**No. 19-60133**

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

JOSEPH THOMAS, VERNON AYERS, MELVIN LAWSON,

*Plaintiffs–Appellees*,

*v*.

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

*Defendants–Appellants.*

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On Appeal from the United States District Court for the

Southern District of Mississippi

USDC No. 3:18-cv-00441-CWR-FKB

***AMICI CURIAE* BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION & American Civil Liberties Union of MISSISSIPPI IN SUPPORT OF APPELLEES FOR AFFIRMANCE ON REHEARING *EN BANC***

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, the American Civil Liberties Union and the American Civil Liberties Union of Mississippi have no parent corporations. The organizations are not subsidiaries or affiliates of any publicly owned corporations, and no publicly held corporation holds ten percent of their stock.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons as described in the fourth sentence of 5th Cir. Rule 28.2.1 have an interest in the outcome of this case. In addition to those identified in the briefs of the Plaintiffs-Appellees and Defendants-Appellants, the following persons may have an interest in the outcome of this case:

American Civil Liberties Union (*amicus curiae*)

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

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

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

Joshua Thomas (counsel for *amici curiae*)

November 29, 2019 Respectfully submitted,

*/s/ Theresa J. Lee*

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The American Civil Liberties Union (“ACLU”)[[2]](#footnote-3) is a nationwide, nonprofit, nonpartisan organization with approximately 1.75 million members, dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the U.S. Constitution and our nation’s civil rights laws. The ACLU of Mississippi is a statewide affiliate of the national ACLU, with thousands of members throughout the state. The ACLU Voting Rights Project has litigated more than 300 voting rights cases since 1965, including voting rights cases before this Court in which the ACLU served as an amicus. *E.g.*, *Patino v. City of Pasadena*, No. 17-20030 (5th Cir. 2017); *Veasey v. Abbott*, No 14-41127 (5th Cir. 2015).

Amici have a significant interest in the outcome of this case and in other cases concerning laws that present unnecessary barriers to individuals exercising their fundamental right to vote. The ACLU and its affiliates have litigated vote dilution claims under Section 2 of the Voting Rights Act throughout the country. *See, e.g.*, *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924 (8th Cir. 2018); *Large v. Fremont Cty., Wyo.*, 670 F.3d 1133 (10th Cir. 2012); *Wright v. Sumter Cty. Bd. of Elections & Registration*, 301 F. Supp. 3d 1297 (M.D. Ga. 2018); *Montes v. City of Yakima*, 40 F. Supp. 3d 1377 (E.D. Wash. 2014); *Whitest v. Crisp Cty.*, No. 17-cv-109 (M.D. Ga. 2017); *Fraser v. Jasper Cty.*, No. 14-cv-2578 (D.S.C. 2014); *Jackson v. Bd. of Trustees of Wolf Point, Mt., Sch. Dist.*, No. 13-cv-0065 (D. Mt. 2014).

## ARGUMENT

Section 2 of the Voting Rights Act (“VRA”) prohibits any “voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .” 52 U.S.C. § 10301(a). Subsection 2(b) provides that a violation of Section 2’s prohibition on discriminatory results “is established if . . . [minority voters] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 52 U.S.C. § 10301(b). The “essence” of a successful claim under this statute “is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” *Thornburg v. Gingles*, 478 U.S. 30 (1986). The Supreme Court and all of the Circuit Courts of Appeals, including this one, have all regularly applied the standard first laid out in *Gingles*, and then specifically applied to single-member districts in *Growe v. Emison*, 507 U.S. 25, 40 (1993), and beyond, in assessing such claims.

