No. 23-969

In The Supreme Court of the United States

CHARLES WALEN AND PAUL HENDERSON,
Plaintiffs-Appellants,

v.

DOUG BURGUM, in his official capacity as Governor of the State of North Dakota; MICHAEL HOWE, in his official capacity as Secretary of State of North Dakota,
Defendants-Appellees,

The MANDAN, HIDATSA, and ARIKARA NATION; CESAR ALVAREZ; and LISA DEVILLE,
Defendant-Intervenors/Appellees.

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

RESPONSE TO INTERVENOR-APPELLEES' MOTION TO DISMISS OR AFFIRM AND SUPPLEMENTAL BRIEF IN REPLY TO APPELLEES' RESPONSE TO JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

The responses to Appellants' Jurisdictional Statement confirm that this Court should vacate and remand this case for trial. The State Appellees now admit they support returning this case to the district court. That provides a sufficient basis for this Court to vacate and remand for further proceedings.

Further, the collision of this case with another challenge arising out of the same Circuit counsels against summary affirmance by this Court. A single-judge district court recently ruled that one of the subdistricts at issue in this case violated Section 2 against the very same electoral map challenged as a racial gerrymander here, but that is likely to be overturned.

Unlike the State's agreement, the Intervenors' Motion makes a number of merits-based arguments the district court did not include in its opinion, as well as attempting to create questions about Appellants' standing. At root, neither the State nor Intervenors can adequately explain the critical errors made by the district court when it decided this case at summary judgment.

This Court should do what State Appellees and Appellants agree should be done—either vacate and remand or summarily reverse the district court. This case can then be considered by this Court (if necessary) on a full record after trial. Alternatively, it should note probable jurisdiction and set a schedule for briefing and argument.

ARGUMENT IN REPLY AND RESPONSE

I. The State agrees this case should be returned to the district court and conserving judicial resources favors that result.

A. The State's position ends the need for further analysis by this Court.

The State agrees with Appellants that this case must be returned to the district court. *See, e.g.*, Memorandum in Response to Jurisdictional Statement ("State Response") at 1–16. That alone should resolve any issues here and this Court should vacate and remand for trial.

But the State also asserts an alternative argument that this Court could affirm the district court if it does not revisit precedents, arguing that it properly applied the "good reasons" and summary-judgment standards discussed in the Jurisdictional Statement.[1] This does not provide a sufficient basis to affirm the decision below as discussed in Section II.

[1] The State's unusual position in the case is due in part to the contradictory positions it took regarding what the VRA does and does not require in this case and in the *Turtle Mt. Band of Chippewa Indians v. Howe*, No. 3:22-cv-22, 2023 U.S. Dist. LEXIS 206894, at *54 (D.N.D. Nov. 17, 2023) ("*Turtle Mountain*") case, discussed further below. While Appellants have some sympathy with the State's concern that it is unfairly caught in the middle, Appellants in this case should not suffer as a result. For example, the State takes the position in this

B. A proper use of judicial resources counsels in favor of remanding this case to the district court for trial.

This case is only one of the cases challenging subdistricts in North Dakota's legislative plans. Shortly after the decision challenged in this appeal, a single-judge district court, following a bench trial, determined that District 9 and its subdistricts violated the Voting Rights Act and enjoined their use—resolving one of the issues raised by Appellants in this case. *Turtle Mt. Band of Chippewa Indians v. Howe*, No. 3:22-cv-22, 2023 U.S. Dist. LEXIS 206894, at *54 (D.N.D. Nov. 17, 2023) ("*Turtle Mountain*"). That decision is currently on appeal to the Eighth Circuit.

But the Eighth Circuit has also recently ruled that there is no private right of action under Section 2 of the VRA. *Ark. State Conference NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1211 (8th Cir. 2023). Thus, when the Eighth Circuit hears the appeal in the *Turtle Mountain* case, it is obliged to overturn the single-judge court decision, reinstating

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case that the VRA required the creation of a subdistrict in District 9 with enough Native Americans to elect a candidate of choice, which is different than its position in *Turtle Mountain*. The State should be forced to take a consistent position in both cases. To its credit, the State's position appears to be moving to a more consistent approach after its Response in this appeal, but fully resolving this discrepancy still requires vacating and remanding, as both the State and Appellants suggest.

District 9, which Appellants challenged in this appeal.[2]

One question left unresolved by the Eighth Circuit is whether 42 U.S.C. § 1983 provides a remedy for Plaintiffs' private-right-of-action problem. 86 F.4th at 1218. But if the Eighth Circuit addresses this issue in the *Turtle Mountain* appeal, the scope of the single-judge court to hear Section 2 claims becomes an issue.[3]

Section 1983 allows private parties to seek redress for violations of their constitutional rights. *See, e.g., Lane v. Wilson*, 307 U.S. 268, 269 (1939); *cf. Maine v. Thiboutot*, 448 U.S. 1, 26-29 (1980) (Powell, J., dissenting) (relaying history of §1983 and noting that "cases dealing with purely statutory civil rights claims remain nearly as rare as in the early years").

