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,

v.

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. 17-cv-8943, Hon. Cathy Seibel

OPENING BRIEF

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GLOSSARY

A__	page(s) in the Appendix filed with this brief
BISG	Bayesian Improved Surname Geocoding
Board	the District's board of education
CVAP	Citizen Voting Age Population data from the Census Bureau
District	Appellant East Ramapo Central School District
ECF __	entries on the district court docket
EI or EI:2x2	King's Ecological Inference
EI:RxC	Rows by Columns Ecological Inference
SA__	page(s) in the Special Appendix filed with this brief
VRA	Voting Rights Act
WRU	"Who Are You" software

JURISDICTIONAL STATEMENT

Plaintiffs sued the East Ramapo Central School District (the "District") for an alleged violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, so the district court has subject-matter jurisdiction under 28 U.S.C. § 1331. After trial, on May 26, 2020, the district court ruled in Plaintiffs' favor and enjoined the District from holding further elections under the challenged voting procedure.[1] Remedial proceedings in the district court are ongoing. On May 27, 2020, the District timely appealed as of right from the district court's injunction order.[2] This Court has appellate jurisdiction under 28 U.S.C. § 1292(a).

[1] SA75 ¶¶ 87–88.
[2] A1475.

ISSUES PRESENTED

The East Ramapo Central School District and its board of education are diverse in every sense—racially, ethnically, religiously, and politically. Plaintiffs claim Black and Latino voters in the District are unable to elect their preferred candidates, who support public school spending, because Orthodox Jewish voters successfully elect their preferred candidates, who support private school services and seek to limit property taxes. Plaintiffs blame their preferred candidates' electoral failures on state laws requiring at-large elections. The district court held that, as applied in the District, at-large elections unintentionally dilute the votes of Black and Latino voters, in violation of Section 2 of the Voting Rights Act.

(1) **"On Account of Race or Color."** Section 2 prohibits vote dilution only if it is "on account of race or color." Elections in the District turn on voters' policy disagreements over taxes and budgets, as well as their preferences for public or private schools. Did the district court err as a matter of law in treating voters' policy disagreements about taxes and budgets as based on race, merely because most public school students are minorities and most private school students are Orthodox Jews?

(2) ***Gingles* Preconditions.** For estimating minority voters' preferences, Plaintiffs' expert used a methodology that is unprecedented in Voting Rights Act litigation. The District's expert used the accepted, gold-standard methodology and data for Voting Rights Act litigation. Did the district court clearly err by accepting the novel methodology without assessing its reliability and giving no weight to the standard methodology?

(3) **Totality of the Circumstances.** In concluding that Black and Latino voters lack equal access to the political process, did the district court misapply several of the Senate Factors, ignore other relevant circumstances, and improperly consider irrelevant, extra-record evidence?

STATEMENT OF THE CASE

Plaintiffs, the Spring Valley Branch of the NAACP and individual voters, claim the at-large election procedure required by New York law for electing school board members in New York's central school districts has the unintended effect of diluting the votes of Black and Latino voters in District elections, in violation of Section 2 of the Voting Rights Act. After a bench trial, District Judge Cathy Seibel found for Plaintiffs and enjoined the District from holding elections at-large (2020 WL 2731163). The District appeals.

I. STATUTORY FRAMEWORK

Section 2 prohibits the "denial or abridgement of the right of any citizen ... to vote *on account of race or color*." 52 U.S.C. § 10301(a) (emphasis added). "A violation" is "established if, based on the totality of circumstances, it is shown that the political processes ... are not equally open to participation by members" of a racial minority group, "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

To prevail on a vote-dilution claim, a plaintiff's threshold burden is to prove correlation between race, voting, and election results (called "racial bloc voting" or "racially polarized voting"). To satisfy this threshold burden, a plaintiff must prove three things: (1) the relevant minority group is "sufficiently large and geographically

compact to constitute a majority in a [hypothetical] single-member district"; (2) the relevant minority group "is politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

Proof of these "*Gingles* preconditions" requires good data and sound, statistical analyses. Voters do not identify themselves by race at the ballot-box, so it is impossible to tell by direct evidence any voter's race and which candidate, if any, was "minority preferred" in an election. Assessing whether a candidate was "minority-preferred—based on subjective indicators such as 'anecdotal testimonial evidence'—is a dubious judicial task, and one that can degenerate into racial stereotyping of a high order." *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1018 (2d Cir. 1995). The inquiry is perilous because "[q]uestions such as whether a candidate, in a campaign, 'addressed predominately minority crowds and interests' suggest the existence of a racial political orthodoxy that courts should not legitimate, much less profess or promote." *Id.* Thus, this Court requires complex statistics to assess whether the preconditions are satisfied.

Proof of the *Gingles* preconditions, while necessary, is not sufficient. *Chisom v. Roemer*, 501 U.S. 380, 397 (1991). A plaintiff also must prove that the totality of the circumstances show that minorities lack equal opportunity to participate in the political process "on account or race or color," not on account of something else,

like policy preferences or partisanship. *See Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994).

Courts must engage in an exhaustive inquiry into the totality of the circumstances. Courts analyze nine factors set out in the Senate Report accompanying the 1982 amendments to Section 2 (the "Senate Factors"). *Id.* at 1010 n.9; *Gingles*, 478 U.S. at 44–45. But the Senate Factors are "neither comprehensive nor exclusive" of the totality of the relevant circumstances. *Gingles*, 478 U.S. at 45. All relevant circumstances must be considered, and the court must detail all of the facts probative of those circumstances, not just those that support its ultimate conclusions. *Johnson*, 512 U.S. at 1011–12 (Section 2 findings must "rest[] on comprehensive, not limited, canvassing of relevant facts").

Only if a plaintiff proves the three *Gingles* preconditions *and* proves that the totality of the circumstances shows vote dilution "on account of race or color" may a court properly find a Section 2 violation. Here, Plaintiffs failed to prove the requirements for a Section 2 violation, and the district court erred in concluding otherwise, at each step of the analysis.

II. RELEVANT FACTS

A. The District Is Diverse.

Located in Rockland County, New York, the District has a population of approximately 113,000 people (per the last decennial Census).[3] That population is racially and ethnically diverse. Self-identified Whites make up a majority of the population (58.55%); Blacks are the largest minority (22.07%), followed by Hispanics (15.44%), and Asians (4.92%).[4] The racial breakdown of voters, the Citizen Voting Age Population ("CVAP"), is comparable: Whites make up the majority (61.4%), followed by Blacks (24.1%), Hispanics (9.1%), and Asians (4.5%).[5]

The District is home to a large and growing community of Orthodox Jews. Though they generally self-identify as White on the Census, Orthodox Jews have a distinct cultural, religious, and ethnic identity. The rapid growth of the Orthodox Jewish community in the District is a relatively recent demographic shift; it began in or around the early 2000s.[6]

As the number of Orthodox Jews in the District has grown, so has the number of children attending private schools.[7] For, by and large, Orthodox Jewish families prefer to educate their children in private religious schools (yeshivas), and not in

[3] A1338 ¶ 13.
[4] A1340–41 ¶ 17; *see also* A137.
[5] SA4 ¶ 4 n.5; *see also* A1342–43 ¶ 21 & Figure 4.
[6] *See* A956 at 1196:6–1198:3 (Price).
[7] *See* A111 ¶ 26.

public schools.[8] Those private preferences have had a substantial effect on the District. About 27,000 school-aged residents—the vast majority in the District—attend the 160-plus private schools in the District (mostly, but not exclusively, yeshivas). Only about 9,000 children are enrolled in the District's fourteen public schools, and those children are overwhelmingly minorities. In the 2017–2018 school year, 60% of students attending public schools were Hispanic or Latino (5,267), 32% were Black (2,804), 4% were Asian or Pacific Islander (348), 4% were White (348), and 1% were multiracial (70).[9]

The District is also socioeconomically unique. By most measures, the District's Black population is wealthier[10] and better educated[11] than Blacks on average across the State.[12] Indeed, the average median income of Black households in the District ($73,032) is higher than the average median income for White households statewide ($70,083).[13] Likewise, Latino residents in the District are performing better socioeconomically than Latino residents on average across the State.[14]

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[8] SA4 ¶ 5.
[9] *Id.*
[10] A1283 (Family Households Below Poverty Level in the Past 12 Months); A1285 (Median Household Income in the Past 12 Months); A1287 (Percentage of Population That Are Home Owners).
[11] A1288 (Percentage of Population with Some College or Associate's Degree); A1289 (African-Americans with College Bachelor's Degree or Higher); A1290 (Percentage of Population With Some College or Associate's Degree And a Bachelor's Degree or Higher).
[12] A1352–53 ¶ 42.
[13] A1284.
[14] A1352–53 ¶ 42.

Not so for the District's White residents, who lag behind White residents statewide.[15] Though Whites in the District tend to own homes whose average value exceeds that of Black residents,[16] the District's Black residents surpass the District's White residents when it comes to poverty rates, median income, and per capita income.[17]

Whatever the measure, the District is certainly not a community in which Black and Latino residents are economically depressed.

B. State Law Mandates At-Large Voting For School Board Elections.

The District is governed by a nine-member school board, presently comprised of three Black women and six Orthodox Jewish men.[18] School board election procedures are governed by State law, *see generally* N.Y. Educ. Law § 2018(a), and Plaintiffs concede that New York law mandates at-large elections for the District's Board.[19] *Id.* Individual boards of education have no authority under State law to change how school district officers are elected.[20] As a result, the at-large election procedure used in the District and in all other central school districts in New York

[15] A1353 ¶¶ 43–44.
[16] *Id.*; *see* A1354 ¶ 47.
[17] SA58–59 ¶ 66.
[18] http://www.ercsd.org/Page/90.
[19] ECF 575 at 19.
[20] In this very case, the N.Y. Commissioner of Education explained that "the relevant statutory provisions governing local school board elections in central school districts ... provide for at-large voting and districts are prohibited from imposing additional qualifications to board of education membership." ECF 73 at 5.

has been in place for as long as the District has existed and is not the result of any action or inaction by the Board.

C. District Politics Center Around Voters' Preferences For Public Or Private Schooling And Related Policies, Like Taxes.

School board elections are nonpartisan, and there is no party primary system for nominations.[21] Any eligible resident who wishes to run for the Board may submit a nominating petition with the required number of signatures to the District Clerk.[22] For the last decade, coincident with the growth of the District's Orthodox Jewish population, elections have been sharply divided between two political factions—the "public school community" and the "private school community."[23]

The Private School Community. New York law requires that local school districts not only provide for the education of students enrolled in public schools, but also provide a range of services (like special education, busing, and access to books) to students attending private schools.[24] As the District's Orthodox Jewish community grew, some became concerned that the District was continually raising property taxes but not adequately providing state-mandated services to students attending private schools.[25] Beginning in 2005, school board candidates who supported controlling the growth of property taxes and ensuring provision of mandated

[21] A137.
[22] *Id.*; *see also* SA50–51 ¶ 57 n.48.
[23] *E.g.*, A111 ¶ 26; *see also* SA24 ¶ 29.
[24] SA3 ¶ 4 n.4.
[25] *See* A955 at 1–13 (Wieder).

services to private school students were backed by the Orthodox Jewish community and won a majority of seats to the Board.[26]

None of this political history is disputed. As Plaintiffs described the political transition in their complaint, "[t]hrough 2004, representatives from the public school community constituted a majority of the Board."[27] In 2005, however, Orthodox Jewish "voters organized successfully to elect a slate of candidates who favored lowering the taxes that funded the District's budget and diverting resources away from the District's public schools and towards services used by the District's private school population."[28]

Candidates who support lower property taxes and who are backed by the Orthodox Jewish community are known as the "private school community" slate of candidates.[29] Since at least 2013, "private school" slates have outperformed their opponents at the polls by large margins.[30] There is no formal organization or process that selects "private school" slates.[31] Instead, the slating process in the Orthodox Jewish community is *ad hoc* and involves a revolving cast of characters who have varying levels of interest and influence in local politics.[32]

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[26] *See* A111–12 ¶¶ 26–27.
[27] A111 ¶ 25.
[28] A112 ¶ 27.
[29] SA4–5 ¶ 5.
[30] *See* A143–144 ¶ 12.
[31] *See* SA50–51 ¶ 57.
[32] *See* SA52–54 ¶ 59.

All agree that obtaining endorsements from influential rabbis is an important step in earning political support from Orthodox Jewish voters.[33] This generally is accomplished by meeting personally with influential members of the community.[34] Rabbi Yehuda Oshry, an influential Hasidic rabbi, testified that he became interested in District politics because of his interest in special education.[35] He endorses and supports candidates, whether Orthodox Jewish or not, who share his views on taxes and education, and he has endorsed several non-Jewish and minority candidates.[36]

The "private school" slates often feature Black and Latino candidates.[37] In 2013, for example, the "private school" slate was comprised of candidates Bernard Charles, Jr. (a Black man), Pierre Germaine (a Black man), and Maraluz Corado (a Latina woman).[38] In 2015, the "private school" slate included Juan Pablo Ramirez (a Latino man).[39] And in 2016, the "private school" slate again included Mr. Charles and Mr. Germain.[40] All of these candidates were elected to the Board with majority support from Orthodox Jewish voters.[41] In addition to these "private school" slates,

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[33] *See* SA50–56 ¶¶ 57, 59–60.
[34] *See* SA34–35 ¶ 44; SA38–49 ¶ 48; SA 50 ¶ 57.
[35] *See* A1044 at 2478:21–2479:9 (Oshry).
[36] *See* SA52–54 ¶ 59; A1042 at 2–6; A1044 at 2–20; A1045 at 13–20 (Oshry) ("I would ask him how would you accept the Orthodox Jewish people and their children, and how would you concern the buses and on the taxes ...").
[37] *See, e.g.*, SA42, 54, 63–64 ¶¶ 48, 59, 74–75 (noting Bernard Charles, Pierre Germaine, Maraluz Corado, and Juan Pablo Ramirez as persons of color on the "private school" slate).
[38] *Id.*
[39] SA54–55 ¶ 60.
[40] *Id.*
[41] *See id.* ¶¶ 60–61.

other minority candidates have also obtained the support of Orthodox Jewish voters and been elected, including two Black women, Sabrina Charles-Pierre[42] and Suzanne Young-Mercer.[43]

The Public School Community. Since around 2009, the "private school" slates have been opposed by "public school community" slates.[44] "Public school community" is not a racial classification; it refers to a multi-racial coalition of Black, Latino, and White voters who support expanding public school programming and are either indifferent to tax rates or actively support raising taxes.[45] Voters affiliated with the "public school community" slates testified that they do not vote for a Board candidate based on his or her race.[46]

The process for slating "public school" candidates is more formal than the "private school" slating process. It relies on local community organizations—all run to some extent by a White local education activist, Steven White—and involves a written application, vetting, and formal selection.[47] The "public school" slates, like the "private school" slates, regularly feature Black, Latino, and White candidates.[48]

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[42] *See* SA64 ¶ 75.
[43] *See* SA5 ¶ 5.
[44] *See* A1315; *see also, e.g.*, A931:9–15, A932:17–23(Castor); A940:23–25 (Goodwin); A949:21–950:16 (Fields).
[45] *E.g.*, A931:13–15, A932:21–933:1 (Castor); A940:7–13, 23–25 (Goodwin).
[46] *E.g.*, A931:5–932:7 (Castor); A942:13–17 (Goodwin)("Anyone who would do the best possible job in regards to enhancing the education within East Ramapo would have gotten my vote"); A937:9–15 (Clerveaux) ("Race has nothing to do with how I vote.").
[47] *See* A992:22–993:1, A994:7–24; A996:2–998:22, A1003:8–1007:23 (White).
[48] *Compare* A1315 *with* SA7–8 ¶ 7.

