voters made up 57.5% of the population).[4]

Thus, under guidance from the Supreme Court, the law of this Circuit, and all but one other Courts of Appeals to consider this question, minority voters are not precluded from invoking the full protections of the VRA simply because they form a numerical majority of a jurisdiction or district. These holdings are not

[4] The Fourth Circuit is the only Circuit Court to have suggested otherwise, contrary to this Circuit and the great weight of consistent authority. In *Smith v. Brunswick Cty. Bd. of Supervisors*, the Fourth Circuit listed a numerical majority of the population as one factor along with "equal access to the polls" and being "free of undue influence in voting," as reasons, taken together, that the minority population in question could not invoke the VRA. 984 F.2d 1393, 1400 (4th Cir. 1993). This decision also arose in a starkly different context: where minority voters made up a super-majority of the voting-age population and had a consistently higher turnout rate. *See id.* at 1400–02.

limited to at-large schemes. The Supreme Court's observation that it is "possible for a citizen voting-age majority to lack real electoral opportunity" was in a case considering single-member districts. *LULAC*, 548 U.S. at 428. Likewise, the case in which the Second Circuit rejected a rule barring a numerical majority from the VRA's protection dealt with single-member districts. *See Pope*, 687 F.3d at 575 n.8; *see also Kingman*, 348 F.3d at 1041 (case rejecting per se rule also dealing with single-member districts); *Valladolid*, 976 F.2d a 1294 (case permitting challenge to single-member district with 57.5% minority population). And still other courts have found Section 2 violations in single-member districts where the minority group was a numerical majority. *See, e.g.*, *Perez v. Abbott*, 253 F. Supp. 3d 864, 879–90 (W.D. Tex. 2017) (three-judge court), (finding single-member district with a Hispanic citizen voting-age majority of 58.5% violated Section 2 in both intent and effect, which was not appealed in the rest of the case's subsequent history); *Baldus v. Members of Wis. Gov't Accountability Bd*., 849 F. Supp. 2d 840, 854–58 (E.D. Wis. 2012) (finding two single-member districts, with 54% and 61% minority voting-age population respectively, diluted voting strength).

The consistent conclusion of these courts makes sense in light of "what kind of 'minority' the Voting Rights Act protects." *Salas*, 964 F.2d at 1547. This Circuit has held that the "plain text of the statute, as affirmed by case law, makes clear that the Act is concerned with protecting the minority in its capacity as a

national racial or language group." *Id.* (emphasis added). In reaching this conclusion, this Court noted that "minority" could be taken to mean either "a national racial or language minority" or "a numerical minority of voters in the jurisdiction at issue," and held that the concern of the VRA is the former. *Id.*; *see also FFSD*, 894 F.3d at 933 ("As *Gingles* notes, under the VRA, the term 'minority' does not refer to a purely numerical fact. Rather, section 2(a) protects the voting rights of 'any citizen who is a member of a protected class of racial or language minorities.'" (quoting *Gingles*, 478 U.S. at 43)).

Bartlett is not to the contrary of any of this precedent. *Bartlett* stands for the proposition that a racial minority must have a population over 50% to have an "opportunity to elect," but does not say that a district is immune from liability where its minority voters reach 50% of the district's voting-age population, such that claims are barred once a minority group becomes 50.1% (or, as here, 50.77%) of a district's voting-age population. Nor did it hold that, as a practical matter, such a numerical threshold is sufficient to elect a minority-preferred candidate in any circumstance. If 50% were talismanic, countless courts would not have found a required voting-age population well past a numerical majority, even upwards of 60% in some cases. *See, e.g.*, *Jones v. City of Lubbock*, 727 F.2d 364, 386 (5th Cir. 1984) (affirming finding of vote dilution and remedial plan with single-member districts with minority voting-age populations of 72.7% and 55.7%);

