Nos. 22-11133, 22-11143, 22-11144 & 22-11145

In the United States Court of Appeals for the Eleventh Circuit

LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., ET AL.,

Plaintiffs-Appellees,

v.

FLORIDA SECRETARY OF STATE, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Florida
Nos. 4:21-cv-00242-MW-MAF, 4:21-cv-00186-MW-MAF,
4:21-cv-00187-MW-MAF, 4:21-cv-00201-MW-MJF

BRIEF OF THE STATE OF GEORGIA AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, and in addition to those persons and entities identified by the Appellants, the State of Georgia identifies all additional attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case:

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Amicus states that no publicly traded company or corporation has an interest in the outcome of this case or appeal. Fed. R. of App. P. 26.1; 11th Cir. R. 26.1.

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ISSUES PRESENTED

1. Whether a limitation on attempting to influence voters with something of value while they are in line to vote violates the First Amendment where prohibiting direct political speech directed at persons waiting in line to vote is permissible under binding Supreme Court precedent?

2. Whether a claim under § 2 of the Voting Rights Act requires proof of discriminatory results, as this Court has held in *Johnson v. DeSoto Cnty. Bd. of Comm'rs*, 72 F.3d 1556 (11th Cir. 1996)?

3. Whether the district court improperly relied upon broad historical and social factors, and its disagreement with legislative policy judgments, in assessing whether there was an intent to discriminate for purposes of § 2 of the Voting Rights Act?

INTRODUCTION AND INTEREST OF *AMICUS*

The district court held that Florida's limitations on voter solicitation or "line warming"—approaching voters standing in line to vote with things of value designed to encourage voting—violated the First Amendment because the limitations were vague and overbroad. Opinion 157–87. It also held that the solicitation and various other provisions of Florida's voting laws were enacted with the intent to discriminate and would have a disparate impact on black voters, in violation of § 2 of the Voting Rights Act. Op. 134–36. It then imposed 10 years of preclearance on future changes to Florida's voting laws and appointed itself the preemptive arbiter of election reform in Florida. Op. 281. For the many reasons discussed in Appellants' opening briefs, Secretary of State Brief 16, RNC Brief 11, those holdings were erroneous and overreaching, and should be reversed.

Amicus the State of Georgia files this brief, pursuant to Fed. R. App. P. 29(a)(2), to make several additional points relevant both to this case and to the challenges to Georgia's voting laws now pending in the Northern District of Georgia. In particular, Georgia, like many other States, has enacted restrictions on soliciting persons waiting in line to

vote, including for the purpose of offering them things of value such as money, gifts, food, or beverages. O.C.G.A § 21-2-414(a). And it has other laws and regulations governing voting by mail, drop boxes, and other aspects of elections that could be affected by this Court's eventual decision in this case. Accordingly, Georgia has a keen interest in both the outcome of this case and the reasoning of this Court's decision even apart from the result.

SUMMARY OF ARGUMENT

1. Contrary to the district court's holding below, limitations on soliciting persons waiting in line to vote are entirely permissible under the First Amendment. It is undisputed that States may prohibit electioneering—classic and core political speech—directed at the captive audience of persons in line to vote. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876 (2018); *Burson v. Freeman,* 504 U.S. 191 (1992) (plurality opinion). Given the permissibility of such direct limits on political speech, then *a fortiori*, limitations on the *conduct* of giving persons things of value while they are waiting in line to vote are compatible with the First Amendment. Even if such conduct were viewed as partly expressive in nature, the burden on First Amendment interests would be a mere

shadow of the burden on speech permissibly imposed by electioneering restrictions. And the notion that such restrictions are somehow overbroad because they might encompass speech in addition to the distribution of goods turns things on their head given that limiting such speech is *precisely* what the Supreme Court has allowed. There is no overbreadth where the supposed further restrictions on speech are *also* valid under the First Amendment. Restrictions on voter solicitation or line warming constitute at best a time-place-manner restriction allowing voters quietude while in line to vote and, are amply supported by the numerous complaints from voters that such "line warming" activities can cause waiting voters to feel pressured or intimidated and can act as a cover for impermissible electioneering.

