No. 23-969

In the
Supreme Court of the United States

CHARLES WALEN and PAUL HENDERSON,
Plaintiffs-Appellants,
v.
DOUG BURGUM, et al.,
Defendants-Appellees.

The MANDAN, HIDATSA, and ARIKARA Nation;
CESAR ALVAREZ; and LISA DEVILLE,
Intervenors-Appellees.

On Appeal From the United States District Court
for the District of North Dakota

BRIEF OF ALABAMA AND 13 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICI CURIAE*

The States of Alabama, Alaska, Georgia, Iowa, Kansas, Mississippi, Missouri, Montana, Nebraska, South Carolina, South Dakota, Texas, Utah, and West Virginia respectfully submit this brief as *amici curiae* in support of Appellants.[1]

"Redistricting is never easy," *Abbott v. Perez*, 585 U.S. 579, 585 (2018), and for many States, litigation-free redistricting will be virtually impossible if courts continue to overlook the text of the Voting Rights Act. The District Court here never considered the meaning of §2, focusing solely on the preconditions to liability set forth in *Gingles*. Other courts identify evidence that can fit into "Senate Factors" categories, but the quantum of evidence needed to prove liability remains undefined. Neither approach provides legislators meaningful guidance on how to craft redistricting laws that comply with both §2 and the Constitution.

Amici States have an interest in being able to accurately predict whether their redistricting laws will comply with federal law. North Dakota is one of the latest to fall prey to the uncertainty that continues to mark vote dilution claims. Below, the District Court held that North Dakota could racially gerrymander to comply with §2. Weeks later, another district court held that the same districting law *violated* §2 because North Dakota failed to engage further in racial sorting. Neither decision makes sense as a matter of statutory interpretation, and both "threaten[] to carry us further from the goal of a political system in which race no longer matters." *Shaw v. Reno*, 509 U.S. 630, 657 (1993). This area of the law needs clarity now.

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[1] Per Rule 37, *Amici* provided timely notice to counsel of record.

SUMMARY OF ARGUMENT

In 1982, Congress amended Section 2 of the Voting Rights Act, codifying the test for vote dilution employed by this Court in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *White v. Regester*, 412 U.S. 755 (1973). This test has two key elements: members of the minority group must have less opportunity than other voters to (1) elect representatives of their choice, and (2) participate in the political process. Proof of both is required to establish liability.

In 1986, the Court decided *Thornburg v. Gingles*, 478 U.S. 30 (1986), which established three preconditions every plaintiff must satisfy before a court will consider whether a redistricting law violates §2. These prerequisites touch upon the first element in the test: opportunity to elect. If plaintiffs clear these three hurdles, they still must show less opportunity to participate in the political process. That element—articulated in *Whitcomb* and *White* and codified in §2—requires evidence that members of the minority group are not allowed to register and vote, choose a preferred party, participate in its affairs, or have an equal vote when the party's candidates are chosen.

The District Court, when holding that North Dakota had good reasons to believe §2 required it to sort voters by race, ignored the second part of the test, focusing exclusively on the first. And many courts that purport to consider whether there is equal opportunity to participate in the political process do so without any description of precisely what plaintiffs must prove or how it ties into §2.

These atextual approaches are both standardless and unconstitutional. If §2 requires States in 2024 to gerrymander their maps according to race wherever the *Gingles* preconditions are likely satisfied, then §2 is no longer constitutional. That approach does not identify past discrimination that could justify a race-based remedy, and it requires racial classifications in districting with no end in sight. Similarly, a political participation inquiry that looks not to the ability to vote but rather to such things as disparities in "access to computers"[2] or "the subliminal message of the Sheriff's Office being housed on the same floor as [the] Registrar of Voter's Office,"[3] cannot be justified under §2 or the Constitution.

No statute that authorizes preclearance for racial gerrymanders and prison time for §2 violations should remain so inscrutable. *See* 52 U.S.C. §§10302(c), 10308(a). The States need clarity, and the Court should provide it now.

