No. 20-1668

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JULIO CLERVEAUX, CHEVON DOS REIS, ERIC GOODWIN, JOSE VITELIO GREGORIO, DOROTHY MILLER, HILLARY MOREAU, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, SPRING VALLEY BRANCH,

Plaintiffs-Appellees,

WASHINGTON SANCHEZ,

Plaintiff,

—against—

EAST RAMAPO CENTRAL SCHOOL DISTRICT,

Defendant-Appellant,

MARYELLEN ELIA, IN HER CAPACITY AS THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK, No. 7:17-CV-08943-CS-JCM

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee National Association for the Advancement of Colored People, Spring Valley Branch, a nonprofit 501(c)(3) corporation, certifies that it has no parent corporation and no publicly held affiliates or subsidiaries.

Dated: July 16, 2020

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STATEMENT OF ISSUES

1. Whether the district court clearly erred in finding that, in view of the totality of the circumstances, the at-large voting system in East Ramapo Central School District (the "District") operates to invidiously exclude black and Latino voters from effective participation in the political process in violation of Section 2 of the Voting Rights Act.

2. Whether the district court abused its discretion by finding that the testimony of Plaintiffs' statistical expert, Dr. Matthew Barreto, provided reliable and credible evidence of racially polarized voting in the District.

INTRODUCTION

The record in this case presents a clear-cut violation of Section 2 of the Voting Rights Act, which proscribes election practices that, under the "totality of circumstances," deprive minority voters of equal opportunity to "participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). As the district court found, a host of circumstances have converged in the District to ensure that black and Latino voters are "invidiously exclude[d] . . . from effective participation in political life." SA75 ¶ 87 (citation omitted).

In the District's at-large voting system, racially polarized voting persistently prevents black and Latino voters from electing the candidates of their choice. SA32 ¶ 39. That fact alone "gives rise to an inference" that the electoral process in the District invidiously "dilutes [the] votes" of the District's black and Latino citizens. SA36 ¶ 45. And the district court correctly found that this pattern of racial polarization accords with the totality of circumstances in this case, which "weigh firmly" in favor of a finding that black and Latino voters in the District suffer exclusion from the political process on account of race. SA75 ¶ 87.

Prime among those circumstances is the existence of an organization that runs a "slating process" in which leading members of the District's white community "select, endorse, promote, and secure the election of their preferred candidates" for at-large seats on the District's Board of Education ("Board"). SA50 ¶ 57.

"[M]inorities have no input into this process." *Id.* This organization "consistently guarantees election outcomes," SA57 ¶ 63, on the electoral strength of a "white bloc vote," SA36 ¶ 45, which makes certain that the result of any given election will be—in the words of Board president and slating organization member Harry Grossman—"whatever we want it to be," SA36 ¶ 44 (citation omitted). The organization fosters a political culture in which "white voters [are] highly cohesive and consistently vote[] for the winning candidate in every election," SA20 ¶ 26, thereby consistently defeating the candidates preferred by black and Latino voters.

In light of this record, presented at a bench trial that stretched across 17 days, the district court had little difficulty concluding that Plaintiffs—black and Latino voters in the District—had proven their Section 2 vote-dilution claim. In arriving at that conclusion, the district court followed a well-established analytical framework prescribed by statute and set out in the Supreme Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Under that framework, the district court first examined the "*Gingles* preconditions"—most crucially, whether "black and Latino voters are politically cohesive" and whether "the white majority votes as a bloc to routinely defeat the minority's preferred candidates." SA32 ¶ 39. The district court found that Plaintiffs had offered strong proof of those preconditions. SA32 ¶ 40.

The district court then proceeded to give holistic consideration to the totality of the circumstances, mindful that it is "only the very unusual case" in which a

plaintiff proves up the *Gingles* preconditions yet fails to establish a violation of Section 2. SA9 ¶ 10 (quoting *NAACP, Inc. v. City of Niagara Falls*, 65 F.3d 1002, 1019 n.21 (2d Cir. 1995)). And the district court undertook that analysis—as it was required to do—"on the basis of objective factors" concerning the political exclusion of minorities, *Gingles*, 478 U.S. at 44 (quoting S. Rep. No. 97-417, at 27 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 205), rather than through inquiry into "the motivations which lay behind" that exclusion, S. Rep. No. 97-417, at 27. Having considered the relevant objective factors in this case, the district court determined that those factors "weigh firmly in Plaintiffs' favor," and correctly granted relief to Plaintiffs. SA75-77 ¶¶ 87-89.

The District rests most of its appeal on its disagreement with the district court's factual and evidentiary determinations, which are reviewed here for clear error or an abuse of discretion. Those arguments fail. As the district court noted in its order denying a stay of injunction, the District's arguments "distort the trial record and attempt to recast factual findings as legal decisions." AA32-33.

The District stakes out only one genuine legal disagreement with the decision below: it contends that the district court erred by failing to require Plaintiffs to provide proof of "racial animus" on the part of either the District itself or white voters in the District. That argument runs afoul of settled law. It is well established in this Circuit, and everywhere else, that Congress crafted Section 2 specifically to

avoid a "discriminatory intent" requirement, and that proof of racial animus forms no part of the plaintiff's burden in a vote-dilution case. *See Gingles*, 478 U.S. at 71-73; *id.* at 100-02 (O'Connor, J., concurring in the judgment); *City of Niagara Falls*, 65 F.3d at 1006; *see also Goosby v. Town Bd. of the Town of Hempstead*, 180 F.3d 476, 488 (2d Cir. 1999) (affirming the district court's finding of "discriminatory effect" without a finding of "racial animus"). This uniform construction of Section 2 is consistent with the text and legislative history of the 1982 amendments to Section 2, which established that Section 2 plaintiffs need not level "charges of racism on the part of individual officials or entire communities" in order to obtain relief. S. Rep. No. 97-417, at 36 (quoting statement of Dr. Arthur S. Flemming, Chair, U.S. Commission on Civil Rights).

To the extent that the District argues that Plaintiffs' exclusion from the political process sounds in race-neutral policy differences, that dispute is one of fact. And the district court correctly turned away the District's argument in light of the "paucity of evidence of policy-driven campaigns, and the identity between race and politics in this community." SA46 ¶ 51. Neither that determination nor any of the district court's other findings of fact were clearly erroneous. The decision below should be affirmed.

STATEMENT OF THE CASE

A. Race And Schooling In The District

The District is a "'highly segregated' political subdivision of New York State located in Rockland County." SA3 ¶ 4 (citation and footnote omitted). Whites form the majority of eligible voters in the District; black and Latino voters respectively account for 24.1% and 9.1% of the citizen voting-age population. SA4 ¶ 4 n.5. Over two-thirds of the white residents in the District live in neighborhoods that are over 80% white, and over half of the non-white residents live in neighborhoods that are over 80% non-white. SA4 ¶ 4.

The vast majority (92%) of public-school students in the District are black or Latino. SA4 ¶ 5. White students in the District overwhelmingly attend private schools, and account for 98% of the students enrolled in private schools in the school district. *Id.* As the district court recognized, the District's residents speak in terms of a "'private school community'" comprising "white Orthodox and Hasidic Jews who educate their children in yeshivas" and a "'public school community'" comprising "primarily black and Latino persons." SA4-5 ¶ 5 (citations omitted).

B. Racial Polarization And Exclusion In The District

The public schools in the District are governed by a nine-member Board. SA5 ¶ 6. Each member of the Board is elected on an at-large basis to a three-year term for a particular seat. SA6 ¶ 6. The Board members' terms are staggered; each year,

the District holds off-cycle elections—that is, elections that do not line up with any other local, state or federal elections—for three seats. *Id.*

Elections for the Board are highly racially polarized. Dr. Matthew Barreto, a political scientist at UCLA and an expert in the statistical analysis of elections, SA13-14 ¶ 17, studied voting patterns in the District and found "high levels of racially polarized voting in every contested election" between 2013 and 2018. SA21 ¶ 27. In particular, Dr. Barreto found that black and Latino voters are "highly cohesive"—that is, "black voters tended to vote for the same candidates as each other, Latino voters tended to vote for the same candidates as each other, and both groups supported the same candidates." SA20 ¶ 26 & n.22. White voters likewise were "highly cohesive," and "'all of the data sources and all of the methods show the same stable level of 70-80% white support for [the same candidates] in each contest.'" SA20 ¶ 26 (quoting A1088). "In every contested election, 'the candidates who were preferred by a cohesive white voting bloc[] beat the candidates preferred by blacks and Latinos.'" SA20 ¶ 26 (alteration in original) (quoting AA58-59 (Tr. 289:24-290:1)).

Anecdotal evidence confirms that electoral campaigns in the District run along racial lines. Former Board member Bernard Charles testified that, "when it comes to running for the school board . . . you're either working with the white community or you're working with the other community." SA42 ¶ 48 (alteration in

original) (quoting AA146 (Tr. 1849:1-4)). A white Board member, Aron Wieder, admitted that he once told a black candidate for the Board—Eric Goodwin, one of the Plaintiffs here—that "the best use of his time was to campaign in his own community" after Goodwin suggested that he wanted to work to "bridge the gap between the communities in the District." SA44 ¶ 49 (quoting AA94 (Tr. 1174:6-8)); AA506 ¶ 54 (Goodwin Aff.) (averring that Wieder advised Goodwin not to "waste my time" campaigning in white neighborhoods "because the white community members would not vote for me"); *see also* AA70-71 (Tr. 801:9-802:2) (Goodwin testimony).

White bloc voting in the District is coordinated by an organization that secretly vets and slates candidates for Board. "Influential members of the white, private school community in the District participate in a slating process by which they select, endorse, promote, and secure the election of their preferred candidates . . . ." SA50 ¶ 57 (citing AA62-64 (Tr. 372:19-374:5); AA365 ¶ 37). This process is neither open nor public, *see* SA52 ¶ 58, and "minorities have no input," SA50 ¶ 57. The slating process is "tightly controlled by a few white individuals," SA57 ¶ 63, including several current and former members of the Board, as well as influential religious leaders in the white community. SA50 ¶ 57 n.47.[1]

[1] At trial, the members of this slating organization—contrary to the overwhelming evidence—strenuously denied its existence and went to extraordinary lengths to frustrate inquiry into its operations. *See, e.g.*, SA38-39 ¶ 48 (noting the

When the white slating organization selects candidates to run for the Board, it does not seek out information about those candidates' policy goals. SA43 ¶ 49 (citing AA164-66 (Tr. 2578:3-23, 2587:20-2588:12); A982:20-983:10; A1305 ¶ 16). The candidates sponsored by the white slating organization do not run on "any particular platforms," and do not "advocate policies, campaign, or spend money" to promote their candidacies, even though rival campaigns associated with the black and Latino communities do campaign actively. SA43-44 ¶ 49; *see also, e.g.*, AA162 (Tr. 2565:1-2566:15). Nevertheless, the white slating organization's candidates consistently win, even though they do not even bother to campaign, *see, e.g.*, SA41 ¶ 48 (describing a victorious candidate who "denied knowing the first thing about how he was elected"). It is widely understood in the District that the white slating organization "has the voting power to place anyone they want on the Board," SA36 ¶ 44 (quoting AA143 (Tr. 1816:22-24)).