For a claim of vote dilution in a single-member district, the Supreme Court has held that, the minority group must show “that it is sufficiently large and geographically compact to constitute a majority in a single-member district.” *LULAC v. Perry*, 548 U.S. 399, 425 (2006) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1006–07 (1994) (quoting *Growe*, 507 U. S. at 40 (in turn quoting *Gingles*, 478 U. S. at 50–51))). Second, the minority group must demonstrate “that it is politically cohesive.” *Id*. And third, the minority group must establish “that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed— usually to defeat the minority’s preferred candidate.” *Id.* These preconditions do not change when assessing one single-member district, a handful of such districts, an entire state-wide plan, or at-large voting. *Cf.* *Bartlett v. Strickland*, 556 U.S. 1, 19 (2009) (declining to “depart from the uniform interpretation of § 2 that guided federal courts and state and local officials for more than 20 years”).

“No single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength.” *DeGrandy*, 512 U.S. at 1020–21. Due to the necessity of the “intensely local appraisal” in considering claims under the VRA, *Rogers v. Lodge*, 458 U.S. 613, 622 (1982), such precedent is unsurprising. This must remain the case when considering a single-member district, like the challenged Senate District 22, that contains a bare numerical majority of the voting age population but that does not contain a “numerical, *working* majority of the voting age population,” *Bartlett*, 556 U.S. at 13. The district court’s decision not to treat the “single statistic” of the racial composition voting-age population of the district as dispositive does not upend the application of decades of Section 2 jurisprudence; rather, it is consistent with guidance from the Supreme Court and the law of the Circuit.

Furthermore, there can be no dispute that Section 2 examines the results of the challenged law. *See, e.g.*, *Bartlett*, 556 U.S. at 10; *DeGrandy*, 512 U.S. at 1009 n.8, 1010; *Salas v. Sw. Tex. Junior Coll. Dist.*, 964 F.2d 1542, 1549 (5th Cir.1992). Contrary to the State’s apparent argument, [State’s EB Br. at 34], when courts assess a challenged district under Section 2, considering where the lines were drawn, this does not convert the claim into one that requires a showing of invidious intent. That the challenged Senate District 22 was drawn in such a way that it did not contain a “numerical, *working* majority of the voting age population,” *Bartlett*, 556 U.S. at 13, does not somehow convert the Plaintiffs’ claims into ones of intentional discrimination and Section 2 does not require such an allegation or showing.

As the district court did not “misread[] the governing law,” *DeGrandy*, 512 U.S. at 1022, in its identification and application of long-standing Supreme Court and Circuit precedent, “the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution.” *Gingles*, 478 U.S. at 79.

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

Since *Gingles*, the Supreme Court has “interpreted [Section 2’s] standard to mean that, under certain circumstances, States must draw ‘opportunity’ districts in which minority groups form ‘*effective* majorit[ies].’” *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018) (quoting *LULAC*, 548 U.S. at 426) (emphasis added).

The Court’s recognition that Section 2 requires districts with “effective” and not just numerical majorities are required makes clear that a single-member district where minority voters make up the voting-age majority may still, “under certain circumstances,” invoke Section 2’s protections. This is so because, as the Supreme Court has recognized, it is “possible for a citizen voting-age majority to lack real electoral opportunity.” *LULAC*, 548 U.S. at 428.