ARGUMENT

I. The *Gingles* Preconditions Alone Cannot Justify Race-Based Districting.

Under our Constitution, race-based classifications "are by their very nature odious," *Shaw v. Reno*, 509 U.S. 630, 643 (1993), "offensive," *Miller v. Johnson*, 515 U.S. 900, 912 (1995), "demeaning," *id.*, and "inconsistent ... with that equality of rights which pertains to citizenship" and "the personal liberty enjoyed

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[2] Doc. 109-19 at 10.

[3] *Nairne v. Ardoin*, 2024 WL 492688, at *41 n.461 (M.D. La. Feb. 8, 2024).

by every one within the United States," *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting).

Nevertheless, Section 2 of the VRA "demands consideration of race," "often insist[ing] that districts be created precisely because of race." *Abbott v. Perez*, 585 U.S. 579, 586-87 (2018). Recognizing these "competing hazards of liability," *id.* at 587, the Court has "assumed that complying with"[4] §2 can justify "narrowly tailored" "race-based sorting of voters," *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 595 U.S. 398, 401 (2022) (per curiam).

To survive "strict scrutiny," the State "must show … that it had a strong basis in evidence for concluding that the statute required" "race-based districting." *Id.* at 401-02 (quoting *Cooper v. Harris*, 581 U.S. 285, 292 (2017)). While this standard gives the States a little "'breathing room' to make reasonable mistakes" of fact, it "does not allow a State to adopt a racial gerrymander that the State does not, at the time of imposition, 'judge necessary under a proper interpretation of the VRA.'" *Id.* at 404 (quoting *Cooper*, 581 U.S. at 292, 306). A reading of the VRA is not proper unless it is "a constitutional reading and application of" the law. *Miller*, 515 U.S. at 921.

The District Court assumed that North Dakota racially gerrymandered its 2021 Plan. Still, the Plan earned the District Court's stamp of approval because there were good reasons to think a hypothetical

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[4] The Court has "never applied this assumption to *uphold* a districting plan that would otherwise violate the Constitution…." *Allen v. Milligan*, 599 U.S. 1, 79 (2023) (Thomas, J., dissenting).

plaintiff could clear a few of the hurdles necessary, though not sufficient, to prove a §2 vote dilution claim. This betrays an atextual, improper, and unconstitutional interpretation of §2 that requires reversal.

While the District Court's failure to engage the text of §2 was particularly obvious, many other lower courts likewise give the text short shrift by presuming vote dilution whenever a new majority-minority district can plausibly be drawn. The result is a jurisprudence of vote dilution that strays far from the original meaning of the statute and renders it utterly unpredictable for any Legislature trying to determine whether race-based districting is required or whether race-neutral districting will do. Congress did not write so arbitrary a law.

A. Unequal Opportunity to Participate in the Political Process is a Necessary Element of a §2 Vote Dilution Claim.

To prove that a voting "standard, practice, or procedure" dilutes minority voting strength in violation of §2, a plaintiff must show that members of a minority group "have less opportunity than other members of the electorate [1] to participate in the political process *and* [2] to elect representatives of their choice." 52 U.S.C. §10301 (emphasis added). In *Chisom v. Roemer*, the Court clarified that proving only less opportunity to elect "is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process." 501 U.S. 380, 397 (1991). A few years earlier, in *Thornburg v. Gingles*, the Court

established a threshold showing every §2 plaintiff must overcome. 478 U.S. 30, 50-51 (1986). These three prerequisites, known as the *Gingles* preconditions, speak only to electoral opportunity. *See Johnson v. De Grandy*, 512 U.S. 997, 1011-13 (1994).[5] To assess §2 liability, "courts must also examine … the extent of the opportunities minority voters enjoy to participate in the political processes." *Id.* at 1011-12.

To determine if Native Americans and other members of the North Dakota electorate today enjoy an equal "opportunity … to participate in the political process," it is of first importance to determine what that statutory phrase means.