D. Minorities Participate In District Elections.

In all eleven elections between 2009 and 2019, there has been at least one Black or Latino candidate on the ballot except in 2014.[49] Minority candidates were elected to the Board in 2010, 2011, 2012, 2013, 2015, 2016, 2018, and 2019.[50] Black or Latino candidates won contested elections in 2013, 2015, 2016, and 2019.[51]

III. RELEVANT PROCEDURAL HISTORY

A. Plaintiffs Sued The District Under Section 2.

In November 2017, Plaintiffs sued the District and the Commissioner of Education,[52] alleging that at-large elections in the District had the unintended effect of diluting Black and Latino votes in violation of Section 2. Plaintiffs claimed the majority of the District's Black and Latino voters prefer the "public school" slates and that their preferred candidates haven't won elections since 2010.[53]

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[49] SA7–8 ¶ 7 (Vera (2009); Young-Mercer (2010); Anderson and Thompson (2011); Rivera and Thompson (2012); Corado, Tuck, Clerveaux, Germain, Forrest, and Charles (2013); Charles-Pierre, Jones, Morales, and Ramirez (2015); Charles, Germain, Morales, and Charles-Pierre (2016); Goodwin and Dos Reis (2017); Charles-Pierre and Cintron (2018); and Charles, Leveille, and Cintron (2019)).

[50] *Id.* (Young-Mercer (2010); Thompson (2011); Thompson (2012); Charles, Germain, and Corado (2013); Ramirez (2015); Charles, Germain, and Charles-Pierre (2016); Charles-Pierre (2018); Leveille (2019)).

[51] *Id.* (Charles, Germain, and Corado (2013); Ramirez (2015); Charles and Germain (2016); and Leveille (2019)).

[52] The district court granted the Commissioner's motion to dismiss but denied the District's motion to dismiss. *See* A19 (Minute Entry 4/13/2018).

[53] A103 ¶ 3.

Plaintiffs moved for a preliminary injunction to stop the 2018 Board election.[54] In support of their motion, Plaintiffs proffered the expert opinion of Dr. Steven Cole on the *Gingles* preconditions.[55] Dr. Cole used an outdated version of the standard and accepted statistical methodology used in Section 2 cases, Ecological Inference or "EI," with the standard Census data set, CVAP, to analyze the District's election results.[56] Dr. Cole opined that his analysis evidenced racially polarized voting in Board elections in the District.[57]

The District's expert, Dr. John Alford, used the modern form of EI and the same Census data set (CVAP)—the standard practice in all Section 2 cases in jurisdictions, like New York, where voter race information is unavailable.[58] Dr. Alford found no evidence of racially polarized voting. Dr. Alford's EI:RxC voter preference estimates are reproduced in full below:

[54] ECF 35.
[55] ECF 32.
[56] ECF 79-4 at 4 ¶ 15, 6 ¶ 25, 7 ¶¶ 27–28.
[57] ECF 32–1 at 2 ¶ 5.
[58] *See* ECF 79-4; *see generally* A1066–96; *infra*, Argument § II.

		Candidate	Election Date	Race	White Vote %	Black Vote %	Latino Vote %
2017	Seat 1	Mark Berkowitz*	5/16/17	W	86% (75, 95)	**54%** (12, 90)	**27%** (5, 60)
		Alexandra K. Manigo	5/16/17	W	14% (5, 25)	**46%** (10, 88)	**73%** (40, 95)
	Seat 2	Harry Grossman*	5/16/17	W	86% (75, 96)	**53%** (10, 89)	**26%** (5, 60)
		Eric Goodwin	5/16/17	B	14% (4, 25)	**47%** (11, 90)	**74%** (40, 95)
	Seat 3	Joel Freilich*	5/16/17	W	87% (77, 96)	**59%** (14, 92)	**31%** (7, 65)
		Chevon Dos Reis	5/16/17	L	13% (4, 23)	**41%** (8, 86)	**69%** (35, 93)
2016	Seat 1	Bernard L. Charles, Jr.*	5/17/16	B	85% (74, 95)	**59%** (13, 91)	**34%** (7, 69)
		Kim A. Foskew	5/17/16	W	15% (5, 26)	**41%** (9, 87)	**66%** (31, 93)
	Seat 2	Pierre Germain*	5/17/16	B	85% (74, 94)	**58%** (14, 92)	**32%** (6, 66)
		Jean E. Fields	5/17/16	B	15% (6, 26)	**42%** (8, 86)	**68%** (34, 94)
	Seat 3	Yehuda Weissmandl*	5/17/16	W	84% (73, 94)	**56%** (11, 92)	**27%** (5, 60)
		Natashia E. Morales	5/17/16	L	16% (6, 27)	**44%** (8, 89)	**73%** (40, 95)
2015	Seat 1	Jacob L. Lefkowitz*	5/19/15	W	82% (70, 93)	**42%** (6, 81)	17% (3, 43)
		Sabrina Charles-Pierre	5/19/15	B	16% (6, 29)	**53%** (15, 89)	**75%** (45, 92)
		Alan Keith Jones	5/19/15	B	1% (0, 3)	5% (1, 16)	8% (2, 20)
	Seat 2	Yonah Rothman*	5/19/15	W	82% (69, 94)	**48%** (8, 86)	**20%** (3, 52)
		Natasha Morales	5/19/15	L	18% (6, 31)	**52%** (14, 92)	**80%** (48, 97)
	Seat 3	Juan Pablo Ramirez*	5/19/15	L	78% (65, 89)	**47%** (8, 84)	**21%** (4, 50)
		Steve D. White	5/19/15	W	17% (6, 30)	**49%** (12, 87)	**74%** (43, 93)
		Yisroel Eisenbach	5/19/15	W	6% (3, 8)	5% (0, 15)	5% (1, 14)
2013	Seat 1	MaraLuz Corado*	5/21/13	L	84% (67, 96)	**50%** (10, 87)	**23%** (4, 54)
		Margaret Tuck	5/21/13	B	17% (4, 33)	**50%** (13, 90)	**77%** (46, 96)
	Seat 2	Pierre Germain*	5/21/13	B	80% (67, 92)	**52%** (11, 88)	**26%** (5, 59)
		Eustache Clerveaux	5/21/13	B	20% (8, 33)	**48%** (12, 89)	**74%** (41, 95)
	Seat 3	Bernard L. Charles, Jr.*	5/21/13	B	80% (66, 92)	**52%** (11, 89)	**25%** (5, 57)
		Robert Forest	5/21/13	B	20% (8, 34)	**48%** (11, 89)	**75%** (43, 95)

Dr. Alford's results[59] compel three dispositive conclusions: (1) neither the second nor third *Gingles* precondition is satisfied because the voter preference estimates for Black and Latino voters are not statistically significant and so cannot be relied upon to show voting polarization or cohesion; (2) even if the lack of statistical significance were ignored, the voter preference estimates for Black voters suggest

[59] Winning candidates are denoted with an asterisk. Dr. Alford did not analyze 2014, as there were no contested elections that year. Red cells reflect voter preference estimates that are not statistically significant because the confidence-interval (the two-number set in parenthesis after each percentage estimate) includes 50%. Green cells reflect voter preferences estimates that are statistically significant. *See infra*, Argument § II.

that small majorities supported the winning candidates in 2013, 2015, and 2017, defeating the second and third *Gingles* preconditions; and (3) the voter preference estimates for White voters were statistically significant and showed no variation in the degree of White voter support for minority candidates, which demonstrates that White voters are not casting their votes on account of race or color.[60]

Following Dr. Alford's expert disclosure, Plaintiffs withdrew their motion for preliminary injunction and discarded Dr. Cole and his flawed opinion.[61] The district court allowed Plaintiffs to replace Dr. Cole with a new expert, Dr. Matthew Barreto.[62] Because Dr. Barreto already knew that using the gold-standard statistical methodology with the gold-standard data set (CVAP) produced results fatal to Plaintiffs' case, Dr. Barreto discarded that approach.[63] Instead, he based his opinion on a novel methodology called "Bayesian Improved Surname Geocoding," or "BISG," which no court has ever relied upon before in a Section 2 case.[64]

Before trial, the District moved to exclude Dr. Barreto's novel opinions under *Daubert* and Federal Rule of Evidence 702.[65] 509 U.S. 579 (1993). The district

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[60] *See generally* ECF 362.
[61] ECF 119.
[62] *See* ECF 146 at 2. Allowing Plaintiffs to discard their expert and replace him and his opinion with an entirely new opinion was itself serious legal error. *See Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000) ("It is implausible to suggest, post-*Daubert*, that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail.").
[63] A1051:19–1052:4 (Barreto).
[64] *See* infra, Argument § II; *see also* SA32 ¶ 39 ("This may be the first time that voter-preference estimates based on BISG have been admitted into evidence at a VRA trial.").
[65] ECF 362.

court ruled that it would consider the reliability of Dr. Barreto's methodology after he testified at trial.[66] The district court, however, did not assess reliability after trial.

The District also moved for summary judgment, arguing that the undisputed facts established that Black and Latino voters are not excluded from political processes in the District and that any divergent voting patterns were not attributable to race or color.[67] The district court denied that motion from the bench.[68]

B. After A Bench Trial, The District Court Ruled For Plaintiffs And Enjoined District Elections.

The district court held a bench trial on seventeen nonconsecutive days between January 22, 2020 and March 24, 2020. On May 26, 2020, the district court issued its verdict (in a "Decision and Order" dated, but not entered, May 25, 2020), finding that Plaintiffs met their burden to show that at-large voting in the District unlawfully dilutes the votes of Black and Latino voters.[69]

Several aspects of the way trial was conducted were unusual and bear special mention because they ultimately played a role in the district court's decision.

First, the district court deeply involved itself in the parties' settlement discussions while presiding as the finder of fact, and the court allowed its impressions about settlement negotiations to influence its decision.[70] The court mandated an

[66] *See* A893:14–17.
[67] ECF 356.
[68] A910:7.
[69] SA75–76 ¶¶ 87–88.
[70] *See infra*, note 74.

in-person settlement conference at the courthouse on the first day of trial.[71] The District objected but was overruled, and when it asked the court to impose "rules of engagement" for the conference similar to traditional mediation, the court again overruled the District.[72] The district court then presided over a settlement conference both before and after opening statements, over the District's stated concerns.[73] While a district court's encouragement of settlement negotiations is not by itself unusual, the district court allowed its involvement in settlement negotiations, and extra-record evidence about those negotiations, to control the outcome of the case.[74]

Second, at several points in the trial, the district court dramatically denounced Orthodox Jewish witnesses and accused them of lying while the witnesses were still on the stand.[75] In one striking example, in the midst of Plaintiffs' lengthy cross-examination of the president of the Board about text messages he sent to an acquaintance several years ago, the district court interrupted and accused the witness of lying.[76] The district court said: "[d]o you want me to tell you whether I believe

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[71] *See* A811.
[72] *Id.*
[73] *See id.*
[74] *See* SA64 ¶ 75 (commenting on internal Board communications regarding settlement); SA65 ¶ 75 n.58; SA72–73 ¶ 84 (commenting on Board members' presumed "interfer[ence] with settlement of this lawsuit"); SA73–75 ¶ 86 (criticizing internal Board communications about settlement); SA74 ¶ 86 n.62 (noting Plaintiffs' offer to waive fees as part of a settlement and accusing the District's decision-makers of having "bad motives" for not settling); SA75–76 ¶ 88 (criticizing Board members for seeming to "stymie resolution" of the case, but also observing some "apparently sincere attempts at agreement").
[75] *E.g.*, A967:1–5, 20–22 (Grossman); A952:4–953:2) (Horowitz).
[76] A967:1–5, 20–22 (Grossman).

Mr. Grossman's honoring his oath? I do not."[77] The court continued: "[d]o you want me to tell you each place I wrote in my notes that I thought, I think this witness is lying? Do you want that to happen?"[78] The court concluded: "I cannot tell a lie. I do think this witness is not credible, put it that way."[79] The district court did not warn the witness about the risk of perjury, as trial judges customarily do when a witness appears to be misrepresenting facts.[80]

Disbelieving that the witness could not recollect the meaning of text messages he had sent years ago, the district court informed the witness and counsel that the court's mind was made up: "I don't usually like to preview my credibility determinations, and who knows, maybe something will happen between now and the end of the case that will change my mind. But right now it's not looking real good."[81]

The district court's belief that *none* of the Orthodox Jewish witnesses who testified were credible is a driving force of the court's decision.[82]

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[77] A967:1–2 (Grossman).
[78] A967:13– 15 (Grossman).
[79] A967:20–22 (Grossman).
[80] *See generally* A937:1–938:7 (Grossman).
[81] A938:4–7 (Grossman).
[82] *See* SA36 ¶ 45 (finding testimony of Orthodox Jewish witnesses Harry Grossman, Yehuda Weissmandl, Aron Wieder, and Yonah Rothman not credible when they testified that, for example, Orthodox Jewish voters who elected them to the Board are concerned about property taxes and public school spending); SA38–43 ¶ 48; SA73–75 ¶ 86 (finding Orthodox Jewish "Board members outright lied or disingenuously claimed lack of memory" when testifying about text messages they had sent years ago).