2. There is no such thing as a stand-alone discriminatory "intent" claim under § 2 of the Voting Rights Act. The district court early in its decision opined that discriminatory results were not required to establish a § 2 violation, only discriminatory intent. Op. 39–40. In ruling on the § 2 claims, however, it held that there would also be a disparate impact on black voters, potentially rendering its earlier legal musings seemingly irrelevant. Op. 115–16. But given the implausibility of its discriminatory

results holding, Sec'y of State Br. 16–21, and the district court's later refusal to expressly address discriminatory results, Op. 255–57, it seems likely that Appellees will adopt the district court's intent-only analysis as at least an alternative ground for affirmance. But this Court has squarely held that "discriminatory intent alone is insufficient to establish a violation of Section 2." *Johnson v. DeSoto Cnty. Bd. of Comm'rs*, 72 F.3d 1556, 1561 (11th Cir. 1996). Instead, there must also be a showing of "discriminatory results." *Id.* That holding applies to all types of claims under § 2, is amply supported by the history and amendments to § 2, and is consistent with years of Supreme Court decisions.

3. Finally, while there is much to criticize in the district court's substantive discussion of whether the Florida legislature acted with discriminatory intent, two aspects of that analysis are particularly problematic and could have broad consequences across all voting litigation. First, historic factors such as slavery and racial discrimination (long preceding the statute in question) and racially disparate social, economic, and political trends are too general and amorphous to bear upon whether the legislature as a whole acted with discriminatory intent. Indeed, the district court's sociological view was that virtually all of

society is reflective of, and provides essential pressures for, racial discrimination, so that literally all election law of any type would have race as a "motivating factor" as the district court understood it. Op. 41–52. Further, the district court viewed any law that had race as "a motivating factor" to be discriminatory, regardless whether race was the primary or but-for cause for enactment. So even laws meant to increase minority participation would be unconstitutional, as such laws are plainly race conscious and hence motivated by, in part, race and prospective racial outcomes.

Second, the district court improperly used its disagreement with the legislature's judgment (regarding the need to foreclose potential avenues of fraud, maintain election integrity and efficiency, and bolster voter confidence) to conclude that such valid legislative interests were mere pretext for racial discrimination. Op. 69–78, 128–35. Courts cannot use simple disagreement with legislatures as a basis for inferring discriminatory intent, and it is corrosive of the judicial role, not to mention democracy, to suggest as much.

ARGUMENT

I. Prohibiting Solicitation of Persons Waiting in Line to Vote Does Not Violate the First Amendment.

The district court erroneously held that limits on voter solicitation were vague and overbroad restrictions on speech and association, and hence violated the First Amendment. Op. 157–87. But there are numerous valid and well-supported reasons for barring third parties from approaching persons waiting in line to vote. The Supreme Court's endorsement of such limitations even as applied directly to political speech demonstrates that the far lesser burdens on conduct at issue here are, *a fortiori*, permissible under the First Amendment. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876 (2018); *Burson v. Freeman,* 504 U.S. 191 (1992) (plurality opinion).

A. The immediate environs of an active voting location is a nonpublic forum where the State has a compelling interest in protecting the captive audience of voters waiting in line.

Unlike streets and sidewalks during most of the year, on election day (and during early voting) the immediate environs of a voting location is a *nonpublic* forum, *see* Defs.' Br. Supporting Mot. to Dismiss at 12, 22, *Sixth District of the African Methodist Episcopal Church v. Kemp,* No.

1:21-cv-01284-JPB (N.D. Ga. June 7, 2021), ECF 87-1, where a speech restriction will be upheld so long as it is "reasonable," *Mansky*, 138 S. Ct. at 1886 (cleaned up). States may even impose facially content-based restrictions in and around polling locations. *See Mansky*, 138 S. Ct. at 1886, 1888 (restricting political apparel within a polling precinct is permissible so long as scope is clear); *Burson,* 504 U.S. at 198–99 (plurality opinion) (restricting solicitation of votes and display or distribution of campaign materials within 100 feet of entrance to a polling place is permissible).