Chisom again points to the answer. The 1982 amendments to "§ 2 [were] intended to 'codify' the results test employed in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *White v. Regester*, 412 U.S. 755 (1973)." *Chisom*, 501 U.S. at 394 n.21 (quoting *Gingles*, 478 U.S. at 83-84 (O'Connor, J., concurring in the judgment)). Those two decisions supplied §2's key language. And because the phrase "is obviously transplanted from another legal source," standard rules of statutory interpretation mandate that "it brings the old soil with it." *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (cleaned up). Thus, "it is to *Whitcomb* and *White* that [courts] should look in the first instance in determining how great an impairment of minority voting strength is required to establish vote dilution

[5] *See also Gingles*, 478 U.S. at 50 n.15 ("It is obvious that unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability 'to elect.'"); *id.* at 50 ("inability to elect"); *id.* at 46, 48, 51 ("ability to elect").

in violation of § 2." *Gingles*, 478 U.S. at 97 (O'Connor, J., concurring in the judgment).

1. *Whitcomb* makes clear what is *not* enough to establish a "vote dilution" claim. The plaintiffs there challenged the use of a multimember districting scheme in Marion County, Indiana, to elect the county's "eight senators and 15 members of the house," alleging the system diluted the voting strength of a heavily black and poor part of the county "termed 'the ghetto area.'" 403 U.S. at 128-29. For "the period 1960 through 1968," that area made up "17.8% of the population" of Marion County but was home to only "4.75% of the senators and 5.97% of the representatives." *Id.* at 133. The voters there "voted heavily Democratic," but "the Republican Party won four of the five elections from 1960 to 1968." *Id.* at 150. The district court found vote dilution and ordered single-member districting. *Id.* at 138.

This Court reversed, emphasizing the absence of "evidence and findings that [black] residents had less" "opportunity to participate in and influence the selection of candidates and legislators." *Id.* at 149, 153. The Court made clear what these words meant by describing what plaintiffs failed to prove:

> We have discovered nothing in the record or in the court's findings indicating that poor [blacks] were not allowed [1] to register or vote, [2] to choose the political party they desired to support, [3] to participate in its affairs or [4] to be equally represented on those occasions when legislative candidates were chosen. Nor did

> the evidence purport to show or the court find that inhabitants of the ghetto were [5] regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats.

Id. at 149-50.

This is what equal "opportunity … to participate in the political process" means. One has "opportunity" if he is "allowed" to register and vote, choose his preferred party, participate in its affairs, and have an equal vote when the party's candidates are chosen. "Strong differences" in socioeconomic indicators did not control. *Id.* at 132. And it made *no* difference that the Democratic Party in Marion County had lost all 23 legislative seats in "four of the five elections from 1960 to 1968." *Id.* at 150. The record suggested that "had the Democrats won all of the elections or even most of them," plaintiffs "would have had no justifiable complaints about representation." *Id.* at 152. That the area did not "have legislative seats in proportion to its populations emerge[d] more as a function of losing elections," not built-in racial bias. *Id.* at 153. The plaintiffs' alleged denial of equal opportunity was "a mere euphemism for political defeat at the polls." *Id.*

White v. Regester shows what *is* enough to prove vote dilution. There, black voters of Dallas County, Texas, also favored the Democratic Party, but at-large elections and "a white-dominated organization that [was] in effective control of Democratic Party candidate slating" combined to stymie political participation by black voters. 412 U.S. at 766-67. The Democratic Party "did not need the support of the

[black] community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the [black] community." *Id.* at 767. Because "the black community" was "effectively excluded from participation in the Democratic primary selection process," it "was therefore generally not permitted to enter into the political process in a reliable and meaningful manner." *Id.* Similarly, the "poll tax" and "restrictive voter registration procedures" kept Mexican-American residents of Bexar County, Texas, from accessing the political process on an equal footing with their white neighbors. *Id.* at 768. This evidence was sufficient to establish illegal vote dilution.

2. All three minority groups—black voters in Dallas County, Mexican-American voters in Bexar County, and black voters in Marion County—experienced socioeconomic hardship and persistent political defeat. All three would likely have been able to satisfy the *Gingles* preconditions. But the political process was closed to two and open to one. The key difference was that the black residents in Marion County had access to those traditional means of political participation like registering, voting, and engaging with their preferred party, while their Texas counterparts did not.