Kirksey v. Bd. of Supervisors of Hinds Cty., 468 F. Supp. 285, 295 (S.D. Miss. 1979) (following remand from en banc panel of this Court that reversed the creation of remedial districts with too low minority voting-age populations, *Kirksey v. Bd. of Supervisors of Hinds Cty.*, 554 F.2d 139, 148–51 (5th Cir. 1977) (en banc), approving remedial districts with minority voting-age populations of 66.6% and 55.9%); *see, e.g.*, *also Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1023 (8th Cir. 2006) (affirming finding of vote dilution and remedial plan with single-member districts with minority voting-age populations of 65% and 74%); *United States v. Blaine Cty.*, 363 F.3d 897, 901 n.2 (9th Cir. 2004) (affirming finding of vote dilution and remedial plan with single-member district with minority voting-age population of 87%); *McGhee v. Granville Cty.*, 860 F.2d 110, 113 (4th Cir. 1988) (approving remedial plan for finding of vote dilution with district with 67.5% minority voting-age population); *Ketchum v. Byrne*, 740 F.2d 1398, 1412–14 (7th Cir. 1984) (rejecting use of simple majority as metric to determine necessary voting-age population to allow for the opportunity to elect candidates of choice noting that "frequently 65% of total population or 60% of voting-age population" is needed).

Indeed, Defendants seem to acknowledge that an intent claim can be made to challenge a district that is 50%+ minority voting-age population. Br. at 31. In so doing, Defendants implicitly admit that a district where the minority group makes

up a statistical majority can operate to deprive minority voters of equal opportunity to elect candidates of choice, as there would be no reason for a jurisdiction to intentionally discriminate by drawing a district with 50%+ minority voting-age population unless, in some circumstances, such a district would fail to perform for minority voters.

Thus, there is no per se bar on a racial or language minority making out a vote dilution claim simply because they constitute a numerical majority, whether under an at-large scheme or in a single-member district.

B. The *Gingles* Preconditions Remain the Same Regardless of the Minority Population of a Challenged District.

The Supreme Court has repeatedly "held that a claim of vote dilution in a single-member district requires proof meeting *the same* three threshold conditions for a dilution challenge to a multimember district: that a minority group be 'sufficiently large and geographically compact to constitute a majority in a single-member district'; that it be 'politically cohesive'; and that 'the white majority vot[e] sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'" *DeGrandy*, 512 U.S. at 1006–07 (quoting *Growe*, 507 U.S. at 40) (emphasis added).

Defendants' citation to *Bartlett*'s summation of the first *Gingles* precondition in holding that districts where there is too small of a population to reach 50% do not satisfy this precondition, Br. at 31, attempts to obscure this

consistent and standard test. *Bartlett* did nothing to change the *Gingles* preconditions, clarifying only that the first precondition required precisely what it said—a population constituting a majority in a single-member district—as opposed to a functional review of populations too small to constitute a numerical majority. *Bartlett*, 556 U.S. at 19. The first *Gingles* precondition simply requires plaintiffs to show that the minority group be "'sufficiently large and geographically compact to constitute a majority in a single-member district.'" *DeGrandy*, 512 U.S. at 1006. Plaintiffs here have done so.

Likewise, Defendants repeatedly invoke *DeGrandy* in support of their arguments. That case, however, does not support Defendants' claims here. *DeGrandy* recognized that where it is not possible to create an additional district where minority voters have an opportunity to elect their candidates of choice, a state cannot be held liable for failing to do the impossible, explaining that "[w]hen applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts *with a sufficiently large minority population to elect candidates of its choice*." *Id.* at 1008 (emphasis added).[5]

[5] The fact that the first *Gingles* precondition was met in the instant case is illustrated by the November 2019 election under the remedial map enacted by the legislature. The new Senate District 22 was altered to provide the Black voters of the District an opportunity to elect their candidates of choice (which they did not have before), and this remedy did not come at the

The *Gingles* factors, of course, "cannot be applied mechanically and without regard to the nature of the claim." *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993). That the challenged Senate District 22 had a 50.77% BVAP does not mean that the first *Gingles* pre-condition could not be met or the Plaintiffs were instead required to make some other showing. Under the particular facts of this case, Senate District 22 did not have "a sufficiently large minority population to elect candidates of its choice," *DeGrandy*, 512 U.S. at 1008, so the Plaintiffs' presentation of another reasonably compact district with a larger minority population met the first *Gingles* precondition, by creating another district "with a sufficiently large minority population to elect candidates of its choice," without dismantling an already existing such district.