Given the unique circumstances of active voting locations, and the captive quality of persons waiting in line to vote, a State has a strong interest in protecting both its voters and the voting process generally from interference, intimidation, or undue influence. As the Supreme Court held in *Brnovich,* "[e]nsuring that every vote is cast freely, without intimidation or undue influence, is . . . a valid and important state interest." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2340 (2021). Georgia, for example, has concluded that handing objects to voters standing in line could be a pretext to defraud, intimidate, or pressure them, *see* SB 202, 156th Leg., Reg. Sess. (Ga. 2021), at 6:126-

129, and that a prophylactic rule is needed because *post-hoc* penalties after a voter had been influenced or intimidated would be very difficult to enforce. *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009). Those interests are every bit as valid as the interests supporting limits on actual political speech upheld in *Mansky* and *Burson*. Whatever expressive qualities handing out food, drinks, or other objects might arguably have, the interests that justify restricting the time and place of electioneering are necessarily sufficient to support restricting the conduct of line warming. Any incidental speech that might also be indirectly restricted could be *directly* restricted and hence there is no impermissible potential overbreadth.

B. State concerns with line warming are supported by both logic and experience.

Beyond the legal flaws in the district court's reasoning, there is ample policy support for such restrictions, as Georgia itself concluded. For example, in recent elections, Georgia received numerous complaints about third parties approaching the line under the guise of handing out food or water but then disturbing voters waiting to vote. *See* Defs.' Br. in Opp'n to Pls.' Motion for Prelim. Inj. at 4–5, 19, *In re Georgia Senate Bill*

202, Master Case No. 1:21-MI-55555-JPB (N.D. Ga. June 24, 2022), ECF 197 (citing testimony and complaints concerning line warming).

In restricting third parties approaching voters with something of value, the General Assembly recounted that "many groups" approached voters in line during recent elections and concluded that "[p]rotecting electors from improper interference, political pressure, or intimidation while waiting in line" was critical to maintaining election integrity. SB 202 at 6:126-29.

While some voters may have welcomed such approaches by some groups, one person's assistance is another person's attempt at influence or intimidation. Indeed, different voters undoubtedly would react differently depending on who was approaching them in line, regardless of the nominal purpose of such approach. Certainly, the Proud Boys or the Oath Keepers handing out water in Atlanta would be taken very differently by some than would similar conduct by the NAACP. Likewise, in other parts of Georgia, approaches by the ACLU would be viewed quite differently by some than approaches by representatives of the local church.

The simple solution adopted by Georgia, Florida, and many other States, is to prohibit third parties from approaching voters waiting in line to vote, whether for electioneering or under the guise of distributing various items of value. *See* SB 202 at 73:1872-89. In New York, for instance, it is a misdemeanor to provide "any meat, drink, tobacco, refreshment, or provision" with a value over one dollar to a voter standing in line to vote. N.Y. ELEC. LAW § 17-140. So too in Montana, where anyone affiliated with a campaign is prohibited from providing food or drink to voters waiting in line. *See* MONT. CODE ANN. § 13-35-211(2). Many other states also prohibit efforts to influence voters by approaching them in line.[1]

If water or snacks are thought necessary, they can be provided by election workers, not third parties, or perhaps made available before voters get in line. In Georgia, for example, SB 202 expressly permits "making available self-service water from an unattended receptacle to an elector waiting in line." SB 202 at 74:1888-89. And nothing prohibits a

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[1] *See*, *e.g.*, ARIZ. REV. STAT. ANN. § 16-1018(1); CAL. ELEC. CODE §§ 319.5, 18370; COLO. REV. STAT. § 1-13-714; CONN. GEN. STAT. § 9-236.

voter from bringing her own water or food to consume while in line.[2] But once voters are in line and waiting to vote, they become a captive audience, may fairly feel intimidated by the approach of differing groups, and it is an entirely valid state interest to ensure them a zone of quietude in their final approach to casting their votes. Georgia thus insulates that captive audience from potential intimidation by barring third parties from approaching them on line, regardless of the intent or effect of their approach.