When Congress amended §2 in 1982, it codified this test for vote dilution employed in *Whitcomb* and *White*. Then in *Gingles*, the Court gave "some structure" to the test and established "three threshold conditions" designed to weed out bad cases—*i.e.*, cases that fail to show even unequal opportunity to elect. *De Grandy*, 512 U.S. at 1006, 1010. In *Chisom*, the Court

confirmed that a plaintiff alleging vote dilution under §2 must show (1) less opportunity to elect *and* (2) less opportunity to participate in the political process. 501 U.S. at 397. Satisfaction of the preconditions is evidence of the first, but not the second. That is where *Whitcomb* and *White* come into play. The two decisions speak with a unified voice: "less opportunity … to participate in the political process" means "being denied access to the political system," *Whitcomb*, 403 U.S. at 155, in other words, being excluded "from effective participation in political life," *White*, 412 U.S. at 769. Access to the "political system," in turn, means access to those traditional methods of political engagement like registering to vote, voting, and participating in the political party of one's choosing.

Applied here, the Legislative Assembly needed "a strong basis in evidence" to show that Native Americans in North Dakota today face *more inequality* in terms of those traditional methods of political participation than did black Indianians in 1960s Marion County. But neither the Assembly nor the District Court looked for such evidence.

B. The District Court Greenlit Racial Gerrymandering Based Solely on the *Gingles* Preconditions.

The Legislative Assembly heard no evidence that Native Americans were excluded from effective political participation in 2021 North Dakota, just testimony about the *Gingles* preconditions. The District Court found this was enough to justify racial sorting.

1. The District Court discussed first the testimony heard by the Redistricting Committee, all of which pertained to the *Gingles* preconditions. For example, the Director of North Dakota Native Vote, the Director of the Gaming Commission, and the Chairman plus a Councilman of the Standing Rock Sioux Tribe all informed the Committee that the Native American population had grown yet still suffered defeat at the polls. App.21-22; Docs.104-1, 104-2, 104-3, 104-4. The Chairman of the Tribal Business Council of the MHA Tribe laid out the *Gingles* preconditions in his written testimony and supplied his bases for concluding that each was satisfied. App.21-22; Doc.109-14. The court then looked to the Redistricting Committee's final report and found its discussion of the *Gingles* preconditions "sufficient pre-enactment analysis to establish it had good reasons to believe the subdistricts were required by the VRA." App.25; Doc.104-14 at 27, 29.

Turning to the House and Senate floor debates, the District Court highlighted speeches by Redistricting Committee members about the *Gingles* preconditions. Several officials discussed whether Native Americans in Districts 4 and 9 were sufficiently large and reasonably compact to constitute majorities in subdivided districts. App.25-26; Doc.100-8 at 11, 19, 53; Doc.100-9 at 2-9. Rep. Nathe addressed the lack of Native American electoral success, telling the House, "You have to follow the thresholds." App.26; Doc.100-8 at 30, 45-46. And Rep. Devlin, who chaired the Committee, seemed to lament, "[W]ith the *Gingles* precedents, we had no choice." Doc. 100-8 at 33.

Others, who went unmentioned by the District Court, criticized the Committee's efforts, asserting

that "nobody's even looked at the voting information." Doc.100-8 at 25 (Rep. Jones). There was "no proof of" "voter denial and voter dilution"—"[t]here were no studies done." *Id.* at 40 (Rep. Ruby). Likewise, the District Court never asked whether the Legislative Assembly had good reasons to believe that Native Americans had less opportunity than other North Dakotans to participate in the political process.

2. As a postscript, the District Court noted, without saying more, the "compelling and unrefuted evidence that as to district 4, without the subdistrict, Native American voters would in fact have a viable Section 2 voter dilution claim under the VRA." App.27. First, even if that evidence was "undisputed," the District Court was required to "carefully evaluat[e] … at the district level" evidence of vote dilution in order to "shoulder strict scrutiny's burden." *Wisconsin Legislature*, 595 U.S. at 403, 404. It did not, so the mere presence in the record of "unrefuted evidence" cannot serve as grounds for affirmance as to the race-based subdivision of District 4.