Defendants ignore the factual determinations below and instead "mechanically" insist that because the challenged district had 50.77% BVAP, the first *Gingles* precondition was not (perhaps, in their estimation, could not be) met. This is error. To the extent Defendants are arguing that because a challenged single-member district has a BVAP over 50% it could never meet the first *Gingles*

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expense of any other districts "*with a sufficiently large minority population to elect candidates of its choice*," as the assignment of precincts in the remedial map did not deprive the voters of Senate District 13 of their opportunity to elect candidates of choice. Thus, in actual fact, there is now an additional district "*with a sufficiently large minority population to elect candidates of its choice*," conclusively demonstrating that the first *Gingles* precondition was met.

pre-condition, Br. at 31–32, this is merely a restatement of the rejected argument that there is a per se bar on finding vote dilution where the minority group is a numerical majority.

To the extent Defendants are arguing that in cases where a challenged district has a bare numerical majority of the minority voting-age population a different first *Gingles* precondition must apply, Br. at 31 & n.19, such a conclusion has zero support in Supreme Court precedent. The Court has been clear that the identified *Gingles* preconditions apply equally in the case of at-large, multi-member, and single-member districting. *See Gingles*, 478 U.S. 30; *DeGrandy*, 512 U.S. at 1006–07. The Supreme Court has rejected attempts to have it depart from the uniform interpretation that has consistently prevailed for, at this point, more than 30 years. *See Bartlett*, 556 U.S. at 19.

The district court acknowledged that the challenged Senate District 22 contained a bare numerical majority of the voting-age population, but found that it did not contain an "*effective* majorit[y]." *Perez*, 138 S. Ct. at 2315 (emphasis added). In the context of Section 2, the Supreme Court has been clear that "minority-majority districts" are those in which "a minority group composes a numerical, *working* majority of the voting-age population." *Bartlett*, 556 U.S. at 13 (emphasis added). Under the "intensely local appraisal" required, *Rogers v. Lodge*, 458 U.S. 613, 622 (1982), a BVAP of 50.77% in Senate District 22 was not

sufficient for the Black population to be an "effective," *Perez*, 138 S. Ct. at 2315, and "working," *Bartlett*, 556 U.S. at 13, majority.

C. Equality of Opportunity Is Based on the Totality of Circumstances, Not a Single Statistic.

The Supreme Court, this Circuit, and all of but one of the Circuit Courts to have considered the question at issue here, have "emphasized that access to the political process, aside from population statistics, is the criteria by which a court determines illegal or unconstitutional vote dilution." *Salas*, 964 F.2d at 1549. That a racial minority makes up a bare majority of the voting-age population does not alter this legal standard. In an attempt to have this single population statistic prevail over the "searching practical evaluation of the 'past and present reality'" required, *Gingles*, 478 U.S. at 79, Defendants take two disparate observations from *Bartlett* to cobble together a conclusion of the Supreme Court that simply does not exist. *See* Br. at 31 (quoting two distinct clauses from *Bartlett*, 556 U.S. at 18, 14, as if they were a single conclusion). Defendants point again and again to the simple numerical majority of 50.77% BVAP. In so doing, they try to hold up this "single statistic" as a shortcut to determine that vote dilution could not exist. The Supreme Court has rejected exactly this sort of mechanical statistical reliance, *DeGrandy*, 512 U.S. at 1020–21, as has this Circuit, *Zimmer*, 485 F.2d at 1303 ("to rely upon population statistics, to the exclusion of all other factors, is to give these statistics greater sanctity than that which the law permits or requires").