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testimony of Board president Harry Grossman that he was not aware of any slating organization in the District, notwithstanding clear evidence that he participated in candidate slating (citing AA244 ¶ 34; AA106-35 (Tr. 1411:8-1413:12, 1427:22-1428:6, 1436:13-1438:22, 1444:15-1447:21, 1451:5-1454:13, 1458:24-1459:17, 1465:24-1466:7, 1468:15-1469:2, 1477:17-25, 1485:1-1486:8, 1515:16-1517:10))); SA39-40 ¶ 48 (discussing Board member Yehuda Weissmandl's "utterly unconvincing" attempts to deny the existence of a white slating process (citing, *inter alia*, AA82-83, 85-93 (Tr. 1056:10-1057:19, 1073:1-1074:25, 1079:21-1081:14, 1107:14-1108:14), AA559-61)); SA53 ¶ 59 n.49 (discussing the unusual conduct and "attempts at evasion" of slating leader Rabbi Yehuda Oshry, who repeatedly defied subpoenas and appeared to testify only after the district court "found him to be in contempt of court" and ordered him "subject to arrest" (citing AA21, 22-23, 24-25)).

The white slating organization has supported some minority candidates, but the district court found that the organization did so "for appearance's sake." SA67 ¶ 77. Most strikingly, as the district court found, the white slating organization "engineered" the victory of a black candidate during the pendency of this case after the District's trial counsel advised that "it would be good for the case to have a minority to run" for the Board. SA65-66 ¶ 76 (quoting AA170-71 (Tr. 2648:22-2649:3)). The slating organizers also arranged the candidacies of minorities whom they "believed would not stand in the way of what they wanted." SA67 ¶ 77.

The white slating organization's influence extends to the internal operations of the Board, and white members of the Board share information and coordinate among themselves to the exclusion of minority Board members. In 2016, when a vacancy opened up on the Board, the school district clerk's office sent all members of the Board an email containing the resumes of candidates who had submitted their names for appointment. AA246. Board member Yehuda Weissmandl forwarded the email only to the white members of the Board, asking them to "Please respond ASAP as we discussed," and instructing, "One choice." *Id.* As the district court noted below, "[t]he candidate ultimately chosen to fill the vacancy was Joe Chajmovicz, a white person with no relevant experience for the position whose application was riddled with spelling and grammatical errors." SA40 ¶ 48 (citing AA313; AA147-50 (Tr. 1853:16-1856:6)); *see also* SA63 ¶ 73 (noting that

Chajmovicz was selected over a "retired District principal with two master's degrees who is black" (citing AA313, AA314-15)). Sabrina Charles-Pierre, a black Board member appointed at the urging of a state fiscal monitor charged with addressing the District's "educational decline, community rifts, [and] failures of accountability," SA34 ¶ 44 & n.36, testified that she is kept out of important discussions among the members of the Board. SA65 ¶ 75 (citing AA167-68 (Tr. 2626:25-2627:7)); *see also* AA169 (Tr. 2639:14-21) (discussing an email from Board president Harry Grossman in which Grossman wrote approvingly that Charles-Pierre "has zero control or influence"); AA96-97 (Tr. 1264:18-1265:21) (discussing the slating organization's support for Charles-Pierre because she is "not . . . aggressive" and speculating that the Board would "have better control of [her]" than another candidate, described as "the Spanish girl").

The Board has been consistently unresponsive to the concerns of black and Latino voters, which has had ruinous results for black and Latino public school students. Over the course of just a few years, the Board "eliminated hundreds of public school teaching, staff, and administrative positions and eliminated classes and programs." SA71 ¶ 83 (citing AA281-83). Public school buildings "fell into disrepair," while the Board "closed two public schools over minority opposition and tried to sell one of them to a yeshiva at a sweetheart price, a sale the New York State Commissioner of Education annulled." *Id.* (citing AA316-21; AA472-73 ¶¶ 18-20;

AA483 ¶ 19; AA517-18 ¶ 36; AA534-35 ¶¶ 26-27; AA546 ¶ 18). Even as it made these cuts, it actively refused $3.5 million dollars in state funding that "could have been used to restore [public school] programs, but which would have required the District to form an advisory committee including parents and teachers that would direct how the money would be spent." SA71-72 ¶ 83.

All the while, the New York State Education Department found that the Board made "no meaningful effort . . . to distribute [the] pain of deep budget cuts fairly among private and public schools." SA71 ¶ 83 (alterations in original) (quoting AA284). Indeed, the Board not only increased transportation funding for private-school busing, but did so for students who did not exist: the state comptroller recently found that, over the past two years, "the District paid yeshiva private contractors to bus 1,172 more students than were registered, totaling $832,584 in unsubstantiated expenses." SA72 ¶ 83 (citing AA324). And between 2010 and 2012, the District improperly gave "so many special education placements . . . to white children that the state refused to fully reimburse the District." SA71 ¶ 83.

The Board also demonstrated great reluctance to replace the District's superintendent, Joel Klein, whom state monitors criticized for "numerous unfortunate comments" regarding the District's Latino population that "contributed to . . . distrust between the District leadership and the public school community." SA70 ¶ 81 (quoting AA188). In 2014, as the District's graduation rates declined,

Klein attributed the problem to an influx of students from Latin American countries, and noted that the District was "setting up . . . an alternate transitional program" because these students "want to learn the language, they want free lunch, breakfast and whatever else they can get." AA239. Soon thereafter, the New York State Education Department issued a monitoring report noting its "serious concerns" regarding the District's failure to provide the District's large populations of native Spanish and Haitian Creole speakers with the ability to "access the core curriculum . . . necessary for graduation." AA338; *see also id.* AA344-45.

The Board has also taken unusual measures to "delay" and "prevent" public comment at its meetings by restricting public comments to the end of its meetings, and holding "long executive sessions beforehand" that kept the Board's deliberations out of view while forcing public comments late into the night, "when most members of the public had already had to leave." SA69 ¶ 80 (citing AA286; AA565 ¶ 13; AA520 ¶ 44; AA536 ¶ 30). Indeed, the Board even enacted a rule prohibiting Board members from responding to public comments at meetings. *Id.* (citing AA67-68 (Tr. 734:25-735:9)). These measures "stifled public school advocates' ability to articulate concerns and enabled Board members to not respond." *Id.* Privately, white Board members gloated at these frustrations: Board president Harry Grossman texted one member of the slating organization to note that public-school parents "feel disempowered because they are." AA250.

C. Procedural History

Plaintiffs sued the District in November 2017, alleging that the at-large system for electing Board members had diluted their votes and deprived them of "an equal opportunity to have a voice in the future of their community's schools" by "prevent[ing] candidates for the Board preferred by Minority voters from winning even a single contested election in the past decade," in violation of Section 2 of the Voting Rights Act of 1965. A103 ¶ 3. Plaintiffs asked for an injunction barring the District from conducting future Board elections under an at-large system and directing the District to adopt a "ward election system" giving minority voters "an equal opportunity to elect candidates of choice." A104-05 ¶ 7.

Following discovery, the District moved for summary judgment in March 2019. The district court denied that motion from the bench in November 2019. A910:7. At the same time, it considered the District's *Daubert* motion to exclude the testimony of Plaintiffs' expert statistician, Dr. Matthew Barreto, on the grounds that Dr. Barreto's methodology for estimating racial voting patterns in the District was unreliable. *See* A885:10-12. The district court denied that motion after setting out the standard for admission of expert testimony under Federal Rule of Evidence 702. *See* A880:1-A885:9. It thoroughly explained its conclusion that Dr. Barreto's expert opinion was "admissible," A898:5-7, because his underlying methodology was supported by strong "indications of scientific reliability," A893:8-17.

The parties proceeded to a 17-day bench trial that concluded in March 2020. On May 25, the district court issued a 77-page decision and order granting injunctive relief to Plaintiffs. The district court analyzed Plaintiffs' vote-dilution claim under the framework set out in *Gingles*, 478 U.S. at 50-51, and found that Plaintiffs had met all three *Gingles* preconditions for relief under Section 2: Plaintiffs had proven that black and Latino voters were sufficiently numerous and geographically compact to form a political majority in several single-member districts, SA12 ¶ 13, and had shown through the expert testimony of Dr. Barreto that "black and Latino voters are politically cohesive," and that the "white majority votes as a bloc to routinely defeat the minority's preferred candidates." SA32 ¶ 39.

The district court re-reviewed the reliability of Dr. Barreto's statistical methods at great length, and concluded that those methods were reliable. *See* SA17-32 ¶¶ 23-38. Following six days of trial testimony among the parties' dueling experts, the district court also found that the voting analysis produced by the District's statistical expert, Dr. John Alford, suffered from several methodological flaws, and concluded that Dr. Barreto's testimony was more credible than Dr. Alford's testimony. *See* SA27 ¶ 33. And the district court turned away the District's attack on Dr. Barreto's methodology by noting, in part, that Dr. Alford himself had proposed the use of that methodology at an earlier stage of this case. SA18 ¶ 23 (citing AA219-20 ¶ 26).

After determining that Plaintiffs had satisfied the *Gingles* preconditions, the district court assessed the totality of the circumstances, and particularly considered the District's argument that race-neutral "policy preferences best explain divergent voting patterns" in the District. SA47 ¶ 51. The district court found that "the record lacks sufficient credible evidence to support such a conclusion," SA36 ¶ 45, and recounted the important role of the white slating organization in District politics, SA38-43 ¶ 48, as well as the fact that candidates backed by that organization seemed not to have run "on any particular platforms," SA43 ¶ 49. The district court concluded that, "in light of the high racial polarization in voting, the paucity of evidence of policy-driven campaigns, and the identity between race and politics in this community," the "evidence supporting the District's race-neutral explanation for divergent voting patterns is weak." SA46-47 ¶ 51. Having canvassed the record, the district court found that the totality of the circumstances "weigh firmly in Plaintiffs' favor," and that Plaintiffs were "entitled to full relief" under Section 2. SA75 ¶¶ 87-88. It issued an injunction barring any further elections under the at-large system, and directed the District to propose a remedial plan. SA75-76 ¶ 88.

The District sought an emergency stay of the injunction, which the district court denied. In its order denying a stay, the district court noted that the District's motion for a stay "distort[ed] the trial record and attempt[ed] to recast factual findings as legal decisions." AA32-33. After filing a notice of appeal, the District

again sought an emergency stay of the injunction in this Court, which denied the District's motion after finding that the District had "not made a sufficient showing under the traditional stay factors," including, "most critically, the likelihood of success on the merits." ECF No. 50 at 1-2 (citing *Nken v. Holder*, 556 U.S. 418, 433-34 (2009)).

STANDARD OF REVIEW

On appeal from a bench trial, this Court reviews conclusions of law de novo, "while findings of fact are reviewed for clear error." *Atlantic Specialty Ins. Co. v. Coastal Envt'l Grp., Inc.*, 945 F.3d 53, 63 (2d Cir. 2019). A finding of fact is clearly erroneous only if the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *Id.* (citation omitted). And, as explained further below—*see infra* at 42-43—this Court reviews the district court's admission of expert testimony for an abuse of discretion. *See Restivo v. Hessemann*, 846 F.3d 547, 575 (2d Cir. 2017).