Other interests in limiting the activities of third parties in the immediate vicinity of voting places include more mundane concerns such as traffic flow and access. Setting up food trucks or tables often makes it more difficult for voters to come and go from their voting places. Parking lots become more crowed or blocked, voters must navigate around third parties giving away or hawking various goods, and there is a greater need for election officials to maintain constant watch to prevent forbidden

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[2] In Georgia, the General Assembly also took proactive measures in SB 202 to address line length, requiring either reduction in precinct size or additional voting equipment for precincts where electors had to wait more than one hour before checking in to vote during the previous election. *See* SB 202 at 29:721-27.

electioneering and to address complaints. Given the limited time and place of restrictions on line warming, they are more than reasonable means of advancing even such mundane interests. Whether viewed as a limitation on speech or on the right to vote, "reasonable, nondiscriminatory restrictions" imposing such "[l]esser burdens" on the voting process are justified by "a state's important regulatory interests." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (cleaned up).

II. Section 2 of the Voting Rights Act Requires Proof of Discriminatory Results, Not Merely Discriminatory Intent.

The district court also committed serious errors in its analysis of the Voting Rights Act. Section 2 of that Act prohibits a voting "standard, practice, or procedure" that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color[.]" 52 U.S.C. § 10301(a). This requires "consideration of 'the totality of circumstances' that have a bearing on whether a State makes voting 'equally open' to all and gives everyone an equal 'opportunity' to vote." *Brnovich*, 141 S. Ct. at 2341. This standard makes room for the "usual burdens of voting," which voters must "tolerate." *Id.* at 2338. It also

recognizes that a State may take proactive measures to prevent voter fraud. *Id.* at 2348. A plaintiff must allege sufficient facts to plausibly show that the challenged laws, when considered alongside the state's "entire system of voting," create a voting system that is not "equally open." *Id.* at 2339, 2341.

After erroneously endorsing the notion that a violation of § 2 can be based on discriminatory intent alone, without discriminatory results, Op. 40, the district court purported to find a likely disparate impact as well. Op. 115. It nonetheless declined to expressly address whether such disparate impact constituted discriminatory results in ruling on the § 2 violations. *Id.* 255–57. The court's finding of disparate impact, however, was sorely lacking, as Appellants have detailed, Sec'y of State Br. 16–21, and thus Appellees may rely on an intent-only claim as either the primary or an alternative ground for affirmance. Given that significant possibility, the district court's extended exegesis on the subject, and the presence of the same legal issue in the Georgia litigation, *Amicus* addresses the error of any intent-only claim under § 2.

In *Johnson v. DeSoto County Board of Commissioners*, 72 F.3d 1556 (11th Cir. 1996), this Court held that "discriminatory intent alone is

insufficient to establish a violation of Section 2." 72 F.3d at 1561 (cleaned up). This Court explained that "the plain language of § 2" "expressly requires a showing of discriminatory results, and it admits of no exception for situations in which there is discriminatory intent but no discriminatory results." *Id.* at 1563; *accord Brooks v. Miller*, 158 F.3d 1230, 1237 (11th Cir. 1998) ("[W]e are bound by *Johnson* . . . which held that discriminatory intent alone, in the absence of a showing of discriminatory effect, is insufficient to establish a violation of § 2.").

In the Georgia litigation, the district court erroneously viewed *Johnson* as limited to vote-dilution cases. *See* Order at 14–15, *Sixth District of the African Methodist Church*, No. 1:21-cv-01284-JPB, ECF No. 136 ["*Sixth District* Order"]. But this Court said no such thing; it relied on the plain language of § 2 to expressly and repeatedly state that the requirement of discriminatory results applied to all § 2 claims. That holding has been reaffirmed outside of the vote dilution context. And that holding is amply supported by the statute and Supreme Court precedent.

A. Congress eliminated the intent test from § 2 in 1982.

When Congress first adopted the Voting Rights Act in 1965, § 2 read differently than it does today:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure *shall be imposed or applied* by any State or political subdivision *to deny or abridge* the right of any citizen of the United States to vote on account of race or color.

42 U.S.C. § 1973 (1965) (emphases added). In 1980, the Supreme Court found that this version of § 2 "no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." *Mobile v. Bolden*, 446 U.S. 55, 60–61 (1980). This was a serious problem for potential plaintiffs, because the Fifteenth Amendment requires a finding of intentional racial discrimination before invalidating a statute—a very high bar. *Id.* at 62.