SUMMARY OF THE ARGUMENT

The facts that dispose of Plaintiffs' Section 2 claim are, and have always been, undisputed. Nothing at trial and no witness's testimony changed that. It is undisputed that the District's "public school" and "private school" communities are divided on matters of education policy, spending, and taxes. It is undisputed that both communities are active in District politics and back slates of candidates. It is undisputed that minority candidates are routinely featured on both the "public school" and "private school" slates. It is undisputed that minority candidates are regularly elected to the Board, and that one third of the Board's current members are Black. And it undisputed that the Orthodox Jewish "private school" community routinely supports Black and Latino candidates to the same degree as White candidates.

On these undisputed facts, there can be no violation of Section 2 as a matter of law. The district court's contrary conclusion is erroneous for three primary reasons, each of which independently requires reversal.

First, Plaintiffs did not—and could not—carry their burden to prove that any dilution of Black and Latino votes occurs "on account of race or color," and the district court impermissibly excused that failure. The phrase "on account of race or color," which survived amendment of Section 2, demands proof of racial causation: race must be a but-for cause of minority-preferred candidates' losses at the polls and exclusion of minorities from political processes, or else there is no violation. Pre-amendment,

racial causation could be proved only by showing that the officials who adopted or maintained the challenged voting procedure did so with a racially discriminatory purpose. Post-amendment, racial causation remains Section 2's core element, but it can be shown by proving *either* that officials acted with racial motivations *or* that the electorate's White majority votes for racial reasons.

Here, it is undisputed that the at-large system was not adopted or maintained with a racially discriminatory purpose, and it is indisputable that Orthodox Jewish "private school" voters are not motivated by racial concerns. Orthodox Jewish voters prefer private schooling for religious and cultural reasons that have nothing to do with race. Preference for private schooling inevitably leads to policy preferences that drive outcomes in school board elections. The election statistics prove the point: both sides experts agreed that (White) Orthodox Jewish voters consistently have supported Black, Latino, and White candidates without regard to the candidate's race. That is conclusive evidence that majority voters are not reacting to race at the ballot-box and that race, therefore, is not a but-for cause of election results. Plaintiffs' Section 2 claim should have been dismissed for this reason.

To avoid that result, the district court erroneously held that racial causation is *never* a necessary element of a Section 2 claim. Instead, the district court held that racial causation is relevant only in cases involving partisan elections and, even then,

only as one potentially relevant—but not necessary—aspect of the totality of the circumstances. That legal error contradicts Section 2's text, Supreme Court precedent, and the decisions of this Court and every other circuit to consider the question.

Alternatively, the district court held that racial causation could be presumed in this case solely because students who attend the District's public schools are mostly Black or Latino, while students who attend the District's private schools are mostly Orthodox Jews. That is, at most, racial *correlation*, not racial *causation*. By basing the violation on the mere correlation of election outcomes and race, the district court necessarily recognized that Plaintiffs failed to prove that race was a but-for cause in District elections. That is dispositive, and this Court should reverse for this reason.

Second, independent of their failure to prove racial causation, Plaintiffs failed to satisfy the threshold *Gingles* preconditions. The District's experienced political science expert found no statistically significant evidence of minority voter cohesion (second precondition) or racially polarized voting (third precondition), using the gold-standard statistical methodology (EI:RxC) with the gold-standard, presumptively reliable data set from the Census Bureau (CVAP). That combination of methodology and Census data is the standard approach to Section 2 statistical analyses, uniformly accepted by both scholars and courts—until this case.

Plaintiffs' expert didn't disagree that the standard approach produced results fatal to Plaintiffs' case. Instead, to manufacture statistics that better suited Plaintiffs'

litigation goals, Plaintiffs' expert discarded the standard method and purported to find evidence of racially polarized voting using an entirely novel combination of methodology and data (BISG) that no court had ever before relied on in a Section 2 case.

The district court relied on Plaintiffs' novel statistics and ignored the results produced using the standard methodology. That was legal error and requires reversal. The district court failed to assess the reliability of Plaintiffs' expert's opinion using the familiar *Daubert* factors, which it flunks. It therefore was legal error for the district court to give Plaintiffs' expert's opinions on the second and third *Gingles* preconditions *any* weight, much less conclusive weight, and to reject completely the standard methodology used by the District's expert. Without the flawed and unreliable methodology used by their expert, Plaintiffs cannot satisfy the *Gingles* preconditions. This error independently warrants reversal.

Finally, independent of the district court's other legal errors, Plaintiffs failed to prove that the totality of the circumstances supports their claim. As straightforward application of the Senate Factors weighs heavily in favor of the District. To sway the analysis for Plaintiffs', the district court was forced to rewrite the Senate Factors to better suit Plaintiffs' purposes. That was legal error. The district court also erred by ignoring other relevant circumstances, and by relying on facts from outside the trial record—such as the District's unwillingness to settle the case on Plaintiffs' terms. All

of this renders the district court's totality-of-the-circumstances finding clearly erroneous—both as a factual and legal matter. This also independently requires reversal.

ARGUMENT

This Court reviews a district court's ultimate finding of unlawful vote dilution for clear error, but reviews its application of the legal standards *de novo*. *Goosby v. Town Bd.*, 180 F.3d 476, 492 (2d Cir. 1999); *Niagara Falls*, 65 F.3d at 1008.

I. THE DISTRICT COURT'S DECISION SHOULD BE REVERSED BECAUSE PLAINTIFFS FAILED TO PROVE DIVERGENT VOTING PATTERNS "ON ACCOUNT OF RACE OR COLOR."

A. Voting Behavior In The District Is Driven By Policy Preferences, Not By Racial Concerns.

School board elections in the District are nonpartisan but intensely political. The District's Orthodox Jewish community overwhelmingly prefers to educate children in private, religious schools called yeshivas, whereas other communities, including Black and Latino residents, tend to avail themselves of the public school system. In elections for the District's school board, partisans from both communities have coalesced into distinct political factions—the "public school community" and the "private school community."[83] Orthodox Jewish residents of the District are denominated members of the "private school community," and generally self-report as

[83] SA5–6 ¶ 5.

White.[84] Residents who prefer public schooling are denominated the "public school community" and include White, Black, and Latino voters.[85]

The political and policy differences between the factions are clearly drawn and revolve around public school budgets, property tax rates, and education spending policy. As Plaintiffs describe it in their complaint, the "private school" community—*i.e.*, the Orthodox Jewish community—backs school board "candidates who favor[] lowering ... taxes" and "increasing support for private school students."[86] The "public school community," in contrast, backs candidates who oppose "decreases in taxes" that fund the District's budget and support increasing "support for the District's public schools."[87] Both factions usually run slates of three candidates every year, and both the "public school" and "private school" slates regularly feature Black, Latino, and White candidates.[88] "Private school" candidates, who generally support policies preferred by the Orthodox Jewish community and work to obtain their support, have typically enjoyed greater success at the ballot-box than their "public school" adversaries.[89]

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[84] *Id.*
[85] *Id.*
[86] A111–12 ¶¶ 26–27.
[87] *Id.*
[88] *See, e.g.*, SA54 ¶ 60 ("private school" slate included Charles, Germain, and Maraluz Corado, all persons of color); SA34–36 ¶ 44 ("public school" candidates included Fields (Black), Foskew (White), and Morales (Latina)).
[89] *See* SA24 ¶ 29.

Nothing about these political patterns reflects "racial animus" on the part of Orthodox Jewish voters—as the district court expressly found.[90] The expert testimony in this case diverged sharply on many issues (as discussed further below), but both sides' experts agreed that White voters from the Orthodox Jewish community have consistently supported and elected minority candidates to the same extent and degree that they have supported and elected White candidates—with no variation in support according to the race of the candidates.[91]

The same is true of minority voters.[92] Voting patterns in the District simply don't change in response to a candidate's race.[93] As the district court found, there is no history of official discrimination on the basis of race in the District, and school board campaigns do not feature overt or subtle racial appeals.[94]

Moreover, minority voters and minority candidates enjoy full access to the political process.[95] Minority voters and candidates participate in both the "public

[90] SA46 ¶ 51.
[91] SA21 ¶ 27 n.24.
[92] A1025:13–17 (Alford) ("[T]here's also no indication that the behavior of black voters is varying according to the race or ethnicity of the candidates in the contest."); A1022:22–1023:10 (Alford) (no evidence Latino voter cohesion "is motivated by the race of candidates").
[93] A1021:1–6 (Alford).
[94] SA32–33 ¶ 41; SA60 ¶ 70.
[95] *E.g.*, SA4–5 ¶ 5 (former Board member Suzanne Young-Mercer, who is Black, was on "public school team" and received support from "private school community" including Orthodox and Hasidic voters); SA62 ¶ 73 (Corado and Ramirez, both Latino, won in 2013 and 2015, respectively); SA63 ¶ 74 (Charles and Germain, both Black, "won four of the six contested elections").

school" and "private school" slating processes.[96] Minority candidates regularly appear on the ballot.[97] And minority candidates regularly win elections.[98]

District voters know which candidates are affiliated with the "public school" and "private school" slates, and they understand what that means in terms of the education, tax, and spending policies they can expect from each slate if elected.[99] In this political environment, the *race* of the candidates does not predict election results. Black and Latino candidates affiliated with the "private school" slate have run—and won—since 2013.[100] White candidates affiliated with the "public school" slate have run—and lost.[101] That means "private school" slate candidates don't win because race influences voters—they win because the policies endorsed by "private school" slates are more popular with voters. It is that simple.

This readily apparent, non-racial explanation for the District's election results defeats Plaintiffs' Section 2 claim, and the district court's contrary conclusion is

[96] *E.g.*, SA54–55 ¶ 60 (Charles, Germain, Corado, and Ramierez, all persons of color, were included on "private school" slates); SA55 ¶ 60 n.53 (Fields (Black), Morales (Latina), and Foskew (White) were included in the 2016 "public school" slate).
[97] *See, e.g.*, A1054–65 (official School Board ballots 2008–2019)].
[98] *See* SA7–8 ¶ 7.
[99] *See, e.g.*, A943:11–945:25 (Goodwin); A989:12–990:10 (Cohen) (testifying that Charles, Germain, and Corado—all persons of color—were part of the private school community because, inter alia, "[t]hey didn't attend the NAACP candidate forum"); A991:20–25 (Cohen) (agreeing that "Orthodox community favors lower taxes and favors maintaining services for private school students"); A998:23–999:16 (White) (testifying that "public school" slate advocated for interests of public school children and never advocated for reduction in property taxes or increased services for private school students).
[100] SA54 ¶ 60.
[101] *Compare* A1315 (chart listing public school candidates) *with* SA7 ¶ 7 (Table 1).

reversible error. As explained below, Section 2 prohibits voting practices that result in electoral defeats "on the basis of race or color," not defeats on the basis of political and policy differences. Plaintiffs failed to prove that "race or color" causes divergent voting patterns in the District, which necessarily means Plaintiffs failed to prove their claim. All of the district court's contrivances to avoid this unavoidable result are clearly erroneous—as a matter of fact and law.

B. As A Matter Of Law, Divergent Voting Patterns Do Not Violate Section 2 Unless Driven By "Race Or Color."

Section 2 is concerned with more than *how* people of different races vote and *whether* minority-preferred candidates lose elections. Those inquiries are necessary, to be sure—without proof of correlation between voters' race and election results (the *Gingles* preconditions), a plaintiff cannot prove a violation of Section 2. *Johnson*, 512 U.S. at 1011. But they're not sufficient. The ultimate inquiry under Section 2 asks *why* voters of different races vote the way they do.

This is because Section 2 is not a vehicle for minority voters to reverse ordinary political defeats at the ballot-box. Congress enacted Section 2 to enforce the Fifteenth Amendment's substantive guarantee that "[t]he right of citizens of the United States to vote shall not be denied or abridged ... on account of race, color, or previous condition of servitude." U.S. CONST. amend XV, § 1; *see Voinovich v. Quilter*, 507 U.S. 146, 152 (1993). The express promise of Section 2 is, and has always been, the invalidation of voting practices that discriminate "*on account of*

race or color." 52 U.S.C. § 10301(a) (emphasis added); *accord* Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965).

The district court dismissed the critical causation inquiry as inconsistent with the 1982 amendments of Section 2.[102] That was legal error. Section 2 was amended in 1982 to repudiate the plurality's holding in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), that the statute did not prohibit facially neutral voting practices unless adopted or maintained by government officials with discriminatory intent. *See Gingles*, 478 U.S. at 35. In place of *Bolden*'s "intent" test, Congress codified the "results" test applied in constitutional vote-dilution cases like *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *White v. Regester*, 412 U.S. 755 (1973)—the same approach Justice Marshall favored for Section 2 vote-dilution cases in his dissent in *Bolden*. *See Gingles*, 478 U.S. at 83–84 (O'Connor, J., concurring); *Bolden*, 446 U.S. at 109–10 (Marshall, J., dissenting).

That shift—from an "intent" test to "results" test—did not untether Section 2 from its purpose of defeating interference with voting rights caused by racial animus. Section 2 still targets voting practices and procedures that discriminate "on account of race or color." 52 U.S.C. § 10301(a). Congress's "decision to retain the words 'on account of race or color'" is significant, for it shows "that Congress did not wholly abandon its focus on purposeful discrimination." *Muntaqim v. Coombe*,

[102] SA34 ¶ 42 n.35.

366 F.3d 102, 117 (2d Cir. 2004), *opinion vacated on jurisdictional grounds*, 449 F.3d 371 (2d Cir. 2006); *see Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883) (courts must avoid a statutory "construction which implies that the legislature was ignorant of the meaning of the language it employed"). Any other conclusion untethers Section 2 from the purpose of combatting purposeful racial discrimination and raises serious concerns about Section 2's constitutionality. To find neutral voting procedures unlawful in the absence of any evidence of racial discrimination would fix nothing and likely violate core First Amendment values.

Instead of looking only at the intent of policymakers, the results test also looks at the motivations of voters. The phrase "on account of" connotes a but-for causation requirement based on the linked trait—here, "race or color." *See Bostock v. Clayton Cty.*, — S. Ct. — , 2020 WL 3146686, at *4–5 (U.S. June 15, 2020). A "but-for test directs [the Court] to change one thing at a time and see if the outcome changes," and if it doesn't, the changed variable is not a but-for cause. *Id.* There can, of course, be multiple but-for causes, but "race or color" must be one of them. *See id.*; *Mutaquim*, 366 F.3d at 116–17. Thus, the 1982 amendments did not eliminate racial causation as a necessary element of a Section 2 claim.