In Section 2 cases, the "Supreme Court has made it clear that resolution of the question of vote dilution is a fact intensive enterprise to be undertaken by the district court." *Goosby*, 180 F.3d at 492. Although this Court "see[s] to the proper application of governing legal principles under a *de novo* standard of review," it is "constrained to apply a clearly erroneous standard of review to the district court's ultimate findings of vote dilution." *Id.*

SUMMARY OF ARGUMENT

I. The district court's treatment of Plaintiffs' Section 2 claim faithfully followed the well-established framework for evaluating such claims. The District argues that the district court erred by failing to require that Plaintiffs prove that their exclusion from the political process was attributable to racial animus. That argument runs against the plain text and legislative history of the Section 2 "results" test, which was adopted specifically for the purpose of repudiating a requirement of intentional race discrimination. And consistent with the statutory text and legislative history, the federal courts uniformly recognize that satisfaction of the *Gingles* preconditions gives rise to an inference of racial discrimination, and that plaintiffs need not otherwise prove racial animus in order to prevail on a Section 2 vote dilution claim. At its core, Section 2 protects against the discriminatory *effect* that results from denying racial minorities an equal opportunity to elect candidates of their choice.

The District also advances a subsidiary argument that mere policy differences between the white and nonwhite communities in the District best account for the vote dilution suffered by Plaintiffs. That is a dispute with the district court's findings of fact, and those findings are reviewed for clear error. There was no error here: the district court found, after evaluating an extensive factual record, that there was little to no evidence to support the District's claim that race-neutral policies drove

elections, and it described at length the extent to which there is an "identity between race and politics in this community." SA46 ¶ 51.

II. The District wrongly asserts that the district court failed to weigh the reliability of Dr. Barreto's testimony under Federal Rule of Evidence 702, and argues on that basis that this Court should consider the issue de novo. But the district court thoroughly evaluated the reliability of Dr. Barreto's testimony—both before and after trial—and explained its reasons for admitting that testimony under Rule 702. That decision is reviewed for an abuse of discretion. And there was no abuse of discretion: Dr. Barreto's expert opinion rested on statistical techniques that are well established in the political-science literature, as even the District's experts recognize. Dr. Barreto's opinion testimony was properly admitted.

III. Finally, the District advances a grab bag of arguments challenging the district court's evaluation of the totality of the circumstances in this case. These arguments fail: the district court's application of the key circumstances—the "Senate Factors"—was true to the facts of the case and in keeping with settled precedent. And contrary to the District's arguments, the district court neither neglected to consider other relevant circumstances nor acted improperly in considering the District's bad-faith litigation of this case as a circumstance weighing against it. The totality of the circumstances in this case provide ample support for the district court's ultimate finding of vote dilution.

ARGUMENT

I. THE DISTRICT COURT PROPERLY FOUND THAT MINORITY VOTERS IN THE DISTRICT SUFFER VOTE DILUTION ON ACCOUNT OF RACE

A. Section 2 Claims Must Rest On Objective Indicia Of Exclusion

Section 2 provides a remedy for minority plaintiffs who can prove they were "denied an equal opportunity to participate in the political process and elect candidates of their choice as a result of an electoral practice." *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1006 (2d Cir. 1995). The "basic framework" for a vote dilution claim under Section 2 is well established, and was set forth by the Supreme Court's in *Thornburg v. Gingles*, 478 U.S. 30 (1986). *Goosby v. Town Bd. of the Town of Hempstead*, 180 F.3d 476, 491 (2d Cir. 1999). The *Gingles* Court held that there are three "necessary preconditions" to a finding of unlawful vote dilution in violation of the Voting Rights Act: first that a group of minority voters is "sufficiently large and geographically compact" to constitute a majority in a single member district; second, that the minority voters are "politically cohesive"; and third, that the racial majority "votes sufficiently as a bloc" such that it will usually "defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51.

Proof of those preconditions "is not alone sufficient to make out a Voting Rights Act violation," *Goosby*, 180 F.3d at 492, but it is enough to establish an inference of discrimination on the basis of race, *see Sanchez v. Colorado*, 97 F.3d

1303, 1310 (10th Cir. 1996); *Uno v. City of Holyoke*, 72 F.3d 973, 980-81 (1st Cir. 1995); *Pope v. County of Albany*, 94 F. Supp. 3d 302, 343 (N.D.N.Y. 2015). Once the preconditions are met, the district court must proceed to survey the "totality of the circumstances"—an inquiry that calls for "comprehensive, not limited, canvassing of relevant facts"—to determine whether Section 2's prohibition on racial vote dilution has been violated. *Goosby*, 180 F.3d at 492 (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994)).[2] It "will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 violation under the totality of the circumstances." *City of Niagara Falls*, 65 F.3d at 1019 n.21 (quoting *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1135 (3d Cir. 1993)).

This fact-intensive inquiry—the *Gingles* preconditions, plus the totality of the circumstances—is the test for determining whether minority voters have suffered vote dilution on account of race. *See Goosby*, 180 F.3d at 497; *see also, e.g.*, *Nipper v. Smith*, 39 F.3d 1494, 1523-24 (11th Cir. 1994) (explaining that minority vote dilution must be "somehow tied to race," and that this may be established through

[2] Inquiry into the totality of the circumstances generally focuses on the "Senate Factors" identified in the Senate Judiciary Committee's report on its 1982 amendments to the Voting Rights Act. *See Gingles*, 478 U.S. at 92-93 (O'Connor, J., concurring in the judgment); *Goosby*, 180 F.3d at 492.

"objective factors that, under the totality of the circumstances, show the exclusion of the minority group from meaningful access to the political process").

In considering the totality of the circumstances, courts may examine a defendant's argument that something other than race—for example, partisan affiliation—accounts for racially polarized voting. *Goosby*, 180 F.3d at 493; *see also Lewis v. Alamance Cty.*, 99 F.3d 600, 616 n.12 (4th Cir. 1996); *Uno*, 72 F.3d at 983. But—contrary to the District's argument—courts have consistently emphasized that it is not a plaintiff's burden to preemptively disprove such an argument; rather, it is a question on which the *defendant* has the burden of bringing forth "credible evidence." *Uno*, 72 F.3d at 983. And that consideration is simply one aspect of an analysis that requires an intensive examination of objective facts: Courts must review how an electoral practice "interacts with social . . . conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Goosby*, 180 F.3d at 496 (quoting *Gingles*, 478 U.S. at 47). Such conditions might include: a local "slating process" that controls access to political office, lies outside of the influence of minority voters, and leaves minorities "unable to have any preferred candidate elected" to office, *id.* at 496-97; or, as in this case, a lack of responsiveness to the interests of minority voters, *id.* at 495; or—again, as in this case—the use of other election practices that tend to enhance the opportunity for discrimination, *id.* at 494.

B. The District Seeks To Circumvent The *Gingles* Framework

1. The District's Demand For Proof Of Subjective Racial Animus Has No Basis In Law

The District correctly acknowledges the *Gingles* framework in its brief (at 28), but then takes a detour from settled law by suggesting that, in order to prove a violation of Section 2—that is, to prove discrimination "on account of" race—a plaintiff must prove that "*racial animus is a but-for cause of election results*." District Br. 37. This novel construction runs against the text and legislative history of Section 2, as well as consistent, binding judicial constructions of Section 2 in this Court and the Supreme Court over many decades.

Section 2 protects against voting practices and procedures that "*result*[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). In 1982, Congress adopted that language—and the "results test" set out at 52 U.S.C. § 10301(b)—in a statutory amendment designed to "eliminate the requirement, declared by a plurality of the Supreme Court in *City of Mobile v. Bolden*, 446 U.S. 55, . . . (1980), that plaintiffs in § 2 cases prove that the challenged electoral system was created or maintained for the purpose of discriminating against minorities." *City of Niagara Falls*, 65 F.3d at 1006 (citing *Gingles*, 478 U.S. at 35). As this Court long ago explained, the text and legislative history of the 1982 amendments to Section 2 "made clear that proving such discriminatory intent was not a statutory

requirement. Instead, § 2 plaintiffs could prevail by proving that minorities were denied an equal opportunity to participate in the political process and elect candidates of their choice as a *result* of an electoral practice." *Id.* (citing *Gingles*, 478 U.S. at 43-44) (emphasis added).

The legislative history of Congress's 1982 enactment leaves no ambiguity on this point: Congress amended Section 2 in order to "restore the legal standard that governed voting discrimination cases prior to the Supreme Court's decision in *Bolden*," under which standard it is "not necessary to demonstrate that the challenged election law or procedure was designed or maintained for a discriminatory purpose." S. Rep. No. 97-417, at 15-16 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 192-93. Under the "results test" enacted by Congress, a court must assess an election practice according to "objective factors" rather than through inquiry into "the motivations which lay behind its adoption or maintenance." *Id.* at 27. As the Senate committee report on the amendments noted, an intent requirement would be "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities," and would "'make it necessary to brand individuals as racist in order to obtain judicial relief.'" *Id.* at 33 (quoting statement of Dr. Arthur S. Flemming, Chair, U.S. Commission on Civil Rights). Justice Brennan expressly recognized this legislative history in his plurality opinion in *Gingles*, *see* 478 U.S. at 72-73, and Justice O'Connor's concurrence likewise

recognized that Congress's amendments to Section 2 "abandon[ed]" any required "showing of discriminatory intent," thus refocusing the Section 2 inquiry on objective "'indicia of lack of political power and the denial of fair representation,'" *id.* at 98 (quoting *Davis v. Bandemer*, 478 U.S. 109, 139 (1986) (plurality opinion)).

Consistent with that history, this Court and others have consistently held that plaintiffs need not supply proof of discriminatory intent or subjective animus in order to establish liability under Section 2. *See Niagara Falls*, 65 F.3d at 1006; *see also Chisom v. Roemer*, 501 U.S. 380, 394 (1991) ("[P]roof of intent is no longer required to prove a § 2 violation."); *Veasey v. Abbott*, 830 F.3d 216, 243 (5th Cir. 2016) ("Unlike discrimination claims brought pursuant to the Fourteenth Amendment, Congress has clarified that violations of Section 2(a) can be 'proved by showing discriminatory effect alone.'" (quoting *Gingles*, 478 U.S. at 35)); *Barnett v. City of Chicago*, 141 F.3d 699, 701 (7th Cir. 1998) (Section 2 claim "does not require any showing of intentional discrimination"); *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 594 (9th Cir. 1997) ("Section 2 requires proof only of a discriminatory result, not of discriminatory intent."); *Uno*, 72 F.3d at 982 (noting that "plaintiffs no longer have to prove discriminatory intent"); *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1564 (11th Cir. 1984) ("[D]iscriminatory intent need not be shown to establish a violation.").

The District has not identified a single Section 2 case going the other way. Tellingly, the case it principally cites for its novel construction is a Title VII case. *See* District Br. 30, 37 (citing *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1739-40 (2020)). *Bostock* has nothing to say about the meaning of the Section 2 results test.