Without even attempting the "intensely local appraisal" required, *Rogers*, 458 U.S. at 622, Defendants make the per se assertion that a "group having a majority cannot have 'less opportunity' than smaller groups." Br. at 32. This is both legally and factually incorrect. The Supreme Court has recognized that it is "possible for a citizen voting-age majority to lack real electoral opportunity." *LULAC*, 548 U.S. at 428. Whether a group has electoral opportunity must be determined based upon the "totality of the circumstances." 52 U.S.C. § 10301(b). The Supreme Court has repeatedly indicated the totality of the circumstances inquiry requires both the demonstration of the *Gingles* preconditions and a review of the so-called Senate Factors, which include, among other things, "the history of voting-related discrimination," . . . "the extent to which voting . . . is racially polarized," "the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group," "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process," and "the extent to which members of the minority group have been elected to public office in the jurisdiction." *Gingles*, 478 U.S. at 44–45; *see also LULAC*, 548 U.S. at 425–27; *DeGrandy*, 512 U.S. at 1010–11.

Defendants' insistence that a minority group with a numerical majority cannot make such a showing ignores the governing jurisprudence that courts and litigants cannot just make assumptions regarding any of these showings. *Cf.* *DeGrandy*, 512 U.S. at 1012; *Gingles*, 478 U.S. at 46. The district court found that there were "vast differences" between Blacks and whites in District 22 in "education, employment, income, housing, and health indices, among others, that ultimately reflect the effects of slavery and segregation." ROA.384. And the district court credited "evidence that these socio-economic factors likely negatively impact voter turnout and that African-American communities in the Delta are less likely to have transportation options that facilitate voter turnout in odd-year elections," *id*., like the State Senate elections. The district court thus concluded that the Plaintiffs showed, consistent with Senate Factor 5, that "effects of discrimination" in District 22 "hinder[ed]" the ability of Black voters "to participate effectively in the political process." ROA.367, 373, 384.

Because of these "bleak" realities, ROA.367, having a bare numerical majority was insufficient to afford minority voters an equal opportunity to elect their candidates of choice. Defendants make no showing that the determinations of the district court were clearly erroneous, which they must in order to disturb such findings, "representing as they do a blend of history and an intensely local

appraisal" of the practice at issue. *White v. Regester*, 412 U.S. 755, 769–70 (1973); *Gingles*, 478 U.S. at 78–79.

Defendants' citation to *DeGrandy* does not alter the district court's assessment of the totality of the circumstances. *DeGrandy* considered a Section 2 challenge in an instance where "minority voters form *effective voting majorities* in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population," and held that while "such proportionality is not dispositive in a challenge to single-member districting, it is a relevant fact in the totality of circumstances to be analyzed when determining whether members of a minority group have 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *DeGrandy*, 512 U.S. at 1000 (emphasis added) (quoting 52 U.S.C. § 10301). The Court was explicit that "the degree of probative value assigned to proportionality may vary with other facts" as "[n]o single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength." *Id.* at 1021–22. This is yet another aspect of the totality of the circumstances that does not support Defendants' assertions.[6]

[6] Proportionality, as identified in *DeGrandy*, does not advance Defendants' arguments. Based on the 2010 Census, Mississippi has a BVAP of 34.9%. *See* American FactFinder, P10 Race for the Population 18 Years and Over, factfinder.census.gov (select Mississippi from "Add/Remove Geographies," dividing the total of those identified as any part Black by the total population

Contrary to Defendants' contention, "equality or inequality of opportunity" cannot be assessed simply by looking at the single statistic of the minority group's numerical population, instead they are "intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *DeGrandy*, 512 U.S. at 1011. It is unsurprising that a racial minority group with a bare numerical majority can still lack equality of opportunity as both the "[Supreme] Court and other federal courts have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes." *Gingles*, 478 U.S. at 69. To be sure, there will be instances where members of a racial minority make up a numerical majority (or even a numerical minority) of the population in a district and have equal opportunity to elect their preferred candidates, such that the jurisdiction in question faces no liability under Section 2. This determination, however, is not based solely on the number of minority voters in a district, but upon the totality of circumstances demonstrating it to be the case.