Beyond that, an examination of the evidence reveals no such "viable claim." Both North Dakota's and the MHA Tribe's experts opined that a potential plaintiff could satisfy the *Gingles* preconditions. *See* Docs.106-2 (Hood), 106-3 (Collingwood). That evidence, "standing alone," is insufficient to prove a §2 claim. *De Grandy*, 512 U.S. at 1012.

The MHA Tribe also submitted two expert reports on the "Senate Factors." *See* Docs.109-18 (McCool), 109-19 (Magargal). But the Senate Factors are not the text of §2, and the "Supreme Court has never held that

the Senate Report can override the plain language of § 2 itself." *Johnson v. DeSoto Cnty. Bd. of Comm'rs*, 72 F.3d 1556, 1563-64 (11th Cir. 1996). Moreover, the Senate Factors describe certain *types* of evidence one might find if a political process provides some groups "less opportunity" than others "to participate"; the factors do not say *how much* evidence is required to make such a showing. 52 U.S.C. §10301(b). But *Whitcomb* and *White* do. The evidence adduced by the MHA Tribe, while tapping Senate Factor bases, does not suggest that Native Americans in 2020s North Dakota had any stronger proof of exclusion from the political process than the unsuccessful plaintiffs in *Whitcomb*.

The Tribe's experts emphasized socioeconomic disparities between Native Americans and white North Dakotans, including "statistically significant" gaps in education, employment, health, wealth, and internet access. *See* Docs.109-18 at 45-61, 109-19 at 9-17. But none of this suggests liability because the same or worse could be said for poor black residents of Marion County in the 1960s, where "[s]trong differences were found in terms of housing conditions, income and educational levels, rates of unemployment, juvenile crime, and welfare assistance." *Whitcomb*, 403 U.S. at 132. Thus, plaintiffs here would have needed to show not just a 1.8% disparity in "access to computers," Doc.109-19 at 10, but that Native Americans were prohibited from participating in the political process on an equal footing with other voters. Such evidence is absent from the record.

C. Other Courts Have Adopted a Similarly Atextual Approach to §2.

The District Court is not alone in giving undue weight to the *Gingles* preconditions. Thirty years ago, the Third Circuit stated, "it will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of the circumstances." *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1116, 1135 (3d Cir. 1993). Other courts have articulated this same presumption in favor of finding vote dilution once the *Gingles* preconditions are satisfied. *See Clark v. Calhoun County*, 21 F.3d 92, 97 (5th Cir. 1994); *Teague v. Attala County*, 92 F.3d 283, 293 (5th Cir. 1996); *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1019 n.21 (2d Cir. 1995); *Wright v. Sumter Cnty. Bd. of Elections and Reg.*, 979 F.3d 1282, 1304 (11th Cir. 2020). Even since *Wisconsin Legislature*, multiple district courts have invoked this "rule" when finding that a districting scheme violates §2. *See, e.g.*, *Nairne v. Ardoin*, 2024 WL 492688, at *36 (M.D. La. Feb. 8, 2024); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 1:21-cv-05337, 2023 WL 7037537, at *57 (N.D. Ga. Oct. 26, 2023); *Petteway v. Galveston County*, No. 3:22-cv-57, 2023 WL 6786025, at *50 (S.D. Tex. Oct. 13, 2023).

But presuming vote dilution as soon as a plaintiff satisfies the threshold showing does not track §2's text and misapprehends the purposes served by the *Gingles* preconditions. The first prerequisite makes sure a potential remedy exists. *See Growe v. Emison*, 507 U.S. 25, 40 (1993). The second and third are

evidence that a minority group *would* elect its preferred representative but currently *cannot* given the "larger white voting population." *Id.* In short, the preconditions weed out bad cases before they get in the door. These prerequisites further respect the States' sovereign authority over reapportionment by ensuring that "§ 2 never requires adoption of districts that violate traditional redistricting principles." *Allen*, 599 U.S. at 30. But they say nothing about whether minority voters are allowed to register, vote, and participate in the party of their choosing.

When focusing solely on the *Gingles* preconditions, the District Court mistakenly took guidance from a particular line, plucked out of context, from *Cooper v. Harris*. In *Cooper*, the Court remarked: "If a State has good reason to think that all the *Gingles* preconditions are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district." 581 U.S. at 302. This line, read alone, appears to condone the District Court's tunnel vision. *See* App.18. But that statement was not made in isolation, and it must be understood in light of *De Grandy*, *Chisom*, *Wisconsin Legislature*, and *Gingles* itself.