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

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

Numerous Circuit Courts, including this Court’s own precedent, have rejected a rule that bars a racial or language minority from the protections of Section 2 when they make up a numerical majority. *See Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.* (“*FFSD*”), 894 F.3d 924, 933 (8th Cir. 2018) (“In short, minority voters do not lose VRA protection simply because they represent a bare numerical majority within the district.”)[[3]](#footnote-4); *Pope v. Cty. of Albany*, 687 F.3d 565, 575 n.8 (2d Cir. 2012) (“[T]he law allows plaintiffs to challenge legislatively created bare majority-minority districts on the ground that they do not present the ‘real electoral opportunity’ protected by Section 2.”); *Kingman Park Civic Ass’n v. Williams*, 348 F.3d 1033, 1041 (D.C. Cir. 2003) (“Vote dilution claims must be assessed in light of the demographic and political context, and it is conceivable that minority voters might have ‘less opportunity . . . to elect representatives of their choice’ even where they remain an absolute majority in a contested voting district.”); *Salas*, 964 F.2d at 1547 (“Unimpeachable authority from our circuit has rejectedany per se rule that a racial minority that is a majority of a political subdivision cannot experience vote dilution.” (quoting *Monroe v. City of Woodville*, 881 F.2d 1327, 1333 (5th Cir. 1989))); *Meek v. Metro. Dade Cty.*, 908 F.2d 1540, 1546 (11th Cir. 1990) (reaffirming *Zimmer v. McKeithen*, 485 F.2d 1297, 1300 (5th Cir. 1973), following Circuit reorganization, rejecting the conclusion that vote dilution could not be proven where racial minority was “a majority of the total population of the parish”); *see also* *Valladolid v. City of Nat’l City*, 976 F.2d 1293, 1294 (9th Cir. 1992) (determining that the first *Gingles* precondition was met in a challenge where Black and Hispanic voters made up 57.5% of the population).[[4]](#footnote-5)

Thus, following guidance from the Supreme Court, the law of this Circuit and all but one other Court of Appeals to consider this question, is that minority voters are not precluded from invoking the full protections of the VRA simply because they form a numerical majority of a jurisdiction or district. These holdings are not limited to at-large schemes. The Supreme Court’s observation that it is “possible for a citizen voting-age majority to lack real electoral opportunity” was in a case considering single-member districts. *LULAC*, 548 U.S. at 428. Likewise, the case in which the Second Circuit rejected a rule barring a numerical majority from the VRA’s protection dealt with single-member districts. *See Pope*, 687 F.3d at 575 n.8. And still other courts have found Section 2 violations where the minority group was a numerical majority. *See, e.g.*, *Perez v. Abbott*, 253 F. Supp. 3d 864, 879–90 (W.D. Tex. 2017) (three-judge court) (finding single-member district with a Hispanic citizen voting-age majority of 58.5% violated Section 2 in both intent and effect); *Baldus v. Members of Wis. Gov’t Accountability Bd*., 849 F. Supp. 2d 840, 854–58 (E.D. Wis. 2012) (finding two single-member districts, with 54% and 61% Latino voting-age population respectively, diluted Latino voting strength).

The consistent conclusion of these courts makes sense in light of “what kind of ‘minority’ the Voting Rights Act protects.” *Salas*, 964 F.2d at 1547. This Circuit has held that the “plain text of the statute, as affirmed by case law, makes clear that the Act is concerned with protecting the minority in its capacity as a *national racial or language group*.” *Id.* (emphasis added). In reaching this conclusion, this Court noted that “minority” could be taken to mean either “a national racial or language minority” or “a numerical minority of voters in the jurisdiction at issue,” and held that the concern of the VRA is the former. *Id.*; *see also* *FFSD*, 894 F.3d at 933 (“As *Gingles* notes, under the VRA, the term ‘minority’ does not refer to a purely numerical fact. Rather, section 2(a) protects the voting rights of ‘any citizen who is a member of a protected class of racial or language minorities.’” (quoting *Gingles*, 478 U.S. at 43)).

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

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

The Supreme Court has repeatedly “held that a claim of vote dilution in a single-member district requires proof meeting *the same* three threshold conditions for a dilution challenge to a multimember district: that a minority group be “‘sufficiently large and geographically compact to constitute a majority in a single-member district’”; that it be “‘politically cohesive’”; and that “‘the white majority vot[e] sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.’” *DeGrandy*, 512 U.S. at 1006–07 (quoting *Growe*, 507 U.S. at 40) (emphasis added). The State’s citation to *Bartlett*’s summation of the first *Gingles* precondition in holding that districts where there is too small of a population to reach 50% do not satisfy this precondition, [State EB Br. at 31], attempts to obscure this consistent and standard test. *Bartlett* did nothing to change the *Gingles* preconditions, clarifying only that the first precondition required precisely what it said, as opposed to some sort of functional review of populations too small to constitute a numerical majority. *Bartlett*, 556 U.S. at 19. The first *Gingles* precondition simply requires plaintiffs to show that the minority group be “‘sufficiently large and geographically compact to constitute a majority in a single-member district.’” *DeGrandy*, 512 U.S. at 1006. Plaintiffs here have done so.