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gives any part BVAP of 34.99%, diving single-race Black by the total single-race population gives single-race BVAP of 34.97%). Prior to the remedial map in this case, Mississippi had 14 of 52 State Senate Districts where "minority voters form effective voting majorities," which amounts to 26.92%. Only at 18 of 52 Districts (34.62%) would the districting plan be approaching the proportionality considered in *DeGrandy*. Thus, proportionality is yet another aspect of the totality of circumstances in this case that points to inequality of opportunity.

II. THE FACTS OF THIS CASE DO NOT REQUIRE A SHOWING OF INTENTIONAL DISCRIMINATION.

Asserting a claim of vote dilution under Section 2 is not converted into a claim of intentional discrimination simply because the minority group in the district has a bare majority of the voting-age population. Defendants seem to contend that Plaintiffs had to make a showing of intentional discrimination, Br. at 34–35, but such an assertion is unmoored from the text of the statute and from vote dilution precedent. As this case is governed by the results test of Section 2, it does not entail a potentially sensitive inquiry into legislative intent. *Cf. Veasey v. Abbott*, 830 F.3d 216, 280–81 n.3 (5th Cir. 2016) (en banc) (Jones, J., concurring in part and dissenting in part).

Grabbing on to the Supreme Court's use of the word "manipulation" in describing a plaintiff's showing in establishing Section 2 vote dilution, Defendants pivot to discussing "intentional 'manipulation of district lines,'" Br. at 34–35. However, *Shaw v. Hunt*, the case cited by Defendants, lays out the same precedent already discussed herein and does not even suggest that plaintiffs must make a showing of invidious intent to meet Section 2's results test. 517 U.S. 899, 914 (1996) (citing *DeGrandy*, 512 U.S. at 1007, 1010–12, *Gingles*, 478 U.S. at 50–51, and *Growe*, 507 U.S. 25). There is no legitimate legal ground to import a requirement of showing intentional discrimination onto the Plaintiffs' claims. That the challenged Senate District 22 was drawn in such a way that it did not contain a

"numerical, *working* majority of the voting age population," *Bartlett*, 556 U.S. at 13 (emphasis added), does not somehow convert the Plaintiffs' claims into ones of intentional discrimination, and Section 2 does not require such an allegation or showing.

Taken to its logical conclusion, Defendants' argument would compel plaintiffs alleging vote dilution, in every instance, to challenge multiple districts. This argument must fail. A plaintiff is not prevented from challenging the district in which they live simply because they have not identified other individuals living in the adjoining districts who are also injured by where the lines are drawn. Further, Defendants' rule would compel litigants to bring more expansive claims in every instance. As challenges to a districting scheme necessarily intrude on state decision making, a rule preferring more expansive challenges is in direct tension with the Supreme Court's jurisprudence. *See LULAC*, 548 U.S. at 415–16.

CONCLUSION

The district court rightly applied the precedent of the Supreme Court and this Circuit in conducting its searching "totality of the circumstances review." Its determinations, including its "ultimate findings of vote dilution" were not clearly erroneous, *see Gingles*, 478 U.S. at 77–79, and for these and all the foregoing reasons, its judgment should be affirmed.

November 29, 2019

Respectfully submitted,

/s/ Theresa J. Lee

Theresa J. Lee
Dale E. Ho
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 284-7359
tlee@aclu.org

Joshua Tom
ACLU of Mississippi Foundation
223 East Capitol Street
Jackson, MS 39201
(601) 354-3408

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

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Dated: November 29, 2019

/s/ Theresa J. Lee
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, thereby serving the foregoing upon all counsel registered with that system.

November 29, 2019 */s/ Theresa J. Lee*