Earlier in the *Cooper* opinion, the Court set the stage by declaring in no uncertain terms that a State could avoid a constitutional violation when sorting voters by race only if "it had 'good reasons' to think that it would transgress *the Act* if it did not draw race-based district lines." 581 U.S. at 293 (emphasis added); *see also id.* at 282 (repeating that the State must reasonably believe "the *statute* required its action") (emphasis added). "The Act" requires a plaintiff to prove, under the totality of circumstances,

(1) less opportunity to elect *and* (2) less opportunity to participate in the political process. As noted earlier, the *Gingles* preconditions go only to the first. *See De Grandy*, 512 U.S. at 1011-12. Thus, their presence alone is "not sufficient to establish a violation." *Chisom*, 501 U.S. at 397.

And given the particular facts presented in *Cooper*, it made sense the Court would emphasize the *Gingles* preconditions. North Carolina defend its gerrymandered map by arguing that §2 required it. But missing from the record was any "evidence that a § 2 plaintiff could demonstrate the third *Gingles* prerequisite." *Id.* at 302. Indeed, the entire §2 discussion revolved around *Gingles* III and the State's failure to conduct a "meaningful legislative inquiry" into whether white bloc voting would usually defeat the minority preferred candidate. *Id.* at 304. This doomed the State's §2 defense.

Cooper must also be read in light of the Court's later decision in *Wisconsin Legislature.* There, the Court repeated that "satisfying the *Gingles* preconditions are necessary but not sufficient." 595 U.S. at 402 (citing *De Grandy*, 512 U.S. at 1011-12). Ultimately, a State wishing to avoid liability under the Equal Protection Clause must conduct the full "totality-of-circumstances analysis," *id.* at 405, which includes an inquiry into whether "members of the protected class have less opportunity to participate in the political process," *Chisom*, 501 U.S. at 397.

II. The District Court's Approach To §2 Is Unconstitutional.

The District Court held that a State may sort voters by race without offending the Constitution whenever it reasonably believes the *Gingles* preconditions require it. App.25. If that is right, then "no end is in sight" to §2's race-based demands, and §2 "must … be invalidated under the Equal Protection Clause of the Fourteenth Amendment." *SFFA v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 213 (2023).

Every racial classification by the government is either unconstitutional or on its way to that end. Those that are not outright prohibited are allowed only to the degree "necessary" "to further compelling governmental interests." *Id.* at 207. That is because even the race-based actions our Constitution permits are "dangerous," *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003), and "the deviation from the norm of equal treatment"; as such, they *must* be limited "in scope and duration." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498, 510 (1989) (plurality opinion).

Even if the District Court's understanding of what §2 allows or requires "made sense" decades ago, it does not today. *Shelby County v. Holder*, 570 U.S. 529, 546 (2013). Over the last few decades, "things have changed dramatically." *Id.* at 547. For example, in 1992 in Alabama, all parties assumed that an "opportunity district" in the State's congressional map would need a black population of at least 65%. *See Wesch v. Hunt*, 785 F. Supp. 1491, 1495-97 (S.D. Ala. 1992) (three-judge court). In that challenge, one proposed plan included two districts with black populations of

59% and 62% respectively, but even the party who submitted the plan doubted whether black Alabamians would have an "opportunity to elect candidates of their choice in these districts." *Id.* at 1496.

Likewise, a proposed district in a 1990s Alabama city council map with a "*bare black supermajority* in the voting-age population" was decried as preserving "white hegemony." *Dilliard v. City of Greensboro*, 213 F.3d 1347, 1351 (11th Cir. 2000) (emphasis added). Plaintiffs, in turn, proposed an 83% black "swing district." *Id.* at 1351. Similarly, in the 1980s, it was "widely accepted … that minorities must have something more than a mere majority even of voting age population in order to have a reasonable" chance of electoral success. *Ketchum v. Byrne*, 740 F.2d 1398, 1413 (7th Cir. 1984). Back then, a DOJ "guideline of 65% of total population" was "adopted and maintained for years … to ensure minorities a fair opportunity to elect a candidate of their choice." *Id.* at 1415.