Congress revised the statute to undo that reading of § 2. But Congress did not add a new test alongside the prior statute's intent-based test—it rewrote the statute entirely. The revised § 2 reads:

> (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.

52 U.S.C. § 10301 (emphasis added). This revised language created a new test—the "results" test—that replaced the old intent standard with "shall be imposed or applied . . . 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." *Id.* § 10301(a) (emphasis added).

In 1986 the Supreme Court recognized this was a *new* test, explaining that "[t]he intent test was *repudiated*" because it "asks the wrong question"—instead, courts should look at the "*result* of the challenged practice." *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (emphases added). The Court was clear: the 1982 amendment to § 2 "repudiat[ed]," "abandoned," and "rejected the old intent test." *Id.* at 71, 72.

The Supreme Court re-emphasized this point in *Brnovich*, where it explained that Congress's goal was to "establish a *new* vote-dilution test" in the 1982 amendment. *Brnovich*, 141 S. Ct. at 2332 (emphasis added). Even the *Brnovich* dissent—which vigorously disagreed with the majority opinion—agreed that there is no intent-only test in § 2, explaining that "[t]his Court, as the majority notes, had construed the original Section 2 to apply to facially neutral voting practices 'only if [they were] motivated by a discriminatory purpose.' . . . Congress enacted the current Section 2 to reverse that outcome—*to make clear that 'results' alone could lead to liability*." *Id.* at 2357 (Kagan, J., dissenting) (emphasis added). A few pages later, Justice Kagan emphasized again: "The [Section 2] inquiry is focused on effects: It asks not about *why* state officials enacted a rule, but about whether that rule *results* in racial discrimination." *Id.* at 2360 (emphasis added).

Other courts, including the Eleventh Circuit, agreed that the 1982 amendment deleted the intent test from § 2: "Congress chose the language of the statute with great care. Congress wished to eliminate any intent requirement from section 2, and therefore changed the terms of § 2(a) . . . to forbid any practice that 'results in' discrimination." *United*

States v. Marengo Cnty. Comm'n, 731 F.2d 1546, 1563 (11th Cir. 1984), *appeal dismissed, cert. denied,* 469 U.S. 976 (1984); *accord McMillan v. Escambia Cnty*., 748 F.2d 1037, 1042 (5th Cir. 1984) (same); *Ketchum v. Byrne*, 740 F.2d 1398, 1409 (7th Cir. 1984) (Congress "wisely eliminated the elusive and perhaps meaningless issue of governmental 'purpose' from the calculus of vote dilution claims"); *Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020) ("intent is not an element" of a § 2 claim).[3]

The language of the statute does not even suggest that intent alone can support a § 2 claim, and the district court's erroneous holding to the contrary should be rejected.

B. *Johnson* is not limited to vote dilution claims.

The district court also disregarded the reality that *Johnson* carefully framed its holding as applying to *all* § 2 claims—with no exceptions. It held that the "statutory language [of § 2] expressly requires a showing of discriminatory results, and it *admits of no exception* for situations in which there is discriminatory intent but no

[3] Further, in *Brnovich*, the Supreme Court clarified the standard for vote-denial cases such as this one: Section 2(b) requires that a state's voting system be "equally open"—an analysis that has nothing to do with the intent behind the challenged legislative enactments. 141 S. Ct. at 2337.

discriminatory results." *Johnson*, 72 F.3d at 1563 (emphasis added). It repeatedly and precisely explained that § 2 plaintiffs, all of them, must plead and prove discriminatory results. *See id.* at 1561 ("DISCRIMINATORY INTENT ALONE IS INSUFFICIENT TO ESTABLISH A VIOLATION OF SECTION 2") (heading of Section II-B of opinion; capitalization in original); *id.* at 1562 (rejecting the view "that *some § 2 plaintiffs* may prevail without showing discriminatory results" because "discriminatory results must be shown in order to establish a § 2 violation") (emphasis added); *id.* at 1564 ("[W]e cannot read the results requirement out of § 2 … [I]n order to prevail on a § 2 claim, a plaintiff must prove discriminatory results"); *id.* ("[O]ur holding [is] that intent alone is insufficient to establish a § 2 violation"); *id.* ("The statute itself requires that discriminatory results be shown"). None of these statements limits *Johnson*'s reach.