The smattering of Section 2 cases that the District cites do not require plaintiffs to establish subjective racial animus, either. The District cites a panel decision from this Court in *Muntaqim v. Coombe*, 366 F.3d 102 (2d Cir. 2004)—subsequently vacated after rehearing en banc—for the proposition that plaintiffs must prove a "subjective intent to discriminate" either on the part of state officials or in the form of a "'race-based motivation on the part of the electorate.'" District Br. 31 (emphasis omitted) (quoting *Muntaqim*, 366 F.3d at 116-18). But Judge Cabranes's panel opinion in *Muntaqim* cited the concurring opinion of Judge Leval in *Goosby* merely for the proposition that Section 2 evinces a "concern for race-based motivation, at least within the electorate." *Muntaqim*, 366 F.3d at 116 (quoting *Goosby*, 180 F.3d at 499 (Leval, J., concurring)). And as Judge Leval explained, his view was that in order to avoid liability the *defendant must prove* that the "defeat of minority preferred candidates is not the result of race-based intent on the part of the governing officials of the electorate," since a plaintiff's proof under the *Gingles* framework "supports an inference that race may have been a motivating factor." *Goosby*, 180 F.3d at 502-03.

Neither Judge Leval's opinion in *Goosby* nor Judge Cabranes's opinion in *Muntaqim* suggest that Section 2 *plaintiffs* have the burden of establishing subjective racial animus on the part of officials or voters. To the contrary: Judge Cabranes noted that the objective "factors listed in the Senate Report" establishing discrimination under a totality of the circumstances "[c]learly . . . would be probative" of discrimination. *Muntaqim*, 366 F.3d at 118 n.17.

The District (at 31-32) leans on the Supreme Court's decisions in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *White v. Regester*, 412 U.S. 755 (1973). Those cases hardly help the District. Neither mentions "animus" as a necessary element of discrimination, and both cases stand for the point merely that "plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation." *Regester*, 412 U.S. at 766 (citing *Whitcomb*, 403 U.S. at 149-50). In amending Section 2, Congress codified that standard while making clear that such burden should be established through "objective factors," rather than through evidence of subjective racism. S. Rep. No. 97-417, at 27 (1982). The *Gingles* preconditions, and the totality-of-the-circumstances inquiry, give effect to that framework.

The District also cites the Fifth Circuit's decision in *LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993), along with a selection of case law from other circuits. *See* District Br. 33 & n.104. But none of those circuits has adopted an animus

requirement, either. In *LULAC*, the Fifth Circuit expressly refrained from holding that Section 2 plaintiffs supply proof of "racial animus in the white electorate." 999 F.2d at 859.[3] Consistent with Section 2's call for an evaluation of the totality of the circumstances, the *LULAC* Court agreed that inquiry into the causes of racial bloc voting must rest upon a "searching," "functional," and "practical" review of the political situation in a given community. *Id.* at 860-61 (citation omitted). And the Fifth Circuit continues to adhere to that standard: As the en banc Fifth Circuit recently explained, violations of Section 2 "can be proved by showing discriminatory effect alone," through reference to the various preconditions and Senate Factors discussed in *Gingles*. *Veasey*, 830 F.3d at 243. This inquiry, the Fifth Circuit emphasized, is highly "fact-dependent." *Id.* at 249 n.41.

Ultimately, the District's argument here is simply an attempt to replace a fact-dependent inquiry into objective discriminatory effect with a subjective inquiry into discriminatory intent: that plaintiffs must prove "a subjective intent to discriminate"

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[3] The other out-of-circuit decisions cited by the District are in accord. *See Salt River Project*, 109 F.3d at 594 ("Section 2 requires proof only of a discriminatory result, not of discriminatory intent."); *Uno*, 72 F.3d at 981 (explaining that proof of the *Gingles* preconditions "create[s] an inference of discrimination" that can be rebutted by the defendant under the totality of the circumstances); *Clarke v. City of Cincinnati*, 40 F.3d 807, 814 & n.4 (6th Cir. 1994) (explaining that the *Gingles* preconditions and the Senate Factors are "probative of a § 2 violation"); *Nipper*, 39 F.3d at 1525 n.64 (noting that a plaintiff's burden is "discharged" once he has "proved the *Gingles* factors"); *Baird v. Consol. City of Indianapolis*, 976 F.2d 357, 360 (7th Cir. 1992) (putting "questions of intentional discrimination to one side" in assessing a Section 2 results claim).

on the part of officials or voters. District Br. 31. Such a test would put Section 2 plaintiffs and district courts in the "unnecessarily divisive" position of "brand[ing]" members of their communities as "racist[s]" as a precondition to establishing liability—precisely the problem Congress sought to avoid in adopting the Section 2 results test. S. Rep. No. 97-417, at 36 (citation omitted). And it runs afoul of decades of consistent precedent in this Court and others holding that a vote dilution claim does not require such proof. *See City of Niagara Falls*, 65 F.3d at 1006; *see also, e.g.*, *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997) (Easterbrook, J.) ("A district [court] judge therefore should not assign to plaintiffs the burden of showing *why* the candidates preferred by black voters lost; it is enough to show *that* they lost . . . ."). The District's argument is simply contrary to settled law.

2. The District Mischaracterizes The Decision Below

The District argues that the district court committed "legal error" by "dismiss[ing]" the "causation inquiry" in this case. District Br. 29 (citing SA34 ¶ 42 n.35). But the district court said merely (and correctly) that "an inference of racial animus is unnecessary" in establishing a Section 2 claim. SA34 ¶ 42 n.35 (citation omitted). The District's argument mistakenly conflates "causation" under Section 2—that is, proof of vote dilution "on account of" race—with proof of racial animus. Proof of racial animus is not an element of a Section 2 results claim.

The district court never disregarded Plaintiffs' need to prove vote dilution "on account of race." Indeed, the district court recited—in the very first paragraph of its opinion—Section 2's prohibition on voting practices that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." SA2 ¶ 1 (quoting 52 U.S.C. § 10301(a)). And it specifically noted that it had to consider "whether, based on the totality of the circumstances, the plaintiffs have proven that the minority group was denied meaningful access to the political system *on account of race*." SA33 ¶ 42 (emphasis added) (quoting *Goosby v. Town Bd. of the Town of Hempstead*, 956 F. Supp. 326, 355 (E.D.N.Y. 1997), *aff'd*, 180 F.3d 476 (2d Cir. 1999)). The district court thoroughly considered the totality of the circumstances here and concluded that the "three *Gingles* factors are met, and the Senate Factors weigh firmly in Plaintiffs' favor." SA75 ¶ 87. Under established precedent, this was enough to prove that Plaintiffs suffered vote dilution on account of race. *See Goosby*, 180 F.3d at 497.

In the course of weighing the totality of the circumstances, the district court also expressly found that the "record lacks sufficient credible evidence to support" a race-neutral explanation for racially polarized voting in the District, SA36 ¶ 45, that "Defendant's attempt to show that policy preferences best explain divergent voting patterns is, on balance, not sufficient to undermine Plaintiffs' strong showing of racial polarization," and that "the District's race-neutral explanation for divergent

voting patterns is weak." SA46-47 ¶ 51.[4] The District contests these findings on appeal, arguing (at 37) that "divergent voting patterns" are "explained best by politics." But that is a *factual* dispute, not a legal one. And, as explained below, the district court's factfinding on this point was entirely correct.

C. The District Court Correctly Rejected The Argument That Mere Policy Differences Account For Minority Vote Dilution

1. Race Plays A Prevailing Role In District Politics

The district court did what it was supposed to do under this Court's binding precedent: as part of its inquiry into the totality of the circumstances, it evaluated the District's argument that race-neutral policy preferences accounted for the pattern of racially polarized voting found in the District. *See Goosby*, 180 F.3d at 493. It rejected that argument at length through detailed findings of fact regarding the particular circumstances of this case. *See* SA33-47 ¶¶ 42-51. Those findings—and

[4] The district court correctly noted, too, that "even if [the District] had provided sufficient evidence" to make a showing that "divergent voting patterns may be explained by a factor other than race, the court must still assess the totality of the circumstances" in determining whether "minority citizens' inability to elect their preferred candidates is best explained by the fact that the political processes leading to the slating and election of candidates are not equally open to them." SA47 ¶ 51 n.43 (citing *Goosby*, 956 F. Supp. at 355); *see also Uno*, 72 F.3d at 983. Thus, the district court found not only that the District had failed to meet its burden of production by failing to provide "sufficient credible evidence" of a race-neutral explanation for voting patterns, SA36 ¶ 45, but also that—even if the District had produced credible evidence—its race-neutral explanation fails to account for Plaintiffs' exclusion from the political process, SA47 ¶ 51 n.43.

the district court's ultimate finding of vote dilution on account of race—are reviewed in this Court for clear error. *Goosby*, 180 F.3d at 492.

At the heart of the district court's findings is the understanding, based on a searching review of extensive evidence, that school governance and politics in the District are inextricably intertwined with race and tightly controlled by a white slating organization that is backed by a white voting bloc. SA46-47 ¶ 51. Plaintiffs' statistical proof of white bloc voting in the District was brigaded with an avalanche of written and testimonial evidence that this white slating organization is real, that it is conscious of its power to control elections, that it is closed to black and Latino voters, and that it is indifferent and unresponsive to the interests of black and Latino voters. In sum, as the district court found, "the white bloc vote holds all the power and controls election outcomes," SA36 ¶ 44, and it exercises that power in ways that compound and magnify "the identity between race and politics in this community." SA46 ¶ 51. The record is filled to the brim with proof of the close relationship between race and school politics in the District.

As the district court found, there is a strong evidence of a pronounced racial dimension to political campaigning in the District, separate and apart from the statistical evidence of bloc voting. *See, e.g.*, SA42-44 ¶¶ 48-49. And that has much to do with the fact that the Board is effectively run by a slating organization that is "tightly controlled by a few white individuals." SA57 ¶ 63. Those individuals

"select[] and approve[] candidates," SA52 ¶ 59, in a process that is neither open nor public, and in which "minorities have no input," SA50 ¶ 57. This slating organization "consistently guarantees election outcomes," SA57 ¶ 63, and the leaders of the organization are not shy about advertising that fact, *see, e.g.*, SA35-36 ¶ 44. There is considerable proof that, through this organization, the Board itself operates along racial lines. *See* SA40 ¶ 48 (noting that white Board members coordinated among themselves, and to the exclusion of minority Board members, regarding the filling of a Board vacancy); SA65 ¶ 75 (finding that a black Board member was kept out of important Board discussions). And there is "ample evidence" that the Board is unresponsive to minority voters more generally. SA68 ¶ 80. These findings all point in the same direction: that school politics in the District are starkly divided along racial lines, and that such division is fostered by a white majority that coordinates to deprive minority voters of political influence.

2. The District's Contrary Arguments Lack Merit

Against all of that evidence, the District continues to insist that the district court's findings were wrong, and that competing race-neutral policy priorities best account for the vote dilution suffered by black and Latino voters in the District. The District makes four points, none of which withstands scrutiny.

First, the District contends (at 40) that the district court's conclusions regarding the connection between race and politics in the District rested solely on

the fact that "students who attend private schools are mostly Orthodox Jews (who are White) and students who attend public schools are mostly Black and Latino."