Compare those figures with today, and it becomes apparent that the "stringent new remedies" of the VRA worked. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). "Voter turnout and registration rates now approach parity," blatant "discriminatory evasions of federal decrees are rare," and "minority candidates hold office at unprecedented levels." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009).

Modern-day North Dakota is a case in point. From 2006 until 2022, a Native American represented

District 9 in the State Senate.[6] According to the 2020 census, District 9 had a Native American voting age population of just 51.7%. Doc.100-10 at 4. No "bare supermajority" was needed because everyone has the opportunity to register, vote, and engage in the affairs of their preferred party.

Absent "particularized findings" that members of the minority group are excluded from effective political participation, the "racial classifications" condoned by the District Court will be "ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986). A Senate Factors expert will always be able to identity at least some "race-based gaps … with respect to the health, wealth, [or] well-being of American citizens." *SFFA*, 600 U.S. at 384 (Jackson, J., dissenting). This will allow §2 to function as "an affirmative-action program" for race-based districting in perpetuity. *Shaw v. Hunt*, 517 U.S. 899, 910 (1996).

But "this Court's precedents make clear that" even "narrowly tailored race-based affirmative action in higher education" may not "extend indefinitely into the future." *SFFA*, 600 U.S. at 316 (Kavanaugh, J., concurring). Likewise, "even if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future." *Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring). If §2 allows courts to "pick[] winners and losers based on the color of their

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[6] *See* Richard Marcellais, BALLOTPEDIA, https://ballotpedia.org/Richard_Marcellais#Elections (last accessed Apr. 3, 2024).

skin," *SFFA*, 600 U.S. at 229, it is time to get out of that sordid business.

III. The States Need Clarity.

The decision below and several other recent decisions from lower courts demonstrate the utter indeterminacy of current vote dilution jurisprudence. "Relatively clear lines of legality and morality have become more difficult to locate as demands for outcomes have followed the cutting away of obstacles to full participation." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 837 (5th Cir. 1993) (en banc). In other words, the VRA's successes have produced statutory mission creep, with some plaintiffs and courts stretching ever further to fill each Senate Factor bucket with some evidence, while lacking any discernible notion of what it is that is even being proven.

This is a critical problem for federalism and federal courts. "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915. "And it is vital in such circumstances that" federal courts "act only in accord with especially clear standards," lest they "risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498 (2019). At a minimum, legislators deserve a rule clear enough to give them a fair chance of complying with §2 and the Constitution. The recent decisions discussed below underscore that legislators do not yet have that clear rule and that the Court should provide it now.

1. Begin with North Dakota. During the floor debates for the 2021 Plan, one representative prophesied, "We're going to end up in court one way or another unless, I don't know, unless we do everything that everybody else says we should do. And I don't even know because there's opposing sides." Doc.100-8 at 15. He was right—two times over.

Within nine days of each other, two sets of private plaintiffs sued the Secretary of State. One (kicking off this case) alleged that the 2021 Plan racially gerrymandered by subdividing Districts 4 and 9. App.1. The District Court granted summary judgment for Defendants, finding that the Legislative Assembly had good reasons to believe it needed to sort voters by race to comply with §2. App.27.

The other suit alleged that the 2021 Plan violated §2 by packing Native Americans into the newly subdivided House District 9A. *Turtle Mtn. Band of Chippewa Indians v. Howe*, No. 3:22-cv-22, 2023 WL 8004576, at *1 (D.N.D. Nov. 17, 2023). The district court found it "evident that the Secretary and the Legislative Assembly did carefully examine the VRA and believed that" its "boundaries of districts 9 … would comply with the VRA." 2023 WL 8004576, at *17. Yet "those efforts did not go far enough to comply with Section 2." *Id.* Apparently, more race-based sorting was needed. "How much is too much?" *Rucho*, 139 S. Ct. at 2501. The court didn't say.