*DeGrandy* also recognized that where it is not possible to create an additional district where minority voters have an opportunity to elect their candidates of choice, the State cannot be held liable for failing to do the impossible, explaining that “[w]hen applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts *with a sufficiently large minority population to elect candidates of its choice*.” *Id.* at 1008 (emphasis added).[[5]](#footnote-6) The *Gingles* factors, of course, “cannot be applied mechanically and without regard to the nature of the claim.” *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993). That the challenged Senate District 22 had a 50.8% BVAP does not mean that the first *Gingles* pre-condition was altered or unable to be met. Senate District 22 did not have “a sufficiently large minority population to elect candidates of its choice,” *DeGrandy*, 512 U.S. at 1008, so the Plaintiffs’ presentation of another reasonably compact district with a larger minority population plainly met the first *Gingles* precondition.[[6]](#footnote-7) The State would ignore the factual determinations proven below and instead “mechanically” insists that because the challenged district had 50.8% BVAP this factor was not (perhaps in their estimation, could not be) met. This is error. To the extent the State is arguing that because a challenged single-member district has BVAP over 50% it could never meet the first *Gingles* pre-condition, this is merely a restatement of the rejected argument that there is a per se bar on finding vote dilution where the minority group is a numerical majority.

The State points again and again to the simple numerical majority of 50.8% BVAP. In so doing, it tries to hold up this “single statistic” as a shortcut to determine that vote dilution could not exist. The Supreme Court has rejected exactly this sort of mechanical statistical reliance. *See DeGrandy*, 512 U.S. at 1020–21. The challenged Senate District 22 contains a bare numerical majority of the voting age population, but it does not contain an “*effective* majorit[y].” *Perez*, 138 S. Ct. at 2315 (emphasis added). The 50.8% BVAP bare numerical majority does not insulate Senate District 22 from challenge. In the context of Section 2, the Supreme Court has been clear that “minority-majority districts” are those in which “a minority group composes a numerical, *working* majority of the voting age population.” *Bartlett*, 556 U.S. at 13 (emphasis added). A BVAP of 50.8% was not, in the “intensely local appraisal” required, *Rogers*, 458 U.S. at 622, sufficient for the Black population to be an “effective,” *Perez*, 138 S. Ct. at 2315, and “working,” *Bartlett*, 556 U.S. at 13, majority.

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

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

The Supreme Court, this Circuit, and all of but one of the federal courts to have considered the question at issue here, have “emphasized that access to the political process, aside from population statistics, is the criteria by which a court determines illegal or unconstitutional vote dilution.” *Salas*, 964 F.2d at 1549. That a racial minority makes up a bare majority of the voting age population does not alter this legal standard. In an attempt to have this single population statistic prevail over the “searching practical evaluation of the ‘past and present reality’” required, *Gingles*, 478 U.S. at 79, the State takes two disparate observations from *Bartlett* to cobble together a conclusion of the Supreme Court that simply does not exist. *See* State EB Br. at 31 (quoting two distinct clauses from *Bartlett*, 556 U.S. at 18, 14, as if they were a single conclusion).

Without even attempting the “intensely local appraisal” required, *Rogers*, 458 U.S. at 622, the State makes the per se assertion that a “group having a majority cannot have ‘less opportunity’ than smaller groups, as § 2(b) requires.” [State EB BR at 32]. This is both legally and factually incorrect. The Supreme Court has recognized that it is “possible for a citizen voting-age majority to lack real electoral opportunity.” *LULAC*, 548 U.S. at 428. Whether a group has electoral opportunity must be determined based upon the “totality of the circumstances.” 52 U.S.C. § 10301(b). The Supreme Court has repeatedly indicated the totality of the circumstances inquiry requires both the demonstration of the *Gingles* preconditions and a review of the so-called Senate Factors, which include, among other things, “the history of voting-related discrimination,” . . . “the extent to which voting . . . is racially polarized,” “the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group,” “the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process,” and “the extent to which members of the minority group have been elected to public office in the jurisdiction.” *Gingles*, 478 U.S. at 44–45; *see also* *LULAC*, 548 U.S. at 425–27; *DeGrandy*, 512 U.S. at 1010–11.