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[2] Any other result would require overturning its recent precedent. *Ark. State Conference NAACP v. Ark. Bd. of Apportionment*, 91 F.4th 967, 967 (8th Cir. 2024)

[3] To be clear, a single judge hearing Section 2 claims about state legislative plans is already questionable. The VRA is a direct exercise of the enforcement power of Congress under the Fourteenth and Fifteenth Amendments. *See City of Boerne v. Flores*, 521 U.S. 507, 518 (1997); *Lewis v. Governor of Ala.*, 896 F.3d 1282, 1293 (11th Cir. 2018), *vacated and rehearing en banc granted by* 914 F.3d 1291 (11th Cir. Jan. 30, 2019) (Wilson, J.). Thus, more than most congressional actions, the VRA represents a direct effort by Congress to *implement* constitutional provisions in the Fifteenth and Fourteenth Amendments. Thus, under 28 U.S.C. § 2284, an action under Section 2 is "an action" "challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body."

And if there is no new private right of action under Section 2, as the Eighth Circuit found, then enforcement through § 1983 is an action to enforce the Fourteenth or Fifteenth Amendment.

As originally conceived, "the coverage provided by § 2 was unquestionably coextensive with the coverage provided by the Fifteenth Amendment." *Chisom v. Roemer*, 501 U.S. 380, 392 (1991). Thus, Section 2 made no "substantive change in the governing law" because the remedy corresponded directly to the underlying constitutional right. *City of Boerne*, 521 U.S. at 519. As a result, a private party proceeding under § 1983 to enforce a Section 2 claim about legislative districts is filing an action (1) to enforce the Fourteenth or Fifteenth Amendment, (2) making the action a challenge to the constitutionality of a statewide legislative body, which (3) requires a three-judge panel. 28 U.S.C. § 2284(a). If that is the result, a three-judge panel already exists—the one that decided this case at summary judgment and has not yet held a trial.

Given the confusion of the district court in this case, the parallel challenge under the VRA, and the potential that both cases should be heard by a three-judge panel, it makes the most sense to return this case to the district court so all of these issues can be addressed after a bench trial. This case should not be decided on the incomplete record below, especially in light of the uncertainty around the future status of the very districts that are challenged here.

II. The "strong basis in evidence" standard requires far more evidence than used by the State and must be analyzed before constructing remedial districts based on race.

Where a state proffers Section 2 compliance as a *defense* to a racial gerrymander, the legislature and courts are required to do more than what the district court did here.

To determine whether the legislature reasonably believed it needed to racially gerrymander certain districts to comply with Section 2 (*i.e.*, that it had "good reasons"), the State was required to conduct an analysis of some sort. *Wis. Legis. v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1249 (2022). While that inquiry might fall somewhat short of the inquiry undertaken by courts in response to a Section 2 *challenge* of an electoral map, far more is required than what occurred here given the State's defense. That is why all the cases cited by Appellants in the Jurisdictional Statement involved states undertaking a far more robust Section 2 analysis. J.S. 14 n. 4. And there are clear reasons for that.

If a district court finds a racially predominate district was required to address an actual Section 2 violation, then the legislature had "good reasons" to gerrymander the districts under current

assumptions.[4] But there was no such finding when the legislature constructed this racial gerrymander. Therefore, the district court's task focuses on the legislature's analysis, if any. The district court reviews the breadth and depth of inquiry undertaken by the legislature before deciding to create the racial gerrymander. The district court simply cannot determine, one way or another, whether a legislature's reasons for a racial gerrymander are "good reasons" unless and until it measures the legislature's actions—which is what the district court failed to do here and could not have done in this case without holding a trial because it would have required the district court to weigh the evidence which was practically nonexistent.

Both the State and Intervenors take issue with this standard by arguing against one never put forth by Appellants. But it is the obligation *of the district court*, in reviewing the evidence purportedly in support of the State's VRA defense, to "determine if the VRA actually requires such a race-predominant district configuration." J.S. 13. Why? Because the district court must weigh the actions taken and evidence considered by the legislature to determine whether it had the requisite "good reasons" needed to racially gerrymander in the first place. In other words, the State need not be *correct* that the VRA required the race-predominant district, but the district court must determine whether the legislature

[4] As discussed in the Jurisdictional Statement, Appellants continue to contend that such a racial gerrymander would still be unconstitutional.

had any basis in fact to craft the district even if they were wrong about the VRA. This is necessary because states frequently claim that districts drawn primarily based on race are excused because of compliance with the VRA. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 921 (1995); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1272 (2015). That's the "breathing room" states are rightfully afforded under this Court's precedent. But that requires making the initial Section 2 determination "under a proper interpretation of the VRA," *Cooper v. Harris*, 581 U.S 285, 306 (2017), with proper evidence, which the legislature did not do, J.S. 12-13, so the district court could not either.