This argument misreads the district court's opinion. As explained above, the district court's rejection of the District's argument that "policy preferences best explain divergent voting patterns" (SA47 ¶ 51) rested on a wide range of findings, just one of which was the background fact that there is "nearly perfect concordance between race and the populations of public and private schools." SA37 ¶ 46. The district court also noted the "high racial polarization in voting, the paucity of evidence of policy-driven campaigns, and the identity between race and politics in this community." SA46 ¶ 51. In particular, the district court emphasized and discussed the predominant role of the white slating organization in controlling school politics in the District, *see* SA38-43 ¶ 48, and recounted that organization's role in compounding the racial polarization of school politics in the District, *see, e.g.*, SA42 ¶ 48 (noting that "when it comes to running for the school board . . . you're either working with the white community or you're working with the other community" (alteration in original) (quoting AA146 (Tr. 1849:1-4))); SA41 ¶ 48 (noting that white voters "usually supported candidates based on community leaders' endorsement"); SA40 ¶ 48 (noting that white Board members excluded minority Board members in coordinating the selection of a white person to fill a Board vacancy).

The district court further explained that the candidates selected through this white slating organization do not appear to be chosen on the basis of any particular policy platforms: the community leaders who slated private school candidates "did not ask about their policies," and "those candidates did not advocate policies" or otherwise publicly campaign for office. SA43 ¶ 49. In sum, "there is little evidence that the private school candidates ran on any particular platform." *Id.*

Additionally, the district court found that the Board—controlled by a white slating organization—has adopted policies that "negatively affected" public-school students who are "overwhelmingly children of color" (SA46 ¶ 51) while also advancing policies that "almost exclusively benefit white children." SA37-38 ¶ 46; *see Regester*, 412 U.S. at 766-67 (finding, in support of liability, that elections were controlled by a "white-dominated organization" that "did not need the support of the Negro community to win elections in the county and . . . did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community"). As such, it is "difficult, if not impossible, to disentangle race" from the policy priorities of the white voting bloc. SA46 ¶ 51.

In light of that difficulty, and because "the evidence supporting the District's race-neutral explanation for divergent voting patterns is weak," the district court declined to find that "policy preferences best explain divergent voting patterns." SA46-47 ¶ 51. That conclusion flowed from a holistic review of the evidence in this

case, which overwhelmingly showed that race plays a significant role in the District's politics—from the way that candidates are vetted and elected, to the way the Board operates, and ultimately to the policies enacted by that Board. The district court's findings regarding the "identity between race and politics" in the District were entirely correct. SA46 ¶ 51.

Second, the District argues (at 41) that the district court "improperly discounted" the fact that "minority candidates regularly appear on the ballot and win elections." The district court addressed that point at length both in its discussion of Senate Factor 2, *see* SA44-46 ¶ 50, and in its discussion of Senate Factors 4 and 7, *see* SA56 ¶ 61; SA61-67 ¶¶ 71-77. It applied established law in concluding that the "election of a few minority candidates does not necessarily foreclose the possibility of dilution of the [minority] vote," given "the possibility . . . that the majority citizens might evade § 2 by manipulating the election of a safe minority candidate." SA61 ¶ 71 (first alteration in original) (quoting *Gingles*, 478 U.S. at 75). And it found that just such circumstances obtained here, as minority candidates' "victories were arranged for appearance's sake and/or occurred in unusual circumstances." SA67 ¶ 77. The District describes this conclusion (at 42) as a "conspiracy theory" that "has no basis in the facts or the law."

The district court's findings were no conspiracy theory, as the District and its counsel well know. In 2018, during the course of this very litigation, as the district

court recalled, Board president Harry Grossman texted one of the key white-slating organization participants, Hersh Horowitz, to note that he had spoken to "[Defendant's counsel] David Butler today. He asked me to convey message that it would be good for the case to have a [m]inority to run against Sabrina [Charles-Pierre] that [the] community could support." SA54 ¶ 59 (alterations in original) (quoting AA251).[5] Indeed, during the 2019 election cycle, the District carried out Mr. Butler's suggestion by engineering a race between black and Latino candidates and ensuring the election of the black candidate. That strange episode—described in all of its remarkable complexity and cynicism by the district court—illustrates just how cohesively white voters in the District respond to the direction of the white slating organization, and for reasons having nothing to do with policy. *See* SA65-67 ¶ 76. In 2019, the white slating organization hastily arranged for the nomination of Latino candidate, Joselito Cintron, to run against a black candidate, Ashley Leveille, before "pull[ing] its support from Cintron" on election day, so as to "engineer[] the victory of a candidate favored by the public school community over another minority candidate," on the Board's apparent view that "it would be

[5] Elsewhere, Grossman threatened Charles-Pierre: "If there really was any desire by anybody to remove you from the board, all that would need to be done was to run a candidate against you in May. That candidate would have garnered 8,000 votes and you would have lost by 4,000 votes just like the other[s]." SA65 ¶ 75 (quoting AA248). The white majority on the Board evidently felt no need to unseat Charles-Pierre, given Grossman's view that she had "zero control or influence." SA65 ¶ 75 (quoting AA169 (Tr. 2639:14-21)).

desirable to have two minority candidates running against one another." SA66-67 ¶ 76 (citing AA136 (Tr. 1520:18-21)); *see also* AA133-35, 141-42 (Tr. 1515:21-1517:12; 1742:19-1743:1). The district court accurately described Leveille's victory as "at least a 'special circumstance,' if not a naked attempt to manipulate the outcome of this case." SA67 ¶ 76.

In light of that record of manipulation, and other relevant evidence, the district court's finding that "the white slating organization was certainly looking for and supporting [minority] candidates believed to be 'safe'" was well founded. SA62 ¶ 73. The minority candidates who served most prominently on the Board with white voting bloc support—Bernard Charles and Pierre Germain—"had no interest in . . . appealing to any other community because they knew they would win by virtue of the white slating organization's support." SA62 ¶ 73 (citing AA144-45, 95 (Tr. 1847:9-1848:15; 1254:18-21)). A wealth of evidence supported the district court's conclusion that the white slating organization supported Charles and Germain because it believed they "would go along with the white community's wishes." SA63 ¶ 73. The success of these minority candidates is not a sign that non-white voters in the District have any real voice in the political process; rather, these candidates' success is just another sign of the white slating organization's ultimate control over that process.

Third, the District criticizes (at 44-45) as "bizarre" the district court's reasoning respecting the "credibility problems" of the District's witnesses, who asserted that the political divide in the District could be chalked up to straightforward policy differences between the white community and racial minorities. There is nothing bizarre about it: as the district court explained, the testimony of Board president Grossman and other "white witnesses associated with the private school community were not credible in their claimed lack of knowledge of the slating process, and the sometimes absurd lengths to which they went to feign ignorance suggests their understanding of how that process excludes blacks and Latinos." SA53 ¶ 59 n.50; *see also* SA39 ¶ 48 (describing Grossman as "one of the more incredible witnesses I have encountered"); *see generally* SA38-43 ¶ 48. A majority faction driven by simple policy interests would not have "engineered the victory of a candidate favored by the public school community over another minority candidate," SA67 ¶ 76, or shut out even those minorities aligned with that faction from key political decisions, *see* SA40 ¶ 48 (describing coordination only among white Board members regarding the filling of a Board vacancy).

The District's witnesses were at pains to deny the existence of a white slating organization precisely because the practices of that organization deeply undercut the District's race-neutral explanation for racially polarized voting. The fact that there are material divergences of interest between white voters and non-white voters in

the District does not change the fact that the District's politics substantially reflect the efforts of "a few white individuals" to "guarantee[] election outcomes" to the detriment and exclusion of black and Latino voters. SA57 ¶ 63. And it is exactly that kind of racial lockout from the political process that Section 2 expressly forbids. *See* 52 U.S.C. § 10301(b) (proscribing practices that leave minorities with "less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice"); *Goosby*, 180 F.3d at 496-97.

Finally, the District warns (at 48) that, "[t]aken to its logical conclusion, . . . the district court's reasoning would transform Section 2 into a political cudgel against political conservatives . . . who favor reducing public spending and taxes."

This argument does not wash. Liability under Section 2 depends on proof of the *Gingles* preconditions and the totality of the circumstances, and that multifaceted inquiry is designed to smoke out patterns of invidious discrimination on the basis of race. That inquiry did its job here: the district court made extensive findings regarding deeply unusual patterns of white-voting-bloc control and exclusion that are difficult to square with the District's race-neutral explanations for the lockout of minority voters in the District. The decision below is not a license for roving scrutiny of low-tax policy platforms. The district court's decision flowed simply from factfinding concerning the particular circumstances of this school district. SA37-38 ¶¶ 46-47. Those well-grounded findings of fact should be affirmed.

II. THE DISTRICT COURT PROPERLY FOUND THAT PLAINTIFFS' STATISTICAL EVIDENCE OF RACIALLY POLARIZED VOTING WAS RELIABLE AND CREDIBLE

The District also contests the district court's findings of fact with respect to the second and third *Gingles* preconditions—that is, that black and Latino voters vote cohesively, and that "the white majority votes as a bloc to routinely defeat the minority's preferred candidates," SA32 ¶ 39—by arguing that the district court erred in admitting the testimony of Plaintiffs' statistical expert, Dr. Matthew Barreto.

The District's argument on this front is twofold. First, it contends that the district court failed to consider whether Dr. Barreto's testimony was reliable, and asserts that Dr. Barreto's testimony should have been barred under Federal Rule of Evidence 702. Second, it argues that the district court erred by crediting Dr. Barreto's testimony rather than the testimony of the District's statistical expert, Dr. John Alford. It speculates (at 57) that in doing so the district court's decision allowed Dr. Barreto to "single-handedly revolutionize[] how Section 2 cases will now be litigated."

These arguments rest on mistaken premises. First, the district court thoroughly evaluated the reliability of Dr. Barreto's testimony and the methodological approach underlying that testimony—both before and after trial. The district court correctly concluded that Dr. Barreto's testimony was reliable, and that conclusion is entitled to a high degree of deference on review in this Court.

Second, the district court did not make any universal determinations about the reliability of the method relied upon by Dr. Barreto—Bayesian Improved Statistical Geocoding (BISG)—to estimate voters' race, as against the method relied upon by Dr. Alford—citizen voting age population (CVAP) estimates drawn from the U.S. Census's American Community Survey. Rather, the district court found that Dr. Barreto's analysis was more reliable in this case given the particular conditions of the District, the limitations of CVAP estimates identified by Dr. Alford himself, and particular shortcomings in Dr. Alford's CVAP analysis. These determinations too were entirely correct, and are entitled to deferential review here.

A. The District Court Did Not Abuse Its Discretion In Admitting Dr. Barreto's Expert Testimony

1. Standard Of Review

This Court reviews a district court's admission of expert testimony for an abuse of discretion. *See Restivo v. Hessemann*, 846 F.3d 547, 575 (2d Cir. 2017). "[T]his is a highly deferential standard, and 'a ruling on the admissibility of expert testimony "is to be sustained unless manifestly erroneous."'" *Id.* (citation omitted). Furthermore, this standard "applies as much to the trial court's decisions about *how to determine reliability* as to its ultimate conclusion." *Id.* (quoting *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 265 (2d Cir. 2002)). The district court thus has "broad discretion in determining what . . . is appropriate for evaluating reliability under the circumstances of each case." *Amorgianos*, 303 F.3d at 265.