The State’s insistence that per se a minority group with a numerical majority cannot make such a showing ignores the governing jurisprudence that courts and litigants cannot just make assumptions regarding any of these showings. *Cf*. *DeGrandy*, 512 U.S. at 1012; *Gingles*, 578 U.S. at 46. The State had made no showing that the determinations of the District Court were clearly erroneous, which it must do to disturb such findings, “representing as they do a blend of history and an intensely local appraisal” of the practice at issue. *White v. Regester*, 412 U.S. 755, 769 (1973); *Gingles*, 578 U.S. at 78–79.

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

## The facts of this case DO NOT REQUIRE A SHOWING OF INTENTIONAL DISCRIMINATION.

Asserting a claim of vote dilution under Section 2 is not converted into a claim of intentional discrimination simply because the minority group in the district has a bare majority of the voting age population. The State seems to advance this argument, [State’s EB Br. at 34–35], but it is unmoored from the distinct lines of precedent concerning Section 2 violations and concerning claimed violations of the Equal Protection Clause. As this case is governed by the results test of Section 2, it does not entail a potentially sensitive inquiry into legislative intent. *Cf. Veasey v. Abbott*, 830 F.3d 216, 280–81 n.3 (5th Cir. 2016) (en banc) (Jones, J., concurring in part and dissenting in part).

Grabbing on to the Supreme Court’s use of “manipulation” in describing a plaintiff’s establishing Section 2 vote dilution, the State pivots to discussing “intentional ‘manipulation of district lines,’” [State’s EB Br. at 34–35]. However, *Shaw v. Hunt*, the case cited by the State, lays out just the same precedent as already discussed herein and does not at all suggest that plaintiffs must make a showing regarding invidious intent. 517 U.S. 899, 914 (1996) (citing *DeGrandy*, 512 U.S. at 1007, 1010–12, *Gingles*, 578 U.S. at 50–51, and *Growe*, 507 U.S. 25). There is no legitimate legal ground on which to import an intentional showing into the Plaintiffs’ claims. That the challenged Senate District 22 was drawn in such a way that it did not contain a “numerical, *working* majority of the voting age population,” *Bartlett*, 556 U.S. at 13, does not somehow convert the Plaintiffs’ claims into ones of intentional discrimination and Section 2 does not require such an allegation or showing.

Taken to its logical conclusion, the State’s argument would compel plaintiffs alleging vote dilution, in every instance, to challenge multiple districts. This argument must fail. First, it is axiomatic that plaintiffs only have standing to challenge their own district. [CITE] A plaintiff is not prevented from challenging the district in which they live simply because they have not identified another individual living in the adjoining districts who is also injured by where the line is drawn. Second, the State’s rule would compel litigants to bring more expansive claims in every instance. As challenges to a districting scheme necessarily intrude on state decision making, a rule preferring more expansive challenges is in direct tension with the Supreme Court’s jurisprudence. *See LULAC*, 548 U.S. at 415–16.

## CONCLUSION

The district court rightly applied the precedent of the Supreme Court and this Circuit in conducting its searching “totality of the circumstances review.”  Its decisions were not clearly erroneous, and for these and all the foregoing reasons, its judgment should be affirmed.

Dated: November 29, 2019 Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH WORD LIMIT**

This document complies with the word limit of Fifth Circuit Rules 29.3 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains [XXXX] words.