2. Turning south, a federal court recently decided that Georgia's congressional and state legislative plans violated §2. *Alpha Phi Alpha*, 2023 WL 7037537, at *144. This notwithstanding the fact that

98% of all eligible voters in Georgia are registered, both major party nominees for the last U.S. Senate race were black, the State's congressional delegation includes five black Democrats despite having only two majority-black districts, and black Georgians enjoy proportional representation in Congress. *See id.* at *9-10, 71, 75, 126, 130, 137.

What should have tipped off the Georgia Legislature that it was required to engage in race-based districting? In the district court's view, it was recent "official discrimination in the state" that included several voting laws "determined in prior decisions by the Court to *not* be illegal under federal law." *Id.* at *59, 62. For example, one law that the same judge had deemed *not* to violate §2 was transmuted into evidence that Georgia's redistricting laws *did* violate §2 because, among the tiny number of people affected by the VRA-compliant law, a higher percentage were black. *Id.* at *63.

But the most telling "evidence" was the district court's reliance on the 1990 congressional redistricting cycle. Without any apparent irony, the court identified DOJ's rejection of "the State's reapportionment plans" as evidence of "Georgia's history of discrimination against Black voters." *Id.* at *60. What the court omitted, however, was that DOJ was misusing Section 5 to demand a flagrantly gerrymandered "'max-black' plan." *Abrams v. Johnson*, 521 U.S. 74, 80 (1997). When, on DOJ's third try, Georgia finally acquiesced to the "Justice Department's maximization policy," this Court held that Georgia's map was unconstitutional. *Miller*, 515 U.S. at 926. Thus, in the district court's upside-down view, Georgia's repeated

refusal to racially discriminate was *evidence* of racial discrimination. It is hard to fathom how the Georgia Legislature could have seen this coming.

3. Then there's the Louisiana ping-pong saga. Following the 1990 census, Louisiana enacted a plan containing a second majority-black congressional district. *Hays v. State of Louisiana*, 936 F. Supp. 360, 363 (W.D. La. 1996). During the ensuing years, a federal court thrice held that plans with two majority-black districts violated the Equal Protection Clause. *Id.* at 362. Following the 2020 Census, Louisiana enacted a plan with one majority-black district, but a federal court held that this plan likely violated §2 for *not* containing a second majority-black district. *Robinson v. Ardoin*, 605 F. Supp. 3d 759 (M.D. La. 2022). The State then enacted a new congressional plan with a second majority-black district, and one week later was sued for racial gerrymandering. *See Callais v. Landry*, No. 3:24-cv-00122 (W.D. La. Jan. 31, 2024) (Complaint).

4. Unable to catch a break, Louisiana received word in February that its legislative districting plans also violated §2 due, in part, to the "subliminal message of the Sheriff's Office being housed on the same floor as [the plaintiff's] Registrar of Voter's Office." *Nairne*, 2024 WL 492688, at *41 n.461. If this is the test, no legislator can know with any reasonable certainty whether he should vote for a race-neutral plan or whether federal law demands gerrymandering.

* * *

The stakes are high. If the States cross the line from race-neutral districting to racial gerrymandering without good enough reasons, then Section 3 preclearance is back on the table, and if they don't gerrymander enough, state officials could face jail time for violating §2. *See* 52 U.S.C. §§10302(c); 10308(a). This was not lost on one North Dakota representative, who told the Assembly: "[M]y wife spends a lot of time trying to keep me out of jail. And I would not want this body to do anything that would be even looking like we're ignoring federal law." Doc.100-8 at 25.

When federal courts are citing VRA-compliant voting laws, refusals to racially gerrymander, and "subliminal messages" as evidence of §2 violations, at least two things are clear: (1) "things have changed dramatically" for the better, *Shelby County*, 570 U.S. at 547, and (2) it may be harder than ever to predict whether redistricting laws will comply with §2 and the Constitution. The way forward is to read §2 like any other statute. That text, drawn from *Whitcomb* and *White*, shows that the Voting Rights Act is concerned with the right to register, vote, and participate in politics—win or lose—not on rates of computer ownership or subliminal messages from parish buildings. But whatever the statute means, the Court should tell the States.

CONCLUSION

The Court should reverse.

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