While it is true that *Johnson* was a vote-dilution case, this Court based its decision on "the plain language of § 2," not anything unique to vote-dilution cases. *Johnson*, 72 F.3d at 1563. Quoting subsection 2(a), this Court emphasized that the text of § 2 speaks of "*results*." *Id.* (quoting

former 42 U.S.C. § 1973(a), now 52 U.S.C. § 10301(a)) (emphasis in *Johnson*).

This Court, moreover, has applied *Johnson* outside the context of vote-dilution cases, which reconfirms that *Johnson* is not limited to that context. For example, in *Brooks*, 158 F.3d 1230, this Court considered a § 2 challenge to Georgia's primary runoff rule, which requires a runoff election if no candidate in a primary election receives a majority of votes. *Brooks* did not involve a vote-dilution claim; the plaintiffs alleged that the primary runoff rule deterred black candidates from running for office. But this Court still rejected the plaintiffs' argument "that a showing of discriminatory purpose alone is sufficient for a violation of § 2." *Id.* at 1237. This Court explained that "we are bound by *Johnson* . . . , which held that discriminatory intent alone, in the absence of a showing of discriminatory effect, is insufficient to establish a violation of § 2." *Brooks*, 158 F.3d at 1237. Like *Johnson*, this Court in *Brooks* did not

limit the rule requiring discriminatory results to certain kinds of § 2 cases.[4]

III. Broad Historical and Social Considerations, and Policy Disagreements with the Legislature, Do Not Support a Finding of Discriminatory Intent.

Even if there *were* an intent-only § 2 claim, to establish a discriminatory purpose, appellees would have to show that "the legislature *as a whole*" acted with such a purpose. *Brnovich*, 141 S. Ct. at 2350 (emphasis added). The facts found by the district court in this case, even if accepted, do not come close to satisfying this requirement.

Instead, the district court relied primarily on innuendo and sweeping social critiques rather than concrete indicia of discriminatory intent. Indeed, the district court foreshadowed its alternative approach

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[4] The district court in the Georgia litigation has suggested that the Supreme Court's discussion of discriminatory intent in *Brnovich* would have been unnecessary if § 2 did not allow for intent-only claims. *Sixth District* Order at 15 (emphasis added). But the question presented in *Brnovich* was not whether a stand-alone intent claim was viable under § 2; it was whether the Ninth Circuit was substantively wrong in finding discriminatory intent. Indeed, the plaintiffs had alleged an intent-plus-results claims under § 2 as well as under the Fifteenth Amendment. 141 S. Ct. at 2334. Addressing discriminatory intent thus was necessary to the issue in the case, while the intent-only issue from *Johnson* was not. Nothing in *Brnovich* even remotely casts doubt on this Court's holding in *Johnson*.

by framing itself as an art critic interpreting a "pointillist" painting to see if it can connect a myriad set of dots to form a nefarious picture. Op. 39. But the district court had before it not a Manet, but rather a Jackson Pollack or, more likely, a Rorschach test, and its conclusions reflect back its own sociological views rather than any legitimate factual or legal conclusion.

1. For instance, the district court spent much time focused on Florida's history of racial discrimination and the past and current social and economic disparities among the races. Op. 42–45.[5] Putting aside the impropriety and offensiveness of attempting to impute to Floridians (or Georgians) of 2021 the racial bigotry of prior generations, the Supreme Court has already ruled that the Voting Rights Act, like the Constitution,

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[5] Similarly thin evidence and unabashed innuendo likewise plague the suits against Georgia. The complaint by the DOJ, for example, is notable for its failure to allege an act or statement by *any* Georgia legislator, much less by the legislature as a whole, during or before enacting SB 202, suggesting a discriminatory intent. *See* Compl. ¶ 98, *United States v. Georgia,* No. 1:21-cv-02575-JPB (N.D. Ga. June 25, 2021), ECF No. 1; *Id.* ¶¶ 97, 98, 99, 106. Isolated allegations of conduct by outsiders "unconnected to the passage of" the challenged law do not remotely demonstrate discriminatory intent by the legislature. *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1324 (11th Cir. 2021) ("*GBM*").

is not "designed to punish for the past." *Shelby Cnty. v. Holder*, 570 U.S. 529, 553 (2013); *see also Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) (noting that "[t]hings have changed in the South"). As the Eleventh Circuit has explained: Georgia's "racist history" is too remote to prevent it from "enacting otherwise constitutional laws about voting." *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1325 (11th Cir. 2021) ("*GBM*").