Rather, by codifying the "results" test *and* retaining the "on account of race or color" language, Congress delimited two ways for Section 2 plaintiffs to prove a violation, each of which "requires a demonstrable causal connection between a

challenged voting rule and purposeful racial discrimination": (1) subjective intent to discriminate on the part of *the officials* "who designed the challenged" practice; or (2) "race-based motivation" on the part of *the electorate* who exploit the challenged practice. *Muntaqim*, 366 F.3d at 116–18; *accord Goosby*, 180 F.3d at 497. So, once racially polarized voting (correlation) is established, a court must "look[] beyond the statistical voting patterns ... to determine ... whether the majority is voting for candidates *for reasons of race*" or for reasons other than race, such as "partisan politics" (causation). *Niagara Falls*, 65 F.3d at 1015 (emphasis added). If "divergent voting patterns among white and minority voters" are caused not by race but by something else, like "partisan affiliation," Section 2 is not violated. *Goosby*, 180 F.3d at 496 (internal citation omitted).

This proposition shouldn't be controversial, but the district court rejected it.[103] Requiring a racial cause of divergent voting patterns not only is consistent with Section 2's text; it also is consistent with Supreme Court precedent, going back to *Whitcomb* and *White*—the decisions from which Congress derived Section 2's "results" test. *See Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (when "a statutory term is obviously transplanted from another legal source, it brings the old soil with it"). In those cases, the Court drew a sharp line between vote dilution

[103] *See, e.g.*, A947:10–12 ("But you're not arguing that there can't be vote dilution just because the motives of the people voting are not racial; are you?").

caused by "built-in bias against" minorities and vote dilution that is but a "euphemism for political defeat at the polls." *Whitcomb*, 403 U.S. at 153. In *Whitcomb*, the Court found no unlawful vote dilution even though Black voters failed to elect preferred candidates in nearly every election. *Id.* at 152–55. Black voters had full access to the political process and often placed their preferred candidates on Democratic Party slates. *Id.* The variable that determined defeats at the ballot-box wasn't *race*, but Black voters' allegiance to the Democratic Party in a jurisdiction where Republicans were all but guaranteed to win. *Id.*

That scenario contrasts with the result in *White*. There, although Black voters generally supported Democrats, they almost never were able to place their preferred candidates on the Democratic Party slate. *White*, 412 U.S. at 766. The Court found that a "white-dominated organization" with "control of Democratic Party candidate slating" excluded Black voters and used "racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the Black community." *Id.* at 766–67. The variable that deprived Black voters of equal access to the political process was not politics, partisanship, or policy—it was race. *Id.* at 767.

In *Gingles*, five Justices adhered to the *Whitcomb*/*White* line between electoral defeats caused by racial bias and defeats caused by race-neutral factors, like political differences. *See Gingles*, 478 U.S. at 83 (White, J., concurring); *id.* at 100 (O'Connor, J., concurring, joined Burger, C.J., Powell, J., and Rehnquist, J.). And

since *Gingles*, the courts of appeals have recognized that racial discrimination is an indispensable element of any Section 2 claim.[104]

The Fifth Circuit's decision in *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831 (5th Cir. 1993) (*en banc*) ("*LULAC*") and this Court's decision in *Goosby* are particularly instructive here. In *LULAC*, the Fifth Circuit held that an at-large system for electing trial judges did not violate Section 2 because, based on the record, partisan affiliation rather than race was responsible for the defeat of minority-preferred candidates. The court held that Section 2's "rigorous protections, as the text of [Section] 2 suggests, extend only to defeats experienced by voters 'on account of race or color," not because they support an unpopular political party. *LULAC*, 999 F.2d at 850. In other words, "[Section] 2 is implicated only where Democrats lose because they are Black, not where Blacks lose because they are Democrats." *Id.* at 854.

[104] *See, e.g.*, *Nipper v. Smith*, 39 F.3d 1494, 1523–24 (11th Cir. 1994) ("Unless the tendency among minorities and white voters to support different candidates, and the accompanying losses by minority groups at the polls are somehow tied to race, voting rights plaintiffs simply cannot make out a case of vote dilution."); *Baird v. Consol. City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992) ("Section 2 ... is a balm for racial minorities, not political ones."); *Uno v. City of Holyoke*, 72 F.3d 973, 981 (1st Cir. 1995) ("[P]laintiffs cannot prevail on a [Section 2] claim if there is significantly probative evidence that whites voted as a block for reasons wholly unrelated to racial animus."); *Clarke v. City of Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994) ("When, in the competition inherent in the democratic process, a racial group's preferred candidates are defeated despite the ability of its members to participate fully in that process, the Voting Rights Act should not provide that group with a remedy which is unavailable to other supporters of defeated candidates."); *Smith v. Salt River Project*, 109 F.3d 586, 595 (9th Cir. 1997) ("In order to make out a [Section] 2 claim against the District, Appellants must establish that the land ownership requirement results in discrimination 'on account of race or color.'").

The plaintiffs argued, however, that party affiliation was a proxy for racial concerns and so could not be used to explain away minority-preferred candidates' defeats. The Fifth Circuit rejected that argument because the facts showed that both political parties "aggressively recruited minority" candidates, and "the undisputed evidence disclose[d] that white voters in most counties, both Republican and Democratic, without fail supported the minority candidates slated by their parties at levels equal to or greater than those enjoyed by white candidates, even where the minority candidate was opposed by a white candidate." *Id.* at 861. That fact pattern "unmistakably shows that divergent voting patterns among white and minority voters are best explained by partisan affiliation," so the Section 2 claim failed. *Id.*

Goosby involved a Section 2 case against a town board. As in *LULAC*, the record showed that the majority of White voters in the town voted Republican, and most Black residents voted Democrat. *Goosby*, 180 F.3d at 484, 489. Democrats invariably lost elections. While Democrats had slated Black candidates before the case was filed, *id.* at 492, town Republicans had never slated—much less elected—even a single Black candidate *until after the case was filed*. *Id.* at 496.

That fact pattern, this Court explained, "stands in sharp contrast to the situation described in [*LULAC*], where minority candidates were slated by *both parties*." *Id.* (emphasis added). In *LULAC*, "it could be said that white voters, both Democrat and Republican, supported minority candidates elected by their parties at

levels equal to or greater than those of white candidates," in which case it would be "proper to conclude ... that divergent voting patterns among white and minority votes are best explained by partisan affiliation" and not race. *Id.* (citing *LULAC*, 999 F.2d at 861). That could not be said in *Goosby* because the record showed that not even Black Republicans could access the political processes necessary to participate equally. That proved that Blacks were excluded from politics in the town *because they were Black*, not because they were Democrats, so this Court found the plaintiffs had proved a Section 2 violation. *Id.* at 498.

This case follows the *LULAC* pattern, and the same facts that distinguish this case from *Goosby* are the facts that compel reversal. Just as in *LULAC*, in the District *both political factions*—the "private school community" and the "public school community"—regularly slate minority candidates. *Supra*, pp. 9–13. Insofar as there is any concern that the "public school" and "private school" slates might be proxies for race (and there is none), *LULAC*, *Goosby*, and this Court's decision in *Niagara Falls* all explain *exactly* how courts should analyze election results to answer the question. As this Court explained, it is necessary to look "beyond the statistical voting patterns of whites and blacks to see *who* is actually running—whites or blacks" in order to determine "whether the majority is voting against candidates for reasons of race" or for some other reason—like political or policy differences. *Niagara Falls*, 65 F.3d at 1015 (emphasis in original). If White voters

are responding to racial cues or exhibiting racial preferences, then their support for minority candidates slated by their own parties should dip. Alternatively, where the evidence shows that "white voters [have] supported minority candidates … at levels equal to or greater than those of white candidates, it [is] proper to conclude … 'that divergent voting patterns among white and minority voters are best explained'" by non-racial concerns. *Goosby*, 180 F.3d at 496 (quoting *LULAC*, 999 F.2d at 861). The latter is *exactly* the situation in the District.

Both parties' experts agreed that White voters consistently supported their preferred candidates on the "private school" slate *irrespective of the candidates' race*.[105] White, Orthodox Jewish voters supported Bernard Charles (a Black man), Pierre Germain (a Black man) and Maraluz Corado (a Latina woman) by large margins in 2013. White, Orthodox Jewish voters similarly supported Juan Pablo Ramirez (a Latino man) by a large margin in 2015, *even though he ran against a White man (Steve White) and an Orthodox Jewish man (Yisroel Eisenbach)*. The same pattern continued in 2016, when White, Orthodox Jewish voters again supported Bernard Charles by large margins, *even though he ran against a White woman (Kim Foskew)*, and similarly supported Pierre Germain once again. The only conclusion that can be drawn from these undisputed facts is that the "private school" and "public school" slates are not mere proxies for race.

[105] A1025:13–17, A1022:22–1023:10 (Alford); *see also* SA21 ¶ 27 n.24.

Thus, as in *LULAC*—and unlike in *Goosby*—divergent voting patterns in the District (to the extent they exist, *see infra*, Section II) are explained best by politics, not by race. Indeed, there is absolutely no evidence in this case that race played any role in White voters' voting decisions.[106] Plaintiffs offered none; the district court found none; and there is none. That is fatal to Plaintiffs' claim.

The district court purported to distinguish both *Goosby* and *LULAC* as cases involving "partisan elections."[107] That distinction finds no support in precedent or logic. Section 2 prohibits discrimination "on account of race or color." A plaintiff cannot prove discrimination "on account of race or color" by proving that *partisan politics is not a cause*. There must be evidence that *racial animus is a but-for cause of election results*—that, after adjusting for race, "the outcome changes." *See Bostock*, 2020 WL 3146686, at *4; *Muntaqim*, 366 F.3d at 117. If race has no effect on the outcome, it follows that something other than race will "best explain[]" divergent voting patterns. *Goosby*, 180 F.3d at 496–97.

Nothing says that *only* party affiliation can explain election results. "[T]here are many other possible non-racial causes of voter behavior beyond partisan affiliation," *LULAC*, 999 F.2d at 859, such as "interest-group politics," *Gingles*, 478 U.S.

[106] *See* SA74 ¶ 86 ("[T]here is no basis for concluding that the at-large elections are a cover for intentional discrimination or a desire for discriminatory effect.").
[107] SA44 ¶ 50.

at 83 (White, J. concurring), or another "underlying divergence of interests of minority and white voters," *id.* at 100 (O'Connor, J., concurring). In the District, the "private school" and "public school" communities may not be formal political parties, but they are unquestionably political factions with different policy preferences, and the partisan dynamic of the competing slates explains divergent election results.

As another end-run around the necessary element of causation, the district court, citing *Goosby*, held that the absence of a discriminatory cause may be relevant as "one aspect of the totality of the circumstances inquiry" but is not "an all-or-nothing" requirement.[108] That is not what *Goosby* held, and the district court is wrong as a matter of law. Addressing *when* in the analysis causation should be considered, *Goosby* directs courts to analyze causation at the second, "totality of the circumstances" step, rather than at the threshold, *Gingles* preconditions step. *Goosby*, 180 F.3d at 493.[109] But *Goosby* certainly did not give courts license to ignore the absence of a racially discriminatory cause for election results, for that would authorize courts to ignore the plain text of Section 2. On the contrary, *Goosby*

[108] SA34 ¶ 43.

[109] Most circuits agree. *See Uno*, 72 F.3d at 983; *Lewis v. Alamance Cty.*, 99 F.3d 600, 615 n.12 (4th Cir. 1996); *NAACP v. Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997); *Solomon*, 221 F.3d at 1225. A couple circuits deal with causation in the *Gingles* preconditions analysis. *LULAC*, 999 F.2d at 861; *Clarke*, 40 F.3d at 812. But no circuit holds that a Section 2 violation can be found in the absence of a racially discriminatory cause.

recognized that where "divergent voting patterns among white and minority voters are best explained" by non-racial factors, there is no Section 2 violation. *Id.* at 496.

The district court's attempt to relegate Section 2's explicit racial causation requirement to marginal or optional relevance improperly ignores the statute's "on account of race or color" language and creates a host of practical problems. Untethered from racial discrimination, proof of racially polarized voting alone would establish Section 2 liability—a proposition the Supreme Court has squarely rejected. *Chisom*, 501 U.S. at 397.

It also deems proof of electoral defeat by minority-preferred candidates sufficient to prove a violation, when the statute expressly requires proof of unequal opportunity "'to participate in the political process *and* to elect representatives of their choice.'" *Id.* (emphasis in original) (quoting Section 2). Consistent with the statute's text ("on account of race or color")—and as the decisions from the Supreme Court, this Court, and other circuits teach—Section 2 is not violated unless racial animus causes unequal opportunity to participate in the political process. *See, e.g.*, *Solomon v. Liberty Cty. Comm'rs*, 221 F.3d 1218, 1225 (11th Cir. 2000) (*en banc*) ("To be actionable, a deprivation of the minority group's right to equal participation in the political process must be on account of a classification, decision, or practice that depends on race or color, not on account of some other racially neutral cause."). That is not the situation in the District.

C. The District Court's Various Bases For Finding A Section 2 Violation In The Absence Of Racial Causation Are Erroneous.

Notwithstanding the lack of evidence of racial causation, the district court found a Section 2 violation. Its reasons for doing so are wrong as a matter of law and based on a clearly erroneous view of the facts.

First, solely because students who attend private schools are mostly Orthodox Jews (who are White) and students who attend public schools are mostly Black and Latino, the district court held that the two political factions serve as "proxies for race,"[110] and their competing "policy preferences are not 'unconnected' to race."[111] That simplistic analysis improperly conflates racial *correlation* and racial *causation*—two distinct inquiries in two distinct requirements that both must be proven to establish a Section 2 violation. That the district court conflates those distinct requirements creates a legal rule that "presuppose[s] the inevitability of electoral apartheid," which this Court rightly eschews. *Niagara Falls*, 65 F.3d at 1016; *see id.* at 1015 ("The Voting Rights Act does not provide that race alone, to the exclusion of all other factors political and social, is the Rosetta Stone of an election."). Far more than correlation is necessary to label communities mere "proxies for race." Such a determination must turn on evidence of a race-based cause. *See LULAC*, 999 F.2d at 861.

[110] SA45.
[111] SA38 ¶ 47.