The District (at 54) presses for a de novo standard, citing *Metavante Corp. v. Emigrant Savings Bank*, 619 F.3d 748, 760 (7th Cir. 2010). That case is inapposite. In *Metavante*, the Seventh Circuit reviewed the admissibility question de novo because the district court had provided no reasoned explanation for admitting expert testimony or treating it as reliable: the district court said only that it found "nothing in [the expert's] opinions to run afoul of either Rule 702 or notice requirements to opposing counsel." *Id.*

The District's suggestion that the district court made no reliability findings here simply ignores both the district court's lengthy pre-trial oral decision on the District's *Daubert* motion and the detailed reliability findings in its post-trial findings of fact. *See* A879:22-904:12; SA13-32 ¶¶ 17-38. In its pretrial *Daubert* decision, the district court discussed the standard for admissibility under Rule 702 at length, *see* A880:1-885:9, and reached the conclusion that "Plaintiffs have made a sufficient showing that I should hear [Dr. Barreto's] testimony." A893:15-17. Considering the same arguments the District now raises, the district court found "the District's arguments to be unavailing" and concluded that Dr. Barreto's opinions were "admissible." A898:5-7. In its post-trial order, the district court set out additional findings supporting its conclusion that Dr. Barreto's testimony was "credible and reliable." SA30 ¶ 35; *see also* SA13-30 ¶¶ 17-35. That conclusion is reviewed for an abuse of discretion. *See Restivo*, 846 F.3d at 575.

2. Dr. Barreto's Expert Testimony Was Reliable

The District's argument regarding the reliability of Dr. Barreto's expert testimony attacks the primary methodology—Bayesian Improved Surname Geocoding—that Dr. Barreto used to estimate the race of voters in the District.

As the District correctly explains, in jurisdictions (like the District) where voters do not report their race, the parties to a Section 2 case must *estimate* voters' race—and their voting patterns by race—using statistical analysis. District Br. 49. Such analysis is done using "statistical models that '. . . draw an inference regarding how groups voted using aggregate ecological data.'" SA15 ¶ 19 (citation omitted). These "ecological inference" (or "EI") models require an "input"—that is, a calculation of voters' race for purposes of estimating those voters' choices by race. SA15-16 ¶¶ 19-20.[6]

In this case, Dr. Barreto's "input"—his estimates of voters' race—rested on Bayesian Improved Surname Geocoding (BISG), which is a well-established, peer-reviewed statistical tool for estimating the racial composition of voters at the precinct level, and is widely used to estimate the racial composition of populations in a variety of other contexts. BISG is a particularly valuable tool in voting-rights cases because it enables political scientists like Dr. Barreto to analyze the voting patterns

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[6] The widely used EI models involved in this case were "King's EI," and "RxC." *See* SA15 ¶ 19. Both models showed that voting in the District is highly racially polarized. *See* SA21 ¶ 27 tbl.2.

of *actual voters* using the names and residential addresses of the people who cast ballots in a given election.[7] BISG combines surname analysis (computed probabilities regarding a voter's race based on Census data about the prevalence of that voter's surname among racial groups) with "geocoding" (information about the racial composition of the voter's Census block, derived from the voter's address) to generate probability estimates of a given voter's race. *See* AA44-46 (Tr. 168:9-170:10). BISG then aggregates those probabilities at the precinct level to derive information about the racial composition of voters in a given electoral precinct. *See* AA48 (Tr. 186:8-10); AA352 ¶ 7 n.2.

To perform his BISG analysis, Dr. Barreto used a statistical computer-code package named WRU (short for "Who Are You") developed by two political scientists, Kosuke Imai and Kabir Khanna, and validated on millions of voters at the precinct level, to analyze the District's voter-file information. *See* AA352 ¶ 7; AA413 ¶ 19 & n.13. Next—having obtained those BISG estimates—Dr. Barreto and his colleague, Dr. Loren Collingwood, ran ecological inference analyses to

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[7] The Citizen Voting Age Population (CVAP) estimates used by the District's expert, Dr. Alford, rely on census block group-level race estimates of racial composition drawn from the U.S. Census's American Community Survey. *See* SA24-25 ¶¶ 31-32. CVAP estimates, as the name suggests, are a measure of the racial composition of the population of *eligible voters* who live in an election precinct—as opposed to the racial composition of the *people who actually voted* at that precinct. As such, CVAP estimates must be supplemented with estimates of voter turnout to account for differences in rates of voter turnout among different voting groups. SA25 ¶ 33.

estimate the aggregate voting choices of white, black, and Latino voters in District elections. *See* AA352-55 ¶¶ 7-13. Those analyses consistently showed that "blacks and Latinos voted cohesively within each minority group and across the two minority groups for the candidates who lost each election," and that "whites voted in a bloc in favor of the winning candidate in each election." AA355 ¶ 14.

The District, running through the *Daubert* factors in its brief, argues that Dr. Barreto's BISG analysis was unreliable. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593-94 (1993). That argument fails at each step for reasons that the district court has already addressed.

a) Dr. Barreto's Analysis Is Replicable

The District argues (at 57) that Dr. Barreto's analysis "cannot be tested," and goes further (at 56) by accusing Dr. Barreto of covering up and "destroy[ing]" his data. The district court rejected these assertions, and justly so. As Dr. Barreto explained at trial, he "produced all of the scripts [i.e., computer code] that [he and Dr. Collingwood] used to calculate [their] analysis," and thus gave the District's experts "everything they needed to run [a] replication" of his results. AA52 (Tr. 234:9-22). Dr. Barreto further explained, "we turned over everything that we ran and we detailed how the script could be used to generate [the] race estimates" derived through the BISG calculations. AA54 (Tr. 237:5-7). The District (at 55-56) reprises its trial argument that, "[a]t some point, Dr. Barreto presumably had a

spreadsheet . . . [containing] individual-level racial probabilities," and argues that Dr. Barreto did not "preserve" these presumed materials. Dr. Barreto explained at trial that this is simply untrue: there was no "interim printout of BISG race estimates" for individuals in the District; rather, those estimates were generated internally within the WRU program as an interim input to the ecological-inference models in a "continuous [computing] process" that delivered the final voting estimates by race. AA53-55 (Tr. 236:16-238:7).

Because Dr. Barreto provided the computer code that was used to deliver those results, the District's experts could have used that same code on the same underlying voter-file data to test Dr. Barreto's results. Indeed, one of the District's experts, Dr. Stevenson, testified that he successfully ran some of those voter data through Dr. Barreto's computer code, "but was never asked [by either the District or Dr. Alford] to complete" his analysis. A896:25-897:3 (citing AA15-17).[8] And, as the district court noted, Dr. Alford also "admitted that he could have independently run the analysis." A897:4-7 (citing AA6). Given that "two of the District's experts evidently could replicate" Dr. Barreto's analysis, the district court concluded that

[8] After Dr. Stevenson's deposition, the District produced a spreadsheet in which Dr. Stevenson had calculated voter turnout by race using Dr. Barreto's BISG scripts and compared it to voter turnout by race generated by CVAP. Dr. Stevenson's results showed that CVAP was dramatically overestimating black and Latino voter turnout relative to BISG, exactly as Dr. Barreto and Dr. Alford had both predicted. *See* SA26 ¶ 33 n.28; *id.* at ¶ 34.

the District had not "shown that the BISG analysis is not replicable." A897:8-14; *see also* SA31-32 ¶ 38. The District's warmed-over argument about replicability in this Court does not engage with the district court's conclusion, much less offer any reason why that conclusion was wrong. The District's experts could have replicated Dr. Barreto's analysis. They chose not to do so.[9]

b) Dr. Barreto Used A Peer-Reviewed Methodology

BISG is well-established in peer-reviewed academic literature and, as the district court found, "has been extensively validated by experts." SA17 ¶ 23. As discussed above, *see supra* at 45, the computer code that Dr. Barreto used to perform his BISG analysis was developed by political scientists Kosuke Imai and Kabir Khanna, who published a study discussing their underlying methodology in one of the leading peer-reviewed journals in their field, *Political Analysis*, in 2016. *See* A1366-75. Imai and Khanna, testing the results of their methodology against empirical data on voter race in Florida, found that their method "provides accurate individual-level predictions [of voter race] and significantly improves the estimation of aggregate-level turnout for each racial group relative to the standard ecological

[9] Under the heading of replication, the District also offers up a scattershot set of arguments having nothing to do with either replication or BISG. *See* District Br. 59-61 (discussing the reliability of Dr. Barreto's efforts to confirm the results of his BISG-based analysis through ecological inference analyses using CVAP estimates of voter race). Even if these arguments had any purchase—and they do not—they would cast no doubt on the reliability of Dr. Barreto's BISG analysis.

inference methods." A1374. They concluded that their methodology would "enable[] academic researchers and litigators to conduct more reliable ecological inference in states where registered voters are not asked to report their race." *Id.*; *see also* SA16 ¶ 20 & n.18 (discussing Imai and Khanna).

The district court also recognized that BISG methods have long been used and validated "in the political science context and in a variety of other disciplines," and that numerous political-science articles on BISG estimates have been "peer reviewed and published in leading journals." SA17-19 ¶ 23 (citing, among others, AA222-36; A1376-81; AA572-91; A1382-97). And, as the district court noted, Dr. Barreto himself has used surname and geocoding analysis on voter files since around 2003, SA17 ¶ 23 (citing AA46 (Tr. 170:16-23)), and in this case "applied BISG in the manner proposed in the academic literature." SA19 ¶ 24.

The District contends that none of this matters because BISG has not been used for "small, localized populations." District Br. 62 (emphasis omitted). That argument is not true, and it rests on the point that the *validation* studies cited by Plaintiffs, such as the Imai and Khanna study, tested the reliability of BISG methods against large populations. But the whole purpose of large methodological validation studies, such as that undertaken by Imai and Khanna in Florida, is to verify that a method can be used "across a variety of geographic locations," AA51 (Tr. 201:17-18), so that the basic accuracy of the method need not be tested in every instance of

its application. And the district court explained why the application of BISG is particularly apt in the District: "BISG models work best" in communities like East Ramapo that are highly segregated, "'where there's more differentiation between names and more differentiation between racial populations of neighborhoods." SA19 ¶ 25 (quoting AA51 (Tr. 201:18-24)). In addition, as the district court noted, "Imai and Khanna's validation in particular supports the use of BISG in the District because Florida and the District have similar demographics, including large Latino, Haitian, and Hasidic populations." SA18 ¶ 23 n.20 (citing AA50 (Tr. 194:4-11). The District has never presented any countervailing academic research or statistical evidence suggesting that BISG is unsuited to the District's population.

Besides, as the district court also noted, BISG *is* used by political scientists to estimate voter race among small, localized populations: voting precincts. *See, e.g.*, SA18 ¶ 23 (citing AA576-77, 584 (peer-reviewed, BISG-based ecological-inference analysis of precinct-level voting patterns)). And Imai and Khanna's validation study tested their method "against true precinct-level and district-level turnout" in Florida. A1373. Dr. Barreto's use of precinct-level BISG estimates was neither unusual nor unreliable, and the district court correctly concluded that Dr. Barreto "applied BISG the way political scientists use it: to generate probabilities, aggregate them to the precinct level, and use those estimates as the input for [ecological inference]" analysis of racial voting patterns. SA30 ¶ 36.