Instead, the relevant question here is not whether legislatures in the past acted with racial motives, but whether "the legislature as a whole" acted with a discriminatory purpose in enacting any particular voting law. *Brnovich*, 141 S. Ct. at 2350. Florida's history (or Georgia's) has no bearing on that question. Indeed, unless a legislator has spoken or acted in a discriminatory manner "during the same [legislative] session" as the allegedly discriminatory bill—and none did here—no such intent may plausibly be alleged. *GBM*, 992 F.3d at 1323.

2. The district court also proffered offensive, generalized observations and innuendo regarding current political, economic, and social disparities to suggest something nefarious behind Florida's statute. Op. 45–48. For instance, it observed that the overwhelming

majority of black Floridians vote for Democrats, whereas a considerably less overwhelming majority of white Floridians voter Republican. Op. 49–50. From this the court inferred that laws enacted by a Republican majority legislature must discriminate in favor of whites and against blacks. Op. 50–52. This is a stunning error, as the district court took it upon itself to, essentially, declare *anything* opposed by Democrats as motivated by race. That is poor form even in the political sphere—but for a court, it is downright dangerous. *Cf. Shaw v. Reno*, 509 U.S. 630, 657 (1993) ("Racial classifications of any sort pose the risk of lasting harm to our society."). As the Supreme Court has emphasized, "partisan motives are not the same as racial motives." *Brnovich*, 141 S. Ct. at 2349.

3. Finally, the district court did not identify anything in the text of Florida's law that reflected a discriminatory purpose. Instead, the district court simply *disagreed* with the proffered policy justifications for Florida's statute. Specifically, because of the lack of systemic fraud in recent elections, the district court inferred that any concerns about fraud *must* be pretextual and hence the legislature must have been motivated by discrimination. Op. 69–89, 128–35.

No part of this tortured reasoning was justifiable. Courts must "*presume*[]" the "good faith" of state legislatures. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (emphasis added). Legislatures have no requirement "to articulate [their] reasons for enacting a statute" in the first place, *FCC v. Beach Commc'n, Inc.*, 508 U.S. 307, 315 (1993), yet the district court inferred discriminatory animus merely because it personally believed that voter fraud is not a substantial concern. On that basis it assumed the *worst* faith of the legislature, as opposed to presuming *good faith*.

Even if legislatures *did* have to justify their laws, limiting voter fraud is an entirely valid concern. Whether or not States have suffered systemic fraud, no State need wait to "sustain some level of damage before the legislature [can] take corrective action." *Brnovich*, 141 S. Ct. at 2348; *accord Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008) (noting the State's "valid interest in protecting the integrity and reliability of the electoral process") (cleaned up); *Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986) (legislatures are "permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively").

On top of all that, concerns about potential voter fraud are only one of multiple considerations behind election reforms, whether in Florida, Georgia, or anywhere else.[6] And different legislators may have had different concerns driving their vote. What "motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *United States v. O'Brien*, 391 U.S. 367, 384 (1968). The district court decided to ignore all this and instead decide this case on blatantly partisan terms. This Court should not countenance these errors.

CONCLUSION

The Court should reverse the judgment below and vacate the district court's preliminary injunction.

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[6] Georgia's recent voting laws, for instance, are intended "to address the lack of elector confidence in the election system on all sides of the political spectrum, to reduce the burden on election officials, and to streamline the process of conducting elections in Georgia by promoting uniformity in voting." SB 202 at 4:79-82.

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CERTIFICATE OF COMPLIANCE

The foregoing Brief of the State of Georgia as *Amicus Curiae* in Support of Appellants complies with the type-volume limit of Fed. R. App. P. 29(a)(5), because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,441 words.

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

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