Section 2's "but-for test directs [courts] to change one thing at a time and see if the outcome changes." *Bostock*, 2020 WL 3146686, at *4. The district court abdicated that responsibility, purportedly because the correlation between race and policy preferences in the District "makes it all but impossible to untangle race and policy."[112] There is nothing "impossible" about it. The District's expert, Dr. Alford, testified that adjusting the race of the candidate does not change the outcome of election results: "you can move the Ls or the Ws or Bs anywhere you want in this analysis and we see it in all kinds of patterns. … *Something is clearly creating white cohesion here, but it apparently is not the race or ethnicity of the candidates*."[113] That testimony was unrefuted, and it establishes not only that it is possible "to untangle race and policy," but also that race *is not a cause* of divergent voting patterns in the District. *See Bostock*, 2020 WL 3146686, at *5. The district court didn't even mention this testimony in its decision, which was clear, reversible error. *See Johnson*, 512 U.S. at 1011 (district court's findings must "rest[] on comprehensive, not limited, canvassing of relevant facts").

Second, the district court improperly discounted the unrefuted evidence that Black and Latino voters enjoy equal access to the political process, including that minority candidates regularly appear on the ballot and win elections.

[112] *Id.*
[113] A1022:1–6 (Alford) (emphasis added).

- The district court treated minority candidates' success as irrelevant because the winning minority candidates were usually not the preferred candidates of Black and Latino voters.[114] That was legal error. The focus of the causation inquiry (and Senate Factor 7) is "race or color" not political preference. How voters respond to racial cues is critical to that inquiry, and a candidate's race is more probative of that inquiry than the race of his supporters. *See, e.g.*, *Niagara Falls*, 65 F.3d at 1015 ("By looking beyond the statistical voting patterns of [W]hites and [B]lacks to see *who* is actually running—[W]hites or [B]lacks—courts attempt to determine ... whether the majority is voting against candidates for reasons of race.") (emphasis in original).
- The district court disregarded the election of every minority candidate associated with the "private school" slate on the specious finding they were "safe" candidates, whose elections were "engineered" by the Orthodox Jews.[115] This conspiracy theory has no basis in the facts or the law. The "safe candidate" doctrine allows courts to discount suspicious elections of a minority candidate *after a Section 2 case has been filed*, because post-filing elections might be an effort by the majority voters to scuttle the pending litigation. Minority candidate victories when there is no litigation on the

[114] SA45 ("The issue is not simply whether a candidate is a member of a minority community, but whether the candidate is minority preferred.").
[115] SA56 ¶ 61; SA61 ¶ 71.

horizon cannot be disregarded under this rationale. Indeed, the "safe" candidate/special circumstances doctrine is relevant only to "*aberrational* victories" for minority candidates. *Rodriguez v. Bexar Cty.*, 385 F.3d 853, 864 (9th Cir. 2004) (emphasis in original). In the District, minority candidate success *is the norm*. Minority candidates have won elections consistently since 2013, including hotly contested elections against White opponents.[116] Of the thirty candidates who participated in the fourteen contested elections for the Board between 2013 and 2018, seventeen—56%—were Black or Latino, and minority candidates won eight—57%—of those elections.[117] "Every victory cannot be explained away as a fortuitous event." *Rollins v. Fort Bend Indep. Sch. Dist.*, 89 F.3d 1205, 1213 (5th Cir. 1996). It is "clear error" for a district court to "employ[] the *Gingles* special circumstances analysis not to explain the victory of an individual minority candidate, but rather to explain away the consistent success of [minority] candidates in a number of races over [multiple] election cycles." *Rodriguez*, 385 F.3d at 864. That exactly describes the district court's error here.

[116] *See, e.g.*, SA54–56 ¶ 60 (noting Charles, Germain, and Maraluz Corado won in 2013); *id.* (Ramirez won in 2015); *id.* (Charles and Germain won again in 2016); *see also* SA7–8 ¶ 7.
[117] *See* SA7–8 ¶ 7.

- The district court also purported to find that "minority voters have no access to the slating process of the overwhelmingly white private school community."[118] That factual finding rejects reality. The undisputed evidence—reflected in the district court's other findings—proves that the "private school" slate regularly includes minority candidates.[119] It appears the district court may have actually meant that the "private school" slate does not include "public school" candidates.[120] That mistake conflates political affiliation with race. There is no evidence that the "private school" slate has ever rejected minority candidates. But of course the "private school" slate would not slate "public school" candidates, for the same reason that Democrats don't slate Republicans.

Third, the district court held the District failed to prove that "private school community" voters "support[] candidates who advocate for lower property taxes and maintaining and increasing mandated services for private schools, while the public school community supports candidates who advocate for policies supporting education."[121] According to the district court, "the record evidence to that effect

[118] SA45.
[119] *E.g.*, SA54 ¶ 60 ("private school" slate supported the winning candidates of color).
[120] *See, e.g.*, SA52 ¶ 58 (finding public school candidates of color "were never approached by anyone connected to the slating organization").
[121] SA38–42 ¶ 48.

came from past and present [Orthodox Jewish] Board members, each of whom had credibility problems."[122]

This reasoning is bizarre. Whether the district court found witnesses credible on this point is irrelevant because *no one has ever even disputed* that Orthodox Jewish voters prefer private schools and lower property taxes and that the "public school community" prefers the opposite. As discussed above, Plaintiffs conceded these exact points in their complaint, describing the competing policy preferences basically the same way the court said the District failed to prove. *Supra*, p. 25.

At trial, evidence about these policy differences came from both sides' witnesses and not solely from the (uniformly Orthodox Jewish) witnesses the district court found "had credibility problems." (It bears noting, however, that none of the "credibility problems" the district court identified relates to whether Orthodox Jewish voters prefer private schools and tax relief.)[123] For example, "public school" voter Olivia Castor testified that the "private school" community "is defined around policy positions that support private schools" and the decision to "send their kids to private schools."[124] "Public school" candidate Jean Fields also testified that

[122] *Id.*
[123] *See* SA38–42 ¶ 48.
[124] A935:3–11 (Castor).

Orthodox Jewish voters "are focused on policies favoring lower taxes" and "policies that maintain a high level of district services for private schools."[125]

Nor does it matter whether "private school candidates ran on any particular platforms."[126] Voters in both communities plainly understood the policy positions they could expect from "private school" and "public school" candidates.[127] Indeed, Plaintiff Eric Goodwin, an unsuccessful "public school" candidate, testified that each side knows the other side's policy views, regardless of campaign activity.[128]

The district court's skepticism is puzzling. If the district court truly thinks the District's voters *aren't* motivated by policy concerns surrounding public and private schooling, then why does everyone call them the "private school" and "public school" slates? And what motivates them instead? The district court provides no answers to these questions because none exist.

And even if the district court had some legitimate reason to be skeptical, that wouldn't cut in Plaintiffs' favor. It was not *the District's burden to disprove* racial causation or to prove a race-neutral cause of election results. It is *Plaintiffs' burden to prove* racial causation, along with the other essential elements of their Section 2

[125] *E.g.*, A950:4–16 (Fields).
[126] SA43 ¶ 49.
[127] *See* SA43 ¶ 49 & n.42.
[128] A943:13–945:25 (Goodwin).

claim. *See Chisom*, 501 U.S. at 397–98. And were it the District's burden, the District indisputably met it—with its own evidence, with Plaintiffs' evidence, and Plaintiffs' judicial admissions in their own complaint.[129]

Finally, after finding *no evidence* that Orthodox Jewish voters "harbor conscious racial animus," the district court accused them of unconscious racial animus in the very next sentence.[130] The district court reasoned that if "the white 'private school community' votes as it does to reduce taxes, it would deny reality to pretend that its members are unaware that the students to be negatively affected by their votes [*i.e.*, those attending public school] are overwhelmingly children of color."[131] That conclusion finds no support in the record. There is no evidence, for example, that "private school community" voters would have changed their stance on taxes and support for private schools if the students' attending public schools were mostly White. If anything, their voting patterns prove the opposite.

Moreover, the district court's presumed *consequences* for public school students that might result from voting decisions based on race-neutral policy preferences, like reducing public school spending, is not evidence of racial discrimination. Taken to its logical conclusion, and stripped of any connection to purposeful racial

[129] It also is worth noting that the district court repeatedly stopped the District from eliciting testimony on this very point. *See, e.g.*, A959:24–964:13 (Trotman).
[130] SA46–47 ¶ 51.
[131] *Id.*

discrimination, the district court's reasoning would transform Section 2 into a political cudgel to be used against political conservatives of all stripes who favor reducing public spending and taxes. That is a result Congress certainly never intended, and any interpretation of Section 2 that endorsed the district court's approach here would impermissibly invade core First Amendment freedoms and render Section 2 unconstitutional.

* * *

As a matter of law, Plaintiffs had to prove racial causation to prove a violation of Section 2. As a matter of fact and law, they failed to do so, and their own evidence precluded them from doing so. Minorities in the District are not excluded from equal participation in political processes "on account of race or color." For this reason alone, the district court's decision should be reversed and its injunction vacated.

II. PLAINTIFFS' EVIDENCE DID NOT SATISFY THE SECOND AND THIRD *GINGLES* PRECONDITIONS.

Wholly apart from their failure to prove causation, Plaintiffs failed to prove the second and third *Gingles* preconditions—that minority voters are politically cohesive (second precondition) and that politically cohesive White voters usually defeat minority-preferred candidates (third precondition). *See Goosby*, 180 F.3d at 491. To conclude otherwise, the district court credited unreliable expert testimony to the complete exclusion of patently reliable expert testimony. This independently requires reversal.

Key to both preconditions is the existence of minority-preferred candidates—candidates who receive more than 50% of minority votes. *Niagara Falls*, 65 F.3d at 1018–19. Voters almost never report their race and almost always cast ballots anonymously, so it is impossible to know with certainty whether any candidate is minority-preferred.[132] Section 2 Plaintiffs therefore need statistical evidence to estimate that. *See id*. This is a task for experts.

As in many jurisdictions, the only information contained in the District's official election records are (a) candidates' names and the seat each ran for; (b) the total votes each candidate received, overall and by precinct; and (c) the names and addresses of the people who voted at each precinct.

Political scientists have developed a technique that estimates voter preferences, based on information about candidates' precinct-level results and the electorate's demographics. The original version of this technique (called King's Ecological Inference or EI:2x2) was designed for biracial electorates; the modern version (called Rows-by-Columns EI or EI:RxC) was refined for multiracial electorates.[133] Both versions do basically the same thing: analyze *precinct-level* voter pool, turnout, and vote totals, then generate estimates of a candidate's *aggregate* support among voters by race.

[132] *See* SA at 14–15 ¶ 19.
[133] A1070–72 (Alford Report).

Since its development, EI:RxC has become the gold standard in vote-dilution cases.[134] *See Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 388 (S.D.N.Y.) (three-judge panel) ("[EI is] generally considered to be the *most accurate method* of calculation.") (emphasis added), *aff'd*, 543 U.S. 997 (2004); *NAACP v. Jindal*, 274 F. Supp. 3d 395, 433 (M.D. La. 2017) ("[EI is] widely recognized as the *best method* for determining candidate preferences for different groups.") (emphasis added).

EI:RxC *estimates* voter preferences. It does not *measure* them. A major benefit of EI:RxC is that it reports uncertainty by generating confidence-intervals around its point estimates.[135] "The confidence interval is a measure of uncertainty" of an estimate. *NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1042 (E.D. Mo. 2016), *aff'd*, 894 F.3d 924 (8th Cir. 2018); *Jindal*, 274 F. Supp. 3d at 433 n.228 ("In addition to providing a point estimate, King's EI also provides a range of estimates within which one can be 95% confident that the actual value of the group's support for a candidate lies."). "[T]he narrower the confidence interval, the more reliable the estimate; the broader the confidence interval, the less reliable the estimate." *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1404 n.5 (E.D. Wash. 2014).

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[134] *See* SA32 ¶ 39 (acknowledging universality of the technique); A1070–72 (Alford Report); A1008:19–23 (Alford) (Dr. Alford testifying that, in 40 VRA cases where he's testified, never have experts disagreed over using EI:RxC).

[135] *Cf.* SA28 ¶ 35 n.30 (explaining the difference between point estimates and confidence-intervals).

EI:RxC thus estimates how much support a candidate received from a group, as well as a range of estimates of that group's support, typically at the 95% confidence level. For example, EI:RxC might estimate that hypothetical candidate Jane Doe won 60% of the minority vote and that, with 95% confidence, Doe's minority support was somewhere between 40% and 70%. Though the point estimate (60%) may appear to estimate that Doe was minority-preferred, one could not say Doe was minority-preferred *with 95% confidence* because the lower bound of the confidence-interval (40%) is below 50%. Data can show that a candidate is minority-preferred, therefore, only if the confidence-interval is entirely above 50%.

EI:RxC needs inputs, including data on the racial composition of the electorate. In Section 2 litigation, the Census Bureau's "Citizen Voting Age Population" data set is the gold-standard because it tracks race as self-reported by residents. As a matter of law, "Census figures," like CVAP, "are presumed accurate." *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 853 (5th Cir. 1999); *accord United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 439 (S.D.N.Y. 2010) (collecting cases). That is not to say CVAP is perfect. It isn't. But CVAP's uncertainties are

well understood.[136] And so, as the district court found, expert witnesses in all Section 2 cases since EI:RxC was developed have used EI:RxC with CVAP (where actual voter turnout information was unavailable).[137]

Only the District's expert used the gold-standard technique (EI:RxC) with the gold-standard data set (CVAP). The results of Dr. Alford's analysis are fatal to Plaintiffs' case, for they show no evidence of racially polarized voting in the District. Dr. Alford found no statistically significant evidence that White voters vote as a bloc to defeat minority-preferred candidates.[138] With respect to Black and Latino voters, all of the relevant estimates of voter support were statistically insignificant because the confidence intervals crossed 50%, making it impossible to say with 95% certainty whether the winning candidate garnered more than 50% of the votes from Black or Latino voters.[139] And ignoring the confidence-intervals, Dr. Alford's point estimates show that Black voters usually preferred the winning candidates.[140]

There is no evidence that Dr. Alford made a mistake or that his analyses were unreliable. Yet, the district court gave his results no weight whatsoever—because,

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[136] A1028–1037 (Alford).
[137] SA32 ¶ 39.
[138] A1010:1–1026:17 (Alford).
[139] With 95% confidence, Dr. Alford could say only that minority support for candidates in the relevant two-way elections was somewhere between a low percentage (like 10%) and a high percentage (like 90%). *See supra*, p. 15; A1025:18–1026:17 (Alford). Such wide confidence-intervals make it impossible to reliably determine if any candidate was minority-preferred and, if so, which one.
[140] A1083 (Alford Report); A1025:4–17 (Alford).

supposedly, CVAP data is inappropriate.[141] Instead, the court relied entirely on Plaintiffs' expert, Dr. Barreto. His opinions are based primarily on a new methodology that never has been offered, let alone accepted, in a fully litigated Section 2 case. Dr. Barreto created his own demographic data set, using a new technique called Bayesian Improved Surname Geocoding, or BISG. (More on BISG, below.) Instead of "presumptively accurate" CVAP data, Dr. Barreto used his BISG data to estimate voter race, and used that for his demographic input.