The District also tries to distance itself from the academic work of its own witness, Dr. Peter Morrison, who published a 2017 article entitled "From Legal Theory to Practical Application: A How-To For Performing Vote Dilution Analyses." A1264-81. In that article, Dr. Morrison cited Imai and Khanna—the very study relied upon by Dr. Barreto—for the proposition that courts could use BISG estimates to derive the racial composition of "a geographic unit such as a voting precinct." A1276 n.21; *see also* AA40-41 (Tr. 86:6-87:15). And that, of course, is "exactly what Dr. Barreto did" here, using Imai and Khanna's own computer code. SA30 ¶ 36 n.33. The District's efforts to paint Dr. Barreto's work as somehow inconsistent with the academic literature on BISG are in vain.

c) BISG Estimates Are Highly Accurate

Daubert instructs that courts "ordinarily should consider the known or potential rate of error" associated with a particular scientific technique. 509 U.S. at 594. The district court did that here, noting that according to one RAND Corporation study (co-authored by Dr. Morrison), "the probability that self-reported race matched with a BISG race estimate (that is, 'concordance') was 95% for Hispanics and 93% for blacks and whites." SA17 ¶ 23 (citing AA223, AA231); *see also id.* (citing A1377) (noting that another RAND study found that "BISG can produce estimates of racial disparities within populations with a concordance of 90 to 96%");

see also A897:17-898:7 (rejecting the District's *Daubert* argument on this point). BISG is a widely used statistical tool because it is highly accurate.

The District does not try to contest the point that BISG estimates generally provide an accurate picture of the racial composition of a given population. Instead, it argues (at 64) that the district court erred in accepting *Dr. Barreto's* BISG estimates because Dr. Barreto "did not calculate error rates when using BISG." But the district court already explained that error rates are "baked into" the BISG model that Dr. Barreto used: when that model "spits out estimates," it does so in the form of *probabilities* that take potential error into account: an individual might be treated, for instance, as ".83 White," ".07 Black and .05 Hispanic." SA29 ¶ 35 n.32 (quoting AA137 (Tr. 1580:6-11)). Thus, contrary to the District's argument (at 65), the "inherent error" in BISG estimation is "incorporated into [Dr. Barreto's] voter preference estimates."

The District concedes this point and acknowledges that this is how the model works at the level of the individual voter, but argues (at 64) that Dr. Barreto still "needed 'race predictions' for the entire electorate." That does not make sense: Dr. Barreto's model simply aggregated individual racial probabilities at the precinct level, which is all that he required to perform an analysis of how actual voters were voting in the District; it did not generate a separate "race prediction" for the entire electorate because no such prediction was necessary. *See* AA56 (Tr. 239:5-14).

Dr. Barreto's explanation of his BISG analysis tracks exactly with the peer-reviewed academic literature on BISG, including articles published by the District's expert, Dr. Morrison. SA19 ¶ 24. Dr. Barreto's methodological approach is also consistent with the methodological approach of Dr. Lisa Handley, who provided expert BISG testimony on behalf of the United States in a recent voting-rights case in the Eastern District of Michigan. *See United States v. City of Eastpointe*, 378 F. Supp. 3d 589, 597-600 (E.D. Mich. 2019) (describing Handley analysis and competing analysis of Dr. John Alford). And the district court in that case denied a motion to exclude Dr. Handley's analysis, finding that she had "provided sufficient facts and data to support of the reliability of BISG . . . and to show that it was applied in a reliable manner." *Id.* at 613. Moreover, as the district court noted, Dr. Barreto "validated his [BISG] analysis using other methodologies to see if the data all stack up and point in the same direction, and each method supported his conclusions." *See* SA22 ¶ 28 (internal quotations and citations omitted) (finding that Dr. Barreto validated his BISG results by using five other methodologies).

Ultimately, the District's demand for a *case-specific* "error rate" is an argument for a rule that would render useless any statistical estimation of voter race. Deriving such an error rate would require comparing the aggregate race estimates generated by WRU to the aggregate self-reported race of the voters in the District (data that does would have to be empirically collected through surveys). Thus, the

District implicitly argues that a validated, generally accepted methodology cannot pass *Daubert* unless a new, bespoke validation study (i.e., one verifying the actual race of all of the voters in a given jurisdiction) is performed on that methodology in every case in which it is used. And that would make estimates of voter race beside the point: the statistical estimation would have no independent value if the litigant had to collect the empirical data on voter race anyway. *Daubert* does not require this belt-and-suspenders approach.

In any event, the District's argument does not succeed in rebutting (or even addressing) the district court's finding that BISG is a generally accurate method of estimating voter race. *See* A897:17-A898:7. That finding should be upheld.

d) Dr. Barreto's Methodology Is Generally Accepted

The foregoing discussion illustrates that the BISG methodology used by Dr. Barreto has found "general acceptance" within the political science community. *Daubert*, 509 U.S. at 594. The District's contrary argument (at 66) that the district court was "constrained to agree" that "what Dr. Barreto did is novel" is a remarkable mischaracterization of the district court's opinion. To the contrary, the district court recognized that BISG is well established in academia and known to the federal courts: It "has been endorsed by respected social scientists in leading publications," and "[a]t least one other court has found such evidence reliable enough to be

admitted in a bench trial involving a Section 2 challenge to an at-large voting system." SA32 ¶ 39 (citing *City of Eastpointe*, 378 F. Supp. 3d at 612-13).

Moreover, BISG has found acceptance even among the District's expert witnesses. As noted above, District witness Dr. Morrison suggested just a few years ago that courts could use BISG estimates in voting-rights litigation. *See* A1276 n.21. And Dr. Alford proposed at an early stage of this litigation that the flaws inherent in CVAP race estimates could be fixed through the use of "estimated voter turnout by race using surnames and voter sign-in records." AA219-20 ¶ 26 & n.17 (citing Imai and Khanna). Those experts' previous positions on this issue further confirm what the district court found here: that the methodology used by Dr. Barreto is a "strong and reliable method for estimating voter preference, minority-group cohesion, bloc voting, and racial polarization." SA32 ¶ 39. That thoroughly reasoned conclusion was not an abuse of discretion.

B. The District Court Did Not Abuse Its Discretion In Crediting Dr. Barreto's Testimony Over Dr. Alford's Testimony

After rehashing its various *Daubert* arguments at some length, the District turns its attention (at 67-69) to an almost perfunctory argument that the district court erred in crediting Dr. Barreto's testimony over the testimony of the District's statistical expert, Dr. Alford. This issue, too, is reviewed for an abuse of discretion. *See Pope v. County of Albany*, 687 F.3d 565, 581 (2d Cir. 2012).

The District argues (at 67) that the district court's reasons for crediting Dr. Barreto's testimony over Dr. Alford's, if allowed to stand, "would preclude ever using CVAP again." The premise of the District's argument (at 53) is that the district court treated CVAP-based statistical analyses as categorically "inappropriate" in all times and all places. That argument is, as the district court recognized, a gross mischaracterization of the district court's analysis, which rested particularly on the finding that, in view of specific shortcomings in Dr. Alford's analysis, "Dr. Alford's conclusions . . . are not as reliable as Dr. Barreto's conclusions," SA27 ¶ 33. The District fails to address the district court's reasoning on these points, and even a cursory examination of the district court's findings shows that the implications of those findings are much less sweeping than the District would suggest.

As the district court noted, one principal difficulty of CVAP analysis (unlike BISG analysis) is that it has an inherent tendency to overestimate minority voter turnout. *See* SA25-26 ¶ 33 & n.28. Dr. Alford himself recognized that the "problems associated with using CVAP as a proxy for turnout are well recognized in the literature." AA219 ¶ 25. He expressly acknowledged that "CVAP was not 'a good data set'" for analyzing racial voting patterns "because it did not use 'the number of *actual voters* from each racial group.'" SA27 ¶34 (quoting AA212 ¶24). And he explained that the use of CVAP estimates—without some kind of modeling adjustment for differing rates of turnout among voters of different races—tends to

produce faulty results by "assum[ing], without justification, that racial groups vote in proportion to their size." AA212 ¶ 24. Indeed, Dr. Alford acknowledged that "[t]ypically, Black and Latino populations have significantly lower turnout than White voters." *Id*. In other words, using CVAP instead of BISG would overestimate the number of black and Latino voters by precinct and underestimate the true amount of racially polarized voting.

Yet, as the district court found, Dr. Alford did nothing in this case to "properly account[]" for that turnout problem in his CVAP estimates. SA27 ¶ 33. As Dr. Barreto explained, Dr. Alford could have accounted for turnout either by using a "double-equation approach"[10] in one of his ecological-inference analyses (the King's EI analysis), or else by building a voter-turnout model into the computer script for his RxC ecological-inference analysis. *See* AA173, 176-78 (Tr. 2708:16-24, 2714:2-2716:1); *see also* SA25-26 ¶ 33. But Dr. Alford did not do either of these things, *see* AA175, 178 (Tr. 2711:3-7, 2716:6-16), and the district court found that Dr. Alford made no "separate calculation" for turnout, SA27 ¶ 33. It was for "these reasons" that the district court found that Dr. Alford's analysis was "not as reliable"

[10] This approach involves the calculation of two separate regressions. The first is "an analysis of turnout, where turnout is the dependent variable." AA173 (Tr. 2708:19-21). Once the results of that regression are calculated, they are used to "adjust[] the race variable before the ecological inference estimates are done." *Id.* (Tr. 2708:21-23).

as Dr. Barreto's analysis. *Id.* The District does not even dispute that finding, much less explain how it amounted to an abuse of discretion.

Nor does the District dispute other findings regarding the relative credibility of Dr. Alford and Dr. Barreto. The district court found that Dr. Barreto "has published extensively and recently on voting, race, and statistical methods," and is "at the leading edge of political science and statistical analysis with respect to racially polarized voting and voting estimates." SA14 ¶ 17. With respect to Dr. Alford, the district court noted that he "has not published a paper on racially polarized voting," and "is not . . . an expert in the area of race and ethnicity politics." *Id.* ¶ 18. The district court found that Dr. Alford's testimony, "while sincere, did not reflect current established scholarship and methods." *Id.* In light of those unrebutted findings, as well as the district court's unrebutted findings regarding the reliability of Dr. Barreto's testimony and the shortcomings of Dr. Alford's analysis, the district court's credibility determination should be affirmed.

III. THE DISTRICT COURT DID NOT MISAPPLY THE TOTALITY-OF-THE-CIRCUMSTANCES INQUIRY

The District finally argues (at 69) that the district court "misapplied or simply rewrote the Senate Factors" and otherwise failed to properly consider the full totality of the circumstances in this case. But the district court did not rewrite any of the Senate Factors; the District's arguments reflect simple disagreement regarding the district court's findings of fact, and most of these arguments overlap with points that

have already been discussed above. *See supra* at 33-40. The district court's individual findings, as well as its ultimate conclusion regarding the totality of the circumstances, are reviewed for clear error. *See Atlantic Specialty Ins. Co.*, 945 F.3d at 63; *Goosby*, 180 F.3d at 492.