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

**CERTIFICATE OF SERVICE**

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

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

1. Amici submit this brief pursuant to Federal Rule of Appellate Procedure 29(a), as all parties have consented to its filing. [↑](#footnote-ref-2)
2. No party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the amici curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E). [↑](#footnote-ref-3)
3. The State’s assertion that *Jeffers v. Beebe*, 895 F. Supp. 2d 920 (E.D. Ark. 2012), with its per se rule that the plaintiffs could not make out a Section 2 claim because they had a numerical majority, is still good law because the Eighth Circuit, considering the same issue six years later, failed to mention *Jeffers*, [State EB Br. at 32 n.20] is flatly wrong. As the members of this Court are well-aware, a Circuit Court, in announcing a rule of law is not required to discuss every contrary ruling by a district court. It is the district courts that must heed the decisions of the Circuit Court; it is not up to the Circuit to find and expressly discuss every closed, contrary district court case . [↑](#footnote-ref-4)
4. *Bartlett*, 556 U.S. 1, is not to the contrary of any of this precedent. *Bartlett* stands for the proposition that a racial minority must have a population over 50% to have an “opportunity to elect,” but does not say that reaching 50% VAP is sufficient to elect a minority-preferred candidate in any district under review, such that claims are barred once a minority group becomes 50.1% (or even 50.8%) of a jurisdiction’s VAP. If this were so, all of the cases which identified a required VAP more than a percentage point above 50% to remedy vote dilution would make no sense. If 50% were talismanic, countless courts would not have found a required VAP even upwards of 60% in some cases. *See, e.g.*, [LIST CASES WITH BVAPs WELL ABOVE 50%]. [↑](#footnote-ref-5)
5. The State repeatedly invokes *DeGrandy* in support of their arguments. That case, however, does not support the State’s claims in the instant case. *DeGrandy* assessed Section 2 in an instance where “minority voters form *effective voting majorities* in a number of districts roughly proportional to the minority voters’ respective shares in the voting-age population,” and held that while “such proportionality is not dispositive in a challenge to single-member districting, it is a relevant fact in the totality of circumstances to be analyzed when determining whether members of a minority group have ‘less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.’” *DeGrandy*, 512 U.S. at 1000 (emphasis added) (quoting 52 U.S.C. § 10301). The Court was explicit that “the degree of probative value assigned to proportionality may vary with other facts” as “[n]o single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength. The same reasoning must apply to the single statistic of the voting age population in the challenged district.

   Proportionality, as identified in *DeGrandy*, does not advance the State’s arguments. Based on the 2010 Census, Mississippi has a BVAP of 34.9%. *See* American FactFinder, P10 Race for the Population 18 Years and Over, factfinder.census.gov (select Mississippi from “Add/Remove Geographies,” dividing the total of those identified as any part Black by the total population gives any part BVAP of 34.99%, diving single race Black by the total single race population gives single-race BVAP of 34.97%). Prior to the remedial map in this case, Mississippi had 14 of 52 State Senate District where “minority voters form effective voting majorities,” which amounts to 26.92%. Only at 18 of 52 Districts (34.62%) would the districting plan be approaching the proportionality considered in *DeGrandy*. Thus, proportionality is yet another aspect of the totality of circumstances in this case that suggests there is inequality of opportunity. [↑](#footnote-ref-6)
6. The fact that the first *Gingles* precondition was met in the instant case is illustrated by the remedial map enacted by the legislature. The new Senate District 22 was altered to provide the Black voters of the District an opportunity to elect their candidates of choice (which they did not have before), and this remedy did not come at the expense of any other districts “*with a sufficiently large minority population to elect candidates of its choice*,” as the assignment of precincts in the remedial map did not deprive the voters of Senate District 13 their opportunity to elect candidates of choice. Thus, in actual fact, there is now an additional district “*with a sufficiently large minority population to elect candidates of its choice*,” conclusively demonstrating that the first *Gingles* precondition was met. [↑](#footnote-ref-7)