The district court clearly erred by accepting Dr. Barreto's novel analysis using BISG and by rejecting Dr. Alford's gold-standard analysis. The district court viewed the experts' disagreement as a *credibility* concern,[142] but the threshold concern is *reliability*. Consistent with Rule 702, an expert's methodology must be reliable, assessed against the four *Daubert* factors: "(1) whether a theory or technique can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) whether it has a high known or potential rate of error; and (4) whether it is generally accepted in the relevant scientific community." *Zaremba v. GM Corp.*, 360 F.3d 355, 358 (2d Cir. 2004) (internal citations omitted); *see* Fed. R. Evid. 702.

A district court always must assess reliability, even in a bench trial. The only thing a bench trial changes is *when* reliability must be assessed. Unlike in a jury

[141] *See* SA32 ¶ 39; SA24–27 ¶¶ 30–33.
[142] *See* SA13–14 ¶¶ 17–18.

trial, a court need not assess reliability *before* evidence is presented at a bench trial, but it must assess reliability *at some point*. *See Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 760 (7th Cir. 2010); *Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009); *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1302 (Fed. Cir. 2002). Here, the district court *never* assessed the reliability of Dr. Barreto's novel methodology. The court denied the District's pre-trial *Daubert* motion to exclude his testimony, opting to consider reliability after trial instead.[143] Yet in the post-trial opinion, the court did not revisit the four *Daubert* factors.

When a district court admits and relies upon expert testimony *without assessing reliability under Rule 702*, the ordinary deferential standards of review don't apply. The appellate court's review is *de novo*. *See Metavante*, 619 F.3d at 760 (appellate court "must review the admissibility of the expert testimony *de novo*" if a district court failed to assess reliability); *see also Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014) (*de novo* review of admissibility of expert testimony when it implicates the "construction or interpretation of … the Federal Rules of Evidence, including whether particular evidence falls within the scope of a given rule") (internal citations omitted); *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 883 (10th Cir. 2005) ("We review de novo whether the district court applied the proper standard in determining whether to admit or exclude expert testimony.").

[143] *See* A893:8–17.

Plaintiffs did not establish that Dr. Barreto's novel methodology—specifically, using BISG data from a small, localized population to estimate voter turnout by race, then inputting that into EI:RxC to estimate voter preferences by race—is reliable,[144] and the district court clearly erred in relying upon it. The reasons the district court gave for believing Dr. Barreto indict every Section 2 vote-dilution case that has been litigated using the standard approach with CVAP data.

A. Dr. Barreto's Use Of BISG In This Case Was Not Reliable.

BISG is a formula that "generate[s] a probability" that a voter is Asian, Black, Hispanic, White, multiracial, or Native American, based on the voter's surname and home address.[145] In essence, BISG takes an individual's surname and home address and calculates the probability of the individual's race.[146] Dr. Barreto neither collected nor verified any of this information himself—he used free software he found on the internet called "Who Are You" or WRU to apply the BISG formula to spit out the probability of each voter's race.[147]

At some point, Dr. Barreto presumably had a spreadsheet whose rows identified voters by surname, address, and race probabilities.[148] (We say "presumably"

[144] *Contra* A921:15–19; A922:18–24 (Morrison).
[145] SA15–16 ¶ 20.
[146] *See* SA16 ¶ 21.
[147] *See* SA15–16 ¶ 20.
[148] *See* SA29 ¶ 35 n.32.

because Dr. Barreto didn't preserve these results.)[149] Because EI:RxC analyzes aggregate data on voter turnout, Dr. Barreto claims he took the individual-level racial probabilities in the (missing) spreadsheets and aggregated them to create precinct-level voter turnout data.[150] How, exactly, he aggregated individual probabilities into precinct-level voter turnout data is unknown because he did not preserve his aggregate data.[151]

Dr. Barreto's BISG methodology is unprecedented—and not just because he destroyed his bespoke data sets before trial. Until this case, no expert in a Section 2 vote-dilution case had (1) used BISG to estimate voter turnout by race in a small, localized population like the District, then (2) used BISG estimates of voter turnout as an input into EI:RxC to estimate voter preferences by race. Not even Dr. Barreto: (1) the district court found that Dr. Barreto has no expertise using WRU and does not know how it works;[152] and (2) Dr. Barreto admitted he had never used BISG before, even though BISG has been available since 2009.[153] *See also Cisneros*

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[149] A972:16–22 (Barreto).
[150] SA19 ¶ 24.
[151] A972:3–973:22 (Barreto). Aggregating voter turnout from the probabilities of an individual voter's race is not a straightforward task. One could count a voter as Black, Hispanic, or White based on the voter's highest probability. Dr. Barreto testified that he did something different—instead of assigning one race to each voter, he counted every voter as a fractional Black voter, a fractional Hispanic voter, and a fractional White voter, based (somehow) on the probabilities that the voter was Black, Hispanic, or White. *See, e.g.*, A974:22–976:4 (Barreto) ("It assigns different race probabilities to each individual based on these two input factors"); A974:22–975:12 (Barreto) ("So if your surname is 0.6 African-American and your census block is 0.8 African-American you don't automatically get 0.7 as the average midpoint.").
[152] *See* SA17 ¶ 21 n.19.
[153] *See* A1053:17–22 (Barreto).

v. Pasadena Indep. Sch. Dist., Civ. Action No. 4:12-CV-2579, 2014 WL 1668500, at *10 (S.D. Tex. 2014) (Dr. Barreto used CVAP); *Rodriguez v. Harris Cty.*, 964 F. Supp. 2d 686, 727 (S.D. Tex., 2013) ("According to Dr. Barreto, the ACS [the Census Bureau's American Community Survey] is the only reliable source for citizen voting age population data.").

It is possible that Dr. Barreto single-handedly revolutionized how Section 2 cases will now be litigated, using a new methodology that he did not understand,[154] with software he did not know how to operate,[155] and without showing his work. It is far more likely that, to avoid the case-ending consequences of using the gold-standard methodology, he cobbled together a one-time-only methodology that, for reasons not even he understands, managed to produce results he liked better.

It is therefore vital to scrutinize the reliability of his methodology. And held up against the four *Daubert* factors, Dr. Barreto's novel methodology is unreliable.

1. The methodology has not and cannot be tested (*Daubert* Factor 1).

Dr. Barreto's use of BISG in this case cannot be tested. He did not preserve his BISG race estimates, individual or aggregate, leaving the District no way to test his application of BISG or his use of that data to estimate voter preferences by race.

[154] *See* SA17 ¶ 21 n.19.
[155] *See id.*; *see also* A977:22–981:19 (Barreto).

That the district court found Dr. Barreto was credible as a witness[156] is no substitute for using the adversary system to test and review his methodology to determine whether it is reliable. Nor did Dr. Barreto do anything to test whether his BISG race estimates were even close to the mark. He did not, for example, validate his BISG results by calling voters and asking their race to compare with his BISG estimates. He took on faith the BISG estimates he obtained from software he didn't understand.

The district court nevertheless took comfort in observing that Dr. Barreto's primary results, obtained via his novel methodology, were "consistent" with secondary results Dr. Barreto obtained via other nonstandard methodologies he performed.[157] But Dr. Barreto's primary results were *inconsistent* with the results Dr. Alford obtained via the gold-standard methodology, and the district court clearly erred by ignoring that inconsistency. If anything, that all of Dr. Barreto's results, primary and secondary, are inconsistent with the gold-standard results indicates that all of his methodologies are unreliable: there are infinitely many more wrong answers than right answers to a problem.

At any rate, the superficial consistency of the results that Dr. Barreto obtained via his various nonstandard methodologies does not establish the reliability of his primary methodology—using EI:RxC with his own BISG data set. One alternative

[156] *See* SA14 ¶ 17.
[157] SA14–15 ¶ 19; SA17 ¶ 22; SA22 ¶ 28.

approach Dr. Barreto took was to use EI:2x2 (the outdated predecessor to EI:RxC) with CVAP data.[158] But for purposes of his EI:2x2/CVAP analysis, Dr. Barreto *combined* Blacks and Hispanics into a single Minority group. This approach is analytically flawed and does not in any way suggest that Dr. Barreto's primary methodology is reliable.

- First, Dr. Barreto's EI:2x2/CVAP methodology tells nothing about minority cohesiveness (the second *Gingles* precondition) and so cannot be used to test the reliability of his novel (BISG/EI:RxC) methodology's conclusions about minority cohesiveness. Because Dr. Barreto combined Blacks and Hispanics into a single "Minority" group, cohesiveness was an *assumption*, not a *conclusion*. It was clearly erroneous for the district court to find that the results of Dr. Barreto's EI:2x2 analysis corroborate the results of his EI:RxC analysis.
- The district court recognized that combining Blacks and Hispanics at the start of the analysis "might not be a reliable methodology in the first instance."[159] That should have been the end of it, but the court didn't stop there. Instead, the court accepted the unreliable methodology ostensibly "because grouping the minority voters increased the sample size being analyzed and helped to

[158] A926:1–929:1 (Barreto).
[159] SA23 ¶ 28 n.25.

mitigate the turnout problem." *Id.* Those excuses make no sense—they certainly do not speak to the methodology's reliability. At most, they acquiesce to its unreliability out of necessity. There is no necessity exception to Rule 702; testimony either meets Rule 702's requirements or not. An unreliable methodology is never admissible evidence—not even when considered "just as a cross-check" of another methodology.[160]

- Ultimately, Dr. Barreto's use of CVAP data to "cross-check" his use of BISG explodes the district court's conclusory finding that CVAP is inappropriate for this case.[161] CVAP cannot be appropriate as an input for an EI:2x2 analysis, yet inappropriate as an input for an EI:RxC analysis. If CVAP is inappropriate, it cannot corroborate Dr. Barreto's BISG analysis, meaning his BISG analysis remains untested and unreliable. And if CVAP is appropriate—which, of course, it is—then the district court had no basis to ignore Dr. Alford's opinion based on the proper analysis using CVAP and EI:RxC.

Besides Dr. Barreto's alternative, EI:2x2/CVAP, the other evidence the district court identified[162] is insufficient to test his primary, EI:RxC/BISG analysis. For

[160] *Id.* The district court's logic is circular: the court accepted Dr. Barreto's (dubious) EI:RxC analysis because it was consistent with his (equally dubious) EI:2x2 analysis, yet when confronting the obvious unreliability of his EI:2x2 analysis, the district court looked past them because his (dubious) EI:2x2 analysis was being considered only as a cross-check of his (equally dubious) EI:RxC analysis. Zero plus zero is still zero.
[161] *See* SA32 ¶ 39; SA24–27 ¶¶ 30–33; *see also* SA23 ¶ 28 n.25.
[162] SA22 ¶ 28.

one, Dr. Barreto used store-bought race estimates from a company called Catalist, but *on only one District election*.[163] For another, racial polarization *in the 2012 presidential election between Barack Obama and Mitt Romney* is barely, if at all, probative of vote dilution *in annual local school board elections*. The district court's reliance on that election analysis is especially puzzling because (1) Dr. Barreto used CVAP data for that analysis, without explaining why it was proper to do the analysis the right way for the presidential election but not for the elections that matter to the case, and (2) the results of the presidential election *are not* consistent with Dr. Barreto's other conclusions, as President Obama, the minority-preferred candidate, *won*.[164]

2. The methodology has not been subjected to peer-review or publication (*Daubert* Factor 2).

Using BISG to estimate voter race for small, localized populations has not been subjected to peer review and publication. One of the co-creators of BISG, Dr. Morrison, testified that BISG was designed for large, geographically diverse populations.[165] In his articles, he explained that BISG was tested on *two million* insurance policyholders across the United States.[166]

[163] SA22 ¶ 28.
[164] A1135, Table 1.
[165] A1236–37, 1241–42; A921:15–19, 922:18–24 (Morrison).
[166] A1484.

Publications the district court cited do not contradict Dr. Morrison's testimony or "validate[]" using BISG to estimate voter race here[167] because none of those publications validated using BISG *for small, localized populations*. The district court noted that BISG had been applied to the entire state of Florida and that the District and Florida both "have large Latino, Haitian, and Hasidic populations."[168] That presumed (but totally unproven) similarity in the electorates' *composition* cannot make up for the vast difference in the electorates' *size* and *concentration*. Florida's population is orders of magnitude larger and more geographically dispersed than the District's.

Using BISG data as the input for EI:RxC to generate voter preference estimates also has not been subjected to peer review and publication. The most the district court found was that BISG data had been used as an input "in health-care and campaign-donation contexts."[169] Those are patently dissimilar applications precisely because they involved much larger data sets; nor did they use BISG data with EI:RxC.[170] They also were not estimating whether any candidate in a local election received more or less than half of the minority votes—the task here.

[167] SA17–18 ¶ 23.
[168] SA18 ¶ 23 n.20; SA9 ¶ 25; SA30 ¶ 36.
[169] SA19 ¶ 24.
[170] *See generally*, A1376 (which says nothing about EI:RxC) & A1382 (same).