A. The District Court Correctly Applied The Senate Factors

The District (at 70-71) first rehashes earlier arguments that Plaintiffs failed to prove racially-polarized voting (Senate Factor 2) and "erroneously discounted" the success of minority candidates for the Board (Senate Factor 7) by "misusing" the "safe candidate" doctrine. But the statistical evidence of racially polarized voting in this case (Senate Factor 2) was reliable and convincing, *see supra* Section II, and showed that in *every* contested election between 2013 and 2018, the white community in the District voted as a bloc for the winning candidate, and black and Latino candidates voted consistently for the losing candidate. *See* SA21 ¶ 27 & tbl.2. That evidence was also supplemented by extensive anecdotal evidence of racially polarized voting. *See, e.g.*, SA24 ¶ 29; SA43-44 ¶ 49. And for the reasons already set out above, *see supra* at 33-40, the district court correctly found that "the District's race-neutral explanation for divergent voting patterns is weak." SA46-47 ¶ 51.

Regarding Senate Factor 7, as discussed above, the district court simply applied settled law that discounts the election of racial minorities where the minority candidates who are elected are not supported by minority voters, and there is

evidence that the majority is "manipulating" the election of minority candidates for its own ends, *Goosby*, 956 F. Supp. at 344 (quoting S. Rep. No. 97-417, at 29 n.115 (1982)); *see also Gingles*, 478 U.S. at 75; *Goosby*, 180 F.3d at 496; *Zimmer v. McKeithen*, 485 F.2d 1297, 1307 (5th Cir. 1973) (noting that white politicians might support minority candidates for political "expedien[cy]" or in order to "thwart successful challenges to electoral schemes on dilution grounds").

The district court in *Goosby* applied that principle in considering Senate Factor 7, *see* 956 F. Supp. at 343-44, and this Court affirmed that analysis, *see* 180 F.3d at 496-97. And the evidence of manipulation is far stronger here than in *Goosby*. In *Goosby*, the evidence of manipulation was simply that the local slating operation had appointed (and then seen to the election of) a black candidate who subsequently proved unresponsive to the concerns of black constituents. *See* 180 F.3d at 495; 956 F. Supp. at 344-46. Here there is direct—and startling—evidence of electoral manipulation on the part of the white slating organization. *See, e.g.*, SA65-66 ¶ 76 (recounting that trial counsel instructed the District to manipulate the election of a minority candidate); SA67 ¶ 76 (noting the use of the slating process to "have two minority candidates running against one another," and describing a black candidate's victory as a "naked attempt to manipulate the outcome of this case"). Under these highly unusual circumstances, the district court correctly concluded that Senate Factor 7 does not weigh in the District's favor.

The District also asserts (at 71-77) that the district court erred when it held that the Senate Factor 4 inquiry "is not limited to whether minorities can get on the ballot, but whether minorities have any 'substantial input into the slating process.'" SA50 ¶ 56 (quoting *Harper v. City of Chicago Heights*, Nos. 87 C 5112, 88 C 9800, 1997 WL 102543, at *9 (N.D. Ill. Mar. 5, 1997)). In the District's view, Senate Factor 4 is limited to the question whether "minority candidates regularly appear on the ballot." District Br. 72. That is wrong. Senate Factor 4 asks, "if there is a candidate slating process, whether the members of the minority group have been denied access to that process." S. Rep. No. 97-417, at 29 (1982).

This factor—like the other Senate Factors—was derived from the Supreme Court's decision in *Regester*, *see id.* at 28 & n.118, and the Court's decision in *Regester* shows that it was as much concerned with minority voters' ability to influence the slating process as it was with whether minority candidates were able to get on the ballot. In *Regester*, the Court took special note of the fact that the slating organization in question was "white-dominated," had "effective control of Democratic Party candidate slating in Dallas County," and "did not need the support of the Negro community to win elections." 412 U.S. at 766-67. What mattered to the district court and the Supreme Court in *Regester* was that "the black community has been effectively excluded from participation in the Democratic primary *selection process*." *Id.* at 767 (emphasis added) (quoting *Graves v. Barnes*, 343 F. Supp. 704,

726 (W.D. Tex. 1972), *aff'd in part, rev'd in part sub nom. White v. Regester*, 412 U.S. 755 (1973)). Minority voters in this case likewise "have no input into [the slating] process." SA50 ¶ 57.

The District contests the district court's factfinding on this point, arguing (at 75) that Bernard Charles, a black candidate affiliated with the white slating organization, "chose his running mates" for the private-school slate. But that is a stretch, since the record is clear that any of Charles's proposed running mates had to be "interviewed and vetted" by white slating officials before being put on the ballot. SA51 ¶ 57. The district court did not err in finding that it is the "[i]nfluential members of the white . . . community" who ultimately control the slating process that selects winning candidates in the District. SA50 ¶ 57.

Next, the District argues (at 77) that the district court's findings on Senate Factor 9—which asks broadly "whether the policy underlying the . . . [contested] practice or procedure is tenuous," SA73 ¶ 85 (citation omitted)—were improper because they were based on "extra-record evidence." Here, the district court correctly found that, although the policy origins of at-large voting in the District are not tenuous, the evidence favored a finding that the rationale for *maintaining* that voting system in this case *is* tenuous because the District "went to extraordinary lengths" to avoid cooperation with these proceedings: One member of the slating organization "went so far as to go into contempt of court" in an attempt to avoid

testifying at trial; members of the Board "outright lied or disingenuously claimed lack of memory" on the stand at trial; and the "Board President and others failed to provide the Board's members of color with complete or accurate information about this lawsuit, including settlement possibilities that could have saved enormous amounts of money." SA74 ¶ 86. In sum, the district court's finding was that the District litigated this case in a "disturbing" and bad-faith manner that "suggests bad motives for adhering to the challenged voting practice." SA74 ¶ 86 n.62.

The District does not even contest these findings of bad faith. Rather, it argues (at 78-79) that the district court's use of evidence regarding settlement negotiations violated Federal Rule of Evidence 408. But Rule 408 permits courts to consider evidence regarding settlement negotiations for the purpose of proving a party's "bad faith" or "intent," or for proving "a wrong that is committed during the course of settlement negotiations." Fed. R. Evid. 408 advisory committee's notes to 2006 amendment (citing *Athey v. Farmers Ins. Exchange*, 234 F.3d 857 (8th Cir. 2000); *Coakley & Williams Constr., Inc. v. Structural Concrete Equip., Inc.*, 973 F.2d 349 (4th Cir. 1992); and *Uforma/Shelby Bus. Forms, Inc. v. NLRB*, 111 F.3d 1284 (6th Cir. 1997)). And that is how the district court used the settlement evidence here. It cited the Board's withholding of information about settlement negotiations from minority Board members as an indicium of the District's bad faith: that the Board had "bad motives for adhering to the challenged voting practice," and thus had

"tenuous, if not illegitimate, reasons for wanting to maintain the *status quo*." SA74-75 ¶ 86 & n.62. Those unchallenged findings were well founded.

B. The District Court's Totality-Of-The-Circumstances Analysis Was Otherwise Proper

The District raises two additional arguments: first, that the district court wrongly failed to consider "[o]ther [r]elevant [c]ircumstances" bearing on the "totality of the circumstances" inquiry, District Br. 80; and second, that the district court "[i]mproperly [r]elied [o]n [w]holly [i]rrelevant [c]ircumstances," District Br. 83. Both arguments fail.

On the first point, the District contends (at 80) that one relevant factor here is that the white community in the District is predominantly Jewish; the District notes that "Jews generally, and Orthodox Jews in particular, have historically been the victims of extreme discrimination." The District argues (at 81) that these voters "are not White supremacists," but are rather members of an historically oppressed group, and thus that application of Section 2 in these circumstances is "profoundly unjust and arguably unconstitutional." The trouble with the District's argument is that Section 2 is not aimed only against "White supremacists," and the fact that the members of a majority group have suffered oppression or discrimination in other circumstances is not a defense to liability under Section 2. Section 2 has been used, for example, to enforce the voting rights of minority white citizens whose votes were diluted by black officials in the rural South. *See United States v. Brown*, 561 F.3d

420, 426-27 (5th Cir. 2009). The Voting Rights Act protects all Americans against discrimination in voting on the basis of race. The general history of anti-Semitic discrimination in this country does not resolve the question whether black and Latino voters in the District have been deprived of equal opportunity to "participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

The District also posits (at 82) that various public-school advocates in East Ramapo have made statements that "reasonably could have [been] interpreted" as anti-Semitic, and asserts (at 82 n.212) that the district court "actively prevented the District's efforts to further develop these issues at trial." Far from preventing the District from developing evidence on this issue, however, the district court allowed the District to question several witnesses on these lines at some length.[11] The district court simply found that evidence unconvincing and irrelevant.[12]

Finally, the District argues (at 83) that the district court erroneously considered several "[w]holly [i]rrelevant [c]ircumstances" in assessing the totality of the circumstances. The gist of the argument—similar to the District's argument about Senate Factor 9, *supra* at 62-63—is that the district court's findings about the

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[11] *See, e.g.*, AA72-79 (Tr. 808:17-815:1); AA100-05 (Tr. 1323:17-1328:22); AA153-60 (Tr. 2071:23-2078:22).

[12] *See, e.g.*, AA78-79 (Tr. 814:23-815:1); A962:1-964:9.

District's "disturbing win-at-all-costs attitude" reflected "possible judicial prejudice" against the District. District Br. 84-85 (citations omitted).

Not so. As the Supreme Court made clear in *Gingles*, the totality-of-the-circumstances inquiry is one that is based on a "searching practical evaluation of the 'past and present reality,'" one that requires "an intensely local appraisal of the design and impact" of electoral mechanisms in a given community. 478 U.S. at 75, 78 (citations omitted). Here, as part of that intensely local appraisal, the district court took note of the current school Board's highly unusual behavior in this case, and came to the reasoned conclusion that the District was willing to go to "extraordinary lengths" to maintain an at-large voting system that would "preserve . . . [the] political power" of the District's "white slating organization." SA74 ¶ 86; *see also, e.g.*, SA65-67 ¶ 76 (discussing the respective roles of the District's leaders and its counsel in seeking to "engineer[]" election outcomes for the purposes of "manipulat[ing] the outcome of this case"); SA42-43 ¶ 48 (declining to "apportion fault between the witnesses and [the District's] counsel for the extent to which the witnesses' affidavits . . . were contradicted by their live testimony," which was "rife with dissembling").

Those findings are not evidence of prejudice on the part of the district court. They are the considered findings of a court that spent years presiding over a complex litigation, culminating in a 17-day trial at which the district court had the opportunity

to assess firsthand the credibility of the District's leaders. The district court's assessment at the end of that process—based on a searching review of the evidence—was that the political structure of the District operates in practice to "invidiously exclude" black and Latino voters from "effective participation in political life" in the District. SA75 ¶ 87 (citation omitted). The District's conduct in this case underscores the extent to which it is determined to perpetuate that exclusion, and only accentuates the propriety of the relief awarded below.

CONCLUSION

The district court's May 25, 2020 findings of fact, conclusions of law, and order granting injunctive relief should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of the Court's July 13, 2020 Order granting Appellees' Motion to File Oversized Brief because this brief contains 16,545 words, including the glossary and excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with 14-point Times New Roman font.

Dated: July 16, 2020

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