Dr. Morrison testified against aggregating BISG probabilities and using them as an input for EI:RxC.[171] As one of the researchers who *invented BISG* and an author of the articles that introduced the concept to the social sciences, the district court might have at least taken seriously Dr. Morrison's concerns. But the district court paid no attention to Dr. Morrison's detailed testimony. Instead, the district court dismissed Dr. Morrison on the flimsiest basis, citing a footnote in an article Dr. Morrison co-authored a few years ago that mentioned BISG.[172]

The district court clearly misread that footnote: the article unequivocally ranks *CVAP* as the best demographic data set for jurisdictions that don't record voters' races.[173] And the footnote merely suggests that, using BISG, "one could assign a race to registrants in a voter file where this quantity is not present and then aggregate these individuals by a geographic unit such as a voting precinct."[174] As Dr. Morrison confirmed at trial, the footnote was aspirational.[175] It also was vague and, contrary to the district court's characterization, did not in any way endorse "*exactly* what Dr. Barreto did."[176] Indeed, that is *not what Dr. Barreto did*. As he testified, Dr. Barreto did not "assign a race to registrants in a voter file"; he took only fractional pieces of

[171] *See* A921:15–19; A922:18–24 (Morrison).
[172] *See* SA19 ¶ 23 n.21; SA30 ¶ 36 n.33.
[173] A1276 & A1276 n.21
[174] *Id.*
[175] A923:3–924:4 (Morrison).
[176] SA30 ¶ 36 n.33 (emphasis added).

voters—20% Black here, 30% White there—and aggregated those fractional pieces, an approach Dr. Morrison rejected.

In sum, the district court made a fundamental mistake in accepting Dr. Barreto's methodology. The underlying theory of BISG may have been peer reviewed *for use in some applications*, but not for what Dr. Barreto did here.

3. The methodology has a high potential rate of error (*Daubert* Factor 3).

It is undisputed that Dr. Barreto did not calculate error rates when using BISG to estimate racial probabilities of District voters and, therefore, that he did not carry those error rates over into his EI:RxC analysis.[177] The district court accepted Dr. Barreto's testimony that he didn't *need* to determine error rates because he "calculated racial probabilities rather than race predictions."[178] That is demonstrably false. At the first step of his BISG analysis, Dr. Barreto may have been calculating "racial probabilities" of individual voters, but at the second step, he needed "race predictions" for the entire electorate to input into EI:RxC. Dr. Barreto was still *es-*

[177] A970:11–15 ("Q. Do you know what the error rates are for the estimate of voters race in the context of this case? Do you see that? A. Yes. Q. And the answer you gave me was no,'= right? A. Yes.")]. Recall that experts who use CVAP to estimate voter turnout by race *do* calculate error rates at the first step of the analysis and *do* carry those error rates over into their EI:RxC analyses.
[178] SA29 ¶ 35.

timating the races of District voters, and estimates *always* generate error. Dr. Barreto had no excuse for not calculating error rates at the first step of his novel methodology.[179]

All the publications on BISG that the district court cited as supporting Dr. Barreto's methodology identified error rates, too.[180] The authors assessed BISG on large, geographically diverse populations, who had self-reported their races, which provided a baseline to evaluate BISG.[181] The district court's assertion that "BISG is likely to provide accurate, reliable estimates in the District"[182] is vague, conclusory, and not based on evidence—not the academic literature nor a real world comparison of BISG's race estimates to the District's voters' actual self-reported races.

Because Dr. Barreto did not know the error rates for his BISG estimates, there was no way for the inherent error to be incorporated into his voter preference estimates using EI:RxC. And so, the confidence-intervals that his EI:RxC analysis generated reflected only *some* of the uncertainties of his approach. That means the confidence-intervals Dr. Barreto reported for his voter preference estimates using BISG were theoretical *minimums*, to the extent they had any scientific validity at all. That

[179] *See* SA29 ¶ 35 n.32 (erroneously crediting Dr. Barreto's testimony that error rates are built into the BISG model).
[180] *See* SA17–18 ¶ 23.
[181] *See* A1370.
[182] SA20 ¶ 25.

makes every one of his estimates not statistically significant, and yet the district court accepted Dr. Barreto's estimates at face value.[183] That was clear error.

4. The methodology is not generally accepted (*Daubert* Factor 4).

General acceptance is not a strict requirement under Rule 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993), but it is relevant to assessing the reliability of a methodology, *id.* at 594. "Widespread acceptance can be an important factor in ruling particular evidence admissible, and 'a known technique which has been able to attract only minimal support within the community,' may properly be viewed with skepticism." *Id.* (internal citation omitted).

Applying this *Daubert* factor to Dr. Barreto's novel methodology is straightforward. Using BISG on a small, localized population, then inputting the results into EI:RxC for the purpose of generating voter preferences, is not generally accepted. It is, in fact, unprecedented. Every witness testified that what Dr. Barreto did is novel, and the district court was constrained to agree.[184] Though that may not in itself be disqualifying, it undermines the reliability of Dr. Barreto's methodology.

[183] SA26 ¶ 35. Moreover, the district court's observation that the confidence-intervals for White voters do not cross 50%, SA28–30 ¶ 35, is irrelevant to the question whether the confidence-intervals for Black and Hispanic voters cross 50%. *See supra*, p.14.
[184] *See* SA32 ¶ 39.

And in conjunction with the other indicia of unreliability discussed above, it underscores that the district court's reliance on such a novel methodology—to the complete exclusion of a reliable, gold-standard methodology—was reversible error.

B. Even If Dr. Barreto's Methodology Were Reliable, The District Court Clearly Erred In Giving It Controlling Weight.

The flaws in Dr. Barreto's methodology render it unreliable. But even if they didn't, those flaws undermine the district court's decision to give that methodology decisive weight in this case. No reasonable factfinder could conclude that Dr. Barreto's custom BISG data set was better and *more reliable* than CVAP here, and the reasons the district court gave for discounting CVAP in this case are clearly erroneous. Indeed, if credited, those reasons would preclude ever using CVAP again.

Experts using the EI:RxC technique use CVAP for demographic information for the neighborhoods (Census blocks) whose residents are eligible to vote in each relevant precinct. At the first step of the analysis, experts estimate the racial breakdown of voter turnout, analyzing the precinct-level voting results in light of neighborhood demographics supplied by CVAP. The primary sources of uncertainty in this analysis arise from (1) the discrepancy between Census blocks and precinct boundaries, which do not perfectly overlap, and (2) the turnout estimates.[185]

[185] *See generally Port Chester*, 704 F. Supp. 2d at 425 (Port Chester failed to convince the Court that there are documented discrepancies in VAP and CVAP or that the other methods it proposed, such as using "corrected" Census numbers, voter registration, or voter turnout, were more reliable measures. In particular, the Court finds that voter registration and voter turnout methods have serious shortcomings that render them inappropriate for this analysis.").

The district court's criticism of CVAP simply restates what every expert does with CVAP.[186] In the district court's view, BISG is more "precise" than CVAP because "BISG begins with the actual voter file."[187] It is true that CVAP does not begin with the actual voter file, but that does not make CVAP less precise. CVAP and BISG are alternative methods for estimating the racial breakdown of voters at a precinct. Both start with the known total ballots cast at the precinct. CVAP estimates the racial breakdown of those ballots based on neighborhood demographics and turnout estimates; BISG estimates the racial breakdown of those ballots based on surnames and home addresses. BISG is not more precise just because it starts with different data (the voter file), since estimating the racial breakdown of the voter file still requires estimation. A different kind of estimation, yes, but still estimation.

The district court also faulted CVAP because it is based on the American Community Survey, which surveys a portion of the population every 5 years.[188] It is not clear why the court believed that a 5-year-old survey might be stale or unrepresentative. Nor did the court consider that BISG too ultimately relies on Census data—the Census Surname List.[189]

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[186] *See* SA25 ¶ 32 (faulting CVAP because of the misalignment between Census blocks and precincts); SA25 ¶ 33 (faulting CVAP because estimating turnout can be hard); *see also* SA27 ¶ 34 (falsely accusing Dr. Alford of "admitting" that CVAP is bad data because he acknowledged these well-known limitations).
[187] SA24 ¶ 31.
[188] *Id.*
[189] SA15–16 ¶ 20 & n.16.

CVAP is "presum[ptively] accurate," despite its known limitations. *Valdespino*, 168 F.3d at 853. The district court's recitation of CVAP's known limitations cannot show that Dr. Alford's CVAP analysis deserves no weight whatsoever—and certainly not less weight than a novel methodology never used before this case.

No reasonable trier of fact could weigh the evidence as the district court did. For this reason, the district court clearly erred in finding that Plaintiffs satisfied the second and third *Gingles* prerequisites, and the decision below must be reversed.

III. THE DISTRICT COURT MISAPPLIED THE "TOTALITY OF THE CIRCUMSTANCES" INQUIRY.

Even if Plaintiffs had satisfied the *Gingles* preconditions, and even if Plaintiffs had proved racial causation, reversal would still be warranted. That is because the district court clearly erred in assessing the "totality of circumstances." The district court misapplied or simply rewrote the Senate Factors.

The district court also failed to consider other relevant circumstances and even considered extra-record evidence in forming its conclusions. Any proper inquiry into the "totality of the circumstances" heavily favors the District. For this reason, too, this Court should reverse.

A. The District Court Misapplied The Senate Factors.

The district court had no choice but to conclude that there was no evidence of official discrimination in the District (Factor 1) and that racial appeals had never

formed any part of campaigns for the school board (Factor 6). But it botched the analysis of the other factors.

1. The district court misapplied the two most important factors (Senate Factors 2 and 7).

The two "most important Senate Factors" are the extent of racially polarized voting (Factor 2) and the "extent to which minority group members have been elected to public office in the jurisdiction" (Factor 7). *Gingles*, 478 U.S. at 48 n.15; *Niagara Falls*, 65 F.3d at 1022. As already discussed, both factors decisively weigh in the District's favor. These are the factors where courts often consider (and where the district court considered) whether the plaintiff has proved racial causation, and there is absolutely no evidence of racial causation in this case. *Supra*, Section I.

Indeed, as for Factor 2, Plaintiffs failed to prove racially polarized voting, *see supra*, Section II, much less racially polarized voting "on account of race or color." And as for Factor 7, the district court erroneously discounted the consistent success of candidates who were "minority group members" (the focus of Factor 7) by misusing the "safe candidate" doctrine, *supra*, pp. 42–43, and because they usually were not minority-*preferred*.[190] By replacing "minority group members" with "minority-

[190] *See, e.g.*, SA63 ¶ 74 (dismissing success of minority candidates because they "won with the support of the white community"); SA63 ¶ 73 (dismissing success of minority candidates because the private school "slating organization believed that [the candidates] would go along with the white [*i.e.*, private school] community's wishes").

preferred candidates," the district court rewrote the factor and changed its meaning completely.

Factor 7 asks only the extent to which "minority group members" have been elected, *Niagara Falls*, 65 F.3d at 1022, because even if not minority-*preferred*, the fact that minority candidates are elected with White support shows that minorities are not excluded from politics on account of race. *See supra*, Section I; *Niagara Falls*, 65 F.3d at 1021–23 (election of one minority candidate to town office supported district court's finding that Factor 7 weighed in defendant's favor, even when election occurred after lawsuit was filed). Adherence to Factor 7, as written, is particularly important because it is the *only* Senate Factor expressly mentioned in the statute's text, and like the Senate Report, the text refers to the election of "members of a protected class," not minority-preferred candidates. 52 U.S.C. § 10301(b).

2. The district court misapplied the slating factor (Senate Factor 4).

Factor 4 asks, "if there is a candidate slating process, whether the members of the minority group have been denied access to that process." *Gingles*, 478 U.S. at 37. "The core inquiry as to slating ... is the ability of minorities to get on the ballot." *League of United Latin Ams. Citizens, Council No. 4434 v. Clements*, 986 F.2d 728, 750 (5th Cir. 1993).[191] If the slating processes that exist regularly slate minority

[191] *Accord France v. Pataki*, 71 F. Supp. 2d 317, 331 (S.D.N.Y. 1999); *Montano v. Suffolk Cty. Legislature*, 268 F. Supp. 2d 243, 265 (E.D.N.Y. 2003).

candidates, then minorities have not been denied access to the slating process. *Compare LULAC*, 999 F.2d at 861 (both parties slated minority candidates, so minorities had access to the slating process), *with Goosby*, 180 F.3d at 495 (Republicans never slated Black candidates pre-litigation, so Black Republicans lacked access to the slating process). It is that simple.

Itt is indisputable that minority candidates regularly appear on the ballot in the District (and win) on both of the competing "private school" and "public school" slates. Nothing more is required to conclude that minorities are not "denied access" to slating, and that Factor 4 favors the District.

Here, the district court erroneously expanded the scope of Factor 4. According to the district court, the "question is not simply whether minority candidates get on the ballot," but whether minority voters have "substantial input" in the slating process—*e.g.*, into deciding "what issues or candidates should or should not be endorsed."[192]

Neither of the cases cited by the district court supports the court's revision of Factor 4.[193] In *Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113 (E.D. La. 1986), there was only one slating "organization" in the jurisdiction, and it consisted of two people—the long-serving mayor and chief of police. *Id.* at 1120–

[192] SA49–50 ¶ 56.
[193] *See* SA50 ¶ 56 (citing *Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113, 1123 (E.D. La. 1986); *Harper v. City of Chi. Heights*, 1997 WL 102543, at *9 (N.D. Ill. 1997)).

23. No Black person had ever been elected to municipal office since the city was incorporated in 1913, and only two Black candidates had even run for election during that time period. *Id.* at 1120–22. The only time a Black candidate had approached the sole slating organization to seek support, he was "informed that he could not be on the slate, that he was not needed to get the black vote." *Id.* at 1123.

Harper v. City of Chicago Heights, 1997 WL 102543 (N.D. Ill. 1997), also involved only one slating organization—the Concerned Citizens Group—that "was responsible for slating candidates for the city council," and there was no evidence "that access to the ballot could be achieved outside of that process." *Id.* at *9.

The facts in *Gretna* and *Chicago Heights* are entirely different from those at issue here. Here, there are two slating processes—an informal process in the Orthodox and Hasidic community that supports "private school" candidates, and a more formal slating organization that slates and supports "public school" candidates. Both processes slate and support minority candidates, and there is no evidence that any minority candidate ever sought and was denied access to the informal slating process in the Orthodox Jewish community. These facts not only distinguish this case from *Gretna*, they are on all fours with cases within this circuit applying Factor 4. *E.g.*, *Flores v. Town of Islip*, 382 F. Supp. 3d 197, 238–39 (E.D.N.Y. 2019).

Factor 4 asks only whether minorities "have been denied access" to the slating process, and for good reason. Informal slating processes, like the "private school"

slating process in the District, do not have organizational structure, bylaws, platforms, committees, or websites. They are just groups of friends and acquaintances who share an interest in politics. Section 2 doesn't condemn that lack of formality, and nothing in Section 2 *requires* the creation of formal slating organizations to avoid being condemned as discriminatory.

The district court also expressly refused to consider the existence of the "public school" slating process in the analysis because "its candidates always lose."[194] The district court similarly declined to give any weight to the track record of minority candidates appearing on the ballot with support from the "private school" slate because these candidates were "often not minority-preferred."[195] Both rationales are untenable. Factor 4 focuses on whether minorities are able to get on the ballot, not whether they win (which is Factor 7) and not whether they are minority-preferred

[194] SA56 ¶ 61.

[195] SA56 ¶ 61 (citing *Velasquez v. City of Abilene*, 725 F.2d 1017, 1022 n.1 (5th Cir. 1984)). *Velasquez* also does not the support the court's interpretation of Senate Factor 4. In *Velasquez* there was only one organization—the Citizens for Better Government—that slated and endorsed candidates for the city council in Abilene, Texas. *Velasquez*, 725 F.2d at 1019. The Fifth Circuit remanded the case to the district court to address evidence of structural impediments that may have prevented access to the sole slating organization in the jurisdiction. The appellants alleged that the minority candidates that had been supported by the sole slating organization "were mere tokens put forward by a slating organization in which minorities have no real influence under the current system," but that was not the finding of the district court or the Fifth Circuit. The footnote cited by the district court merely quotes the Senate Report for the proposition that the election of a few minority candidates does not necessarily foreclose the possibility of vote dilution. But nothing in *Velasquez* supports the district court's decision to disregard evidence that minority candidates were regularly supported on the "private school" slate.

(which is Factor 2). Had the district court not rewritten Factor 4, it would have been compelled to conclude that it favors the District.

Regardless, the district court's conclusions blink reality even under the court's legally erroneous rewrite of Factor 4. At trial, the unrebutted evidence showed that minority candidates were *actively involved* in the "private school" slating process, and on some occasions controlled it. Minority candidates affirmatively reached out to leaders in the Orthodox Jewish community to seek their support, formed their "private school" slates, and got elected.[196] For example, even the district court acknowledged evidence that Bernard Charles, who is Black, chose his running mates on the "private school" slate in 2013, and secured support from the "private school community" for his all-minority "slate."[197] That didn't matter to the district court because "only people with some kind of connection to the organization were introduced, vetted, and selected."[198] That cryptic statement is hard to interpret: it is unclear what is meant by a "connection to the organization" or why that would matter even if it were true. It is hardly unusual for people to support candidates with whom they have a "connection." The usual word for it is "politics."

[196] A1320 ¶ 21 (Charles); A1305 ¶ 16 (Germain); A984:5–19; A986:22–987:17 (Charles) (testifying that Ramirez also spoke with Rabbi Rosenfeld about school board election in 2015).
[197] SA50–52 ¶ 57.
[198] SA52 ¶ 58.

The assumptions driving the district court's Factor 4 analysis are that people involved with slating in the Orthodox Jewish "private school" community were obligated to provide "public notices welcoming candidates to meet religious leaders in open forums" and introduce "public school candidate[s] to Orthodox leaders"[199]—even candidates who had different political and policy preferences, had not sought support from the "private school community," and/or supported positions attacking the District's Orthodox Jewish community.[200] Those assumptions have no foundation in Section 2, which targets discrimination on the basis of *race* and doesn't take sides on matters of political preference. Indeed, if Section 2 *required* religious leaders in the Orthodox Jewish community to provide open forums welcoming political views with which they obviously disagree, as the district court assumed, it would infringe upon First Amendment rights to free association, expression, and religion.

The district court's misinterpretation and misapplication of Senate Factor 4 was a legal error that had significant implications for the court's ultimate finding under the totality of the circumstances. The undisputed evidence shows that minority candidates have access to both slating processes in the District, and there is no evidence that any minority candidate has been "shut out" of either process. *See*

[199] *Id.*

[200] This is not a hypothetical concern. As discussed below, the District adduced evidence of statements from at least two "public school" candidates that may be perceived as anti-Semitic (despite those candidates' post-hoc disclaimer of such intent at trial). *See infra*, p. 82.

Goosby, 180 F.3d at 494. The district court erred in finding Factor 4 favors Plaintiffs, and these errors undermine its ultimate conclusion.

3. The district court's findings on the "tenuousness" factor are internally inconsistent, based on extra-record evidence, and are improper (Senate Factor 9).

Factor 9 asks whether the District's reason for using at-large voting "is tenuous." *Gingles*, 478 U.S. at 37. The purpose for this factor is obvious—if officials have just recently switched to at-large voting and can't explain a good reason for doing so, it may be reasonable to assume they intended to dilute minority votes. Factor 9 does not help Plaintiffs here because the District's Board didn't create the at-large voting process, and couldn't change it even if it wanted to. As Plaintiffs concede, at-large voting it is mandated by state law. *See* N.Y. Educ. Law §§ 2018, 2032. There is nothing *tenuous* about the District's reasons for using at-large voting—it has no choice—like every other central school district in the state.

Shortly before trial, the district court addressed that fact and its bearing on Factor 9, and correctly concluded that what matters is not whether "state law does or does not preclude ward voting," but "the sincerity of the Defendant's believe that it does."[201] The district court further held that the District does *not* have a "tenuous reason for its policy under Section 9" because the District's "reading of the law is a

[201] A850:23–851:9.

fair reading and it's shared by the Commissioner of Education and a number of legislators."[202] So far so good.

Post-trial, the district court remembered its ruling that "the District has a legitimate basis for running the elections the way that it does" and that its interpretation of New York law "is reasonable, and may even be correct."[203] And it further found that, "on this record, there is no basis for concluding that the at-large elections are a cover for intentional discrimination or a desire for a discriminatory effect."[204]

Then the district court found that Factor 9 favors Plaintiffs anyway. Essentially, the district court found that, because the District's Board was not willing to settle this case on the terms Plaintiffs demanded, that suggests the Board members had "bad motives" and were "desperate" to maintain the at-large voting system.[205] From there, the district court concluded that even if the District was required to use at-large voting, its presumed reasons for *not settling* the case were tenuous, and that made Factor 9 weigh for Plaintiffs.[206]

There was error for several reasons. As an initial matter, it is improper to rely on speculative presumptions about the Board members' motivations in out-of-court settlement negotiations. Just as Plaintiffs could not try to use settlement negotiations

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[202] *Id.*; *see* A852:5–7 ("I do think the Defendant's reading of the statute is reasonable and frankly more reasonable than the other interpretation.").
[203] SA74 ¶ 86.
[204] *Id.*
[205] SA74–75 ¶ 86 n.62.
[206] *Id.*

against the District, *see* Fed. R. Evid. 408, neither can the district court use them against the District. That the court was involved in settlement negotiations to such a degree that it formed views about the parties' conduct and allowed those views to drive judicial decision-making is troubling.

In all events, the district court is just wrong. The fact remains that the District uses at-large voting because it is mandated by state law. Plaintiffs' lawsuit did nothing to change that, nor did unsuccessful settlement negotiations. Factor 9, as the district court correctly found pre-trial, decisively favors the District.

* * *

To recap, the district court found that Factors 1 and 6 favor the District. Properly considered, Factors 2, 4, 7, and 9 also favor the District, and the district court clearly erred in concluding otherwise. The District disagrees with but will not belabor the district court's analysis of Factors 5 and 8, for the court found Factor 5 (effects of past discrimination that hinder ability to participate) basically in equipoise,[207] and gave Factor 8 (responsiveness to the particularized needs of the minority community) little weight.[208] While the district court's decisions on these factors were error, they appear to be harmless. That leaves only Factor 3 on Plaintiffs' side

[207] SA60 ¶ 68.
[208] SA68 ¶ 79.

of the ledger—that certain voting procedures that, like at-large voting, are mandated by state law, may have the tendency to enhance the opportunity for discrimination.

B. The District Court Ignored Other Relevant Circumstances.

The Senate Factors are not an exhaustive list of circumstances relevant to the "totality of the circumstances" inquiry that Section 2 mandates. *Gingles*, 478 U.S. at 36–37; *see Johnson*, 512 U.S. at 1011. A district court's charge is "to engage in a searching practical evaluation of the past and present reality." *Niagara Falls*, 65 F.3d at 1008 (citing *Gingles*, 478 U.S. at 45). A court is justified in ignoring evidence "only if, after the receipt of that evidence, the existence of a fact appears no more or less probable than it did before that evidence was offered." *Solomon*, 221 F.3d at 1226 n.7. The district court failed its obligation to consider the *totality* of the circumstances here.

In particular, the district court failed to acknowledge that the "White" community targeted by Plaintiffs is the Jewish community and that the unique characteristics of the Jewish community are important. That Jews generally, and Orthodox Jews in particular, have historically been the victims of extreme discrimination and oppression both in the United States and throughout the world requires no citation. When Congress first passed the Voting Rights Act in 1965, and when it amended

Section 2 in 1982, the oppressive White voting majority it had in mind was *not* Orthodox Jews. The purpose of Section 2 is to remedy the historic exclusion of Black Americans from the political process by the White majority.

Section 2 wasn't intended for one marginalized minority group to use against another to achieve political victories it can't win fairly at the polls. For this Court to permit Plaintiffs to weaponize Section 2 against the Orthodox Jewish community to achieve purely political ends, unconnected with the goal of remedying historic racial discrimination, would be profoundly unjust and arguably unconstitutional.

The District's Jewish residents are not White supremacists. They are a historically oppressed and unwelcomed people who have made homes in the District and gained a foothold in local politics to advocate for their interests. That is democracy in action.

The district court also failed to consider that discrimination against Jews is still an unfortunate, modern-day reality—one that the evidence showed may have affected voter behavior in the District. While there was no evidence at trial that elected officials or others from the Jewish community acted with racial bias,[209] the same is not true going the other direction. Two "public school" candidates, one White and one Black, made campaign-related statements that members of the District's Jewish, "private school community" could reasonably have interpreted as

[209] SA46 ¶ 51.

anti-Semitic. Plaintiff Eric Goodwin, a Black man and former "public school" candidate, posted the following on Facebook: "The night before the election and those who want to keep the balance of power in their favor, spending the night at your religious establishments will not mask your master plan. East Ramapo is watching your every move."[210] Accusing Jews of having a secret "master plan" to control politics is a classic anti-Semitic trope.

And Steven White, a White man, perennial organizer of the "public school" slates, and former "public school" candidate, gave a campaign speech in which he labeled the District's Jews "segregationists" who are attempting to transform the town into a "labor camp" for their servants.[211] The anti-Semitic overtones need no further explanation.

Whether the speakers of these and similar statements *intended* them to be anti-Semitic is irrelevant. It is enough that a voter reasonably could have interpreted them to be anti-Semitic. That any voter in the District, much less Orthodox Jewish voters, might hesitate to cast a vote for the "public school community" candidates who made such public statements has nothing to do with "race or color," and everything to do with the candidates' unsuitability to hold public office.[212]

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[210] A1301.
[211] A1000:22–1002:18.
[212] Not only did the district court fail to consider these circumstances, but the Court actively prevented the District's efforts to further develop these issues at trial. *See, e.g.*, A959–64:9 (Trotman).

C. The District Court Improperly Relied On Wholly Irrelevant Circumstances.

Finally, and as noted above, the district court was directly involved in the parties' settlement discussions during the bench-trial. During these off-the-record settlement discussions, the District expressed its concern that the district court, the trier of fact in this case, was so involved. And it is clear from the district court's decision that the District's concerns were well-founded, for the district court improperly relied on its involvement in settlement discussions—and in particular its frustrations that the District did not accede to Plaintiffs' settlement demands and that a member of the District's school board perceived that the court was hailing board members into court to "talk/yell" at them for not settling—in making credibility findings and assessing the "totality of the circumstances":

- In connection with Senate Factor 7 and, in particular, the district court's conclusion that every successful minority candidate was "safe," the district court found that a board member "affirmatively mislead [a Black board member] by telling her that the reason for a settlement conference was 'Judge wants to talk/yell at' the Board 'for not doing what NAACP wants."[213] The district court called this a "lie[]."[214]

[213] SA65 ¶ 75 n.58.
[214] SA39.

- In connection with Senate Factor 8, the district court accused the same board member of "interfering with settlement of this lawsuit."[215]
- In connection with Senate Factor 9, the district court again accused the same board member of providing minority members with inaccurate "information about this lawsuit, including settlement possibilities that could have saved enormous amounts of money."[216] On this point, the court noted—as it learned in settlement discussions—that "Plaintiffs' counsel offered to waive their fees as part of a settlement."[217] While the court professed that it did "not hold [the refusal to settle] against" the District, the court relied on the same fact to conclude that the District had "a disturbing win-at-all costs attitude that suggests bad motives for adhering to the challenged voting practice."[218]

The district court's disclaimer doesn't change the fact that it relied on extra-record settlement discussions and the District's failure to settle the case. None of that is relevant to the "totality of the circumstances" inquiry here. Nor does a board member's subjective belief that a judge is going to "yell" at him for not settling on the other side's terms.

[215] SA73 ¶ 84.
[216] SA74 ¶ 86.
[217] SA74 ¶ 86 n.62.
[218] *Id.*

The district court's reliance on speculative assumptions about settlement motives drawn from extra-record evidence calls into serious question the district court's impartiality. "There is necessarily a broad line between commendable advance of judicial economy and undue court meddling." *Crandell v. United States*, 703 F.2d 74, 75 (4th Cir. 1983). Especially at a bench trial, a trial judge's involvement with settlement discussions followed by an express statement that one party "unreasonably refused to settle" indicates "possible judicial prejudice against" that party. *Id.* "Prejudgment is further indicated by judicial comments about the possible financial ramifications of the trial—considerations which were irrelevant to proper deliberation of the issues." *Id.*

The district court's improper reliance on settlement discussions, the District's failure to settle, and the court's subjective perceptions about the court-monitored settlement process, were outside the scope of any proper "totality of the circumstances" inquiry relevant to Section 2.

* * *

CONCLUSION

The district court's finding of a violation of Section 2 of the Voting Rights Act should be reversed; the district court's May 26, 2020 injunction order should be vacated; and this case should be remanded with instructions that the district court enter judgment in the District's favor.

Respectfully submitted,

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Dated: June 25, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this motion complies with the type-volume limits of Federal Rule of Appellate Procedure 27(d)(2) because this document contains 20,235 words, and complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it has been prepared in 14-point, Times New Roman font.

Dated: June 25, 2020

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CERTIFICATE OF SERVICE

I certify that, on June 25, 2020, the foregoing Brief was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users. All attorneys in this case are filing users.

s/ David J. Butler
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STATUTORY APPENDIX

52 U.S.C. § 10301

Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.