III. Intervenors do not identify a compelling reason to affirm the district court.

Intervenors list a host of reasons they believe this Court should affirm the district court, at least as to Subdistrict 4A. But none of these rationales stand up to scrutiny when measured against the opinion this Court is tasked with reviewing. Indeed, Intervenors seem intent on ignoring what the district court actually did and presenting facts as if they were having a trial on the merits before this Court. They do so by arguing untested "facts" that were never considered by the State in creating the challenged districts, let alone properly analyzed by the district court when evaluating them. But it is not on briefing at this Court where these purported facts should be tested. That is what trial is for—and that is exactly where this Court should direct this case to proceed.

A. The Intervenors' Motion to Dismiss or Affirm must be denied because it seeks to introduce evidence not considered below and asks this Court to affirm a non-existent evidentiary standard at summary judgment.

In contrast to the State, Intervenors respond by putting forward evidence that they wish the State and district court would have considered, but did not. *Compare* Intervenor Motion 19–40 *with* J.S. App. A1–A28.

For example, they cite to multiple experts that never had their opinions tested at trial and that were never considered by the legislature. Intervenor Motion at 24–26. Ultimately, Intervenors cannot cite to the evidence before the legislature (or even the district court's reliance on those facts) for most of what they wish the State had considered—but even if they could, the district court could not draw inferences from that evidence against Appellants while granting summary judgment to the State. Yet that is what the district court did here.

The district court explicitly construed facts against Appellants. J.S. A27. While the district court could have construed facts to *deny* Appellants' Motion for Summary Judgment, it is entirely backwards to use it as a reason to *grant* the State's and Intervenors' respective motions. In granting their motion for summary judgment, not only did the district court fail to construe the evidence in a light most favorable

to Appellants, but it also actually took the evidence arrayed against them *as true*.

Intervenors ask this Court to make the same error, by considering a number of facts that require the weighing of evidence. That should take place in a trial and not at summary judgment.

IV. Intervenors have not shown Appellants lack standing.

Because Article III standing is an "irreducible constitutional minimum," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992), Appellants next turn to Intervenors' argument that they lack standing to bring this case. The court below did not question the standing of either plaintiff. None of the purported bases raised by Intervenors have any merit, but even if they did, they must be resolved at trial and not at summary judgment.

A. Charles Walen.

Intervenors do not dispute that Mr. Walen lives in subdistrict 4A, which is one of the subdistricts challenged here and one that the district court expressly assumed was intentionally racially gerrymandered by the State. J.S. A13–A15. As a result, Mr. Walen suffers the stereotyping harm common to all racial gerrymandering cases based on *Shaw* and its progeny. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 647 (1993); *Hayes v. N. State Law Enforcement Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993); *Miller v. Johnson*, 515 U.S. 900, 920 (1995); *Students for Fair Admissions, Inc. v.*

President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2165 (2023). This should be the end of the analysis, as it was for the district court below.

In contrast, Intervenors suggest Mr. Walen has no "cognizable injury" apparently because he failed to state certain "magic words" in his deposition. But that is not the standard at any phase of litigation, and certainly not at summary judgment. In any event, the place for consideration of testimony is at trial, not relying on deposition testimony at summary judgment.

Further, putting aside that the case cited by Intervenors in support of its injury argument provided a *non-exhaustive*[5] list of possible racial gerrymandering injuries, Mr. Walen has indisputably been subject to a "racial classification" because the district court *assumed* the State created subdistricts 4A and 4B to racially gerrymander a subdistrict that would include a district intentionally designed to elect a Native American representative. J.S. A13–A15. Thus, he has standing to bring this case.

B. Paul Henderson.

Intervenors also dispute the standing of Mr. Henderson, who is a resident of District 9 on the 2021 plan. Intervenors claim Mr. Henderson has no standing here because he is a resident of District 9B

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[5] *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941); *accord* BLACK'S LAW DICTIONARY 912 (11th ed. 2019) ("The participle *including* typically indicates a partial list…").

and not 9A. *See, e.g.*, Intervenor Motion 14–19. But Intervenors miss the point.

Mr. Henderson lives in District 9—a district that would have been kept whole *but for* the State's decision to racially gerrymander a subdistrict in that district. Thus, Mr. Henderson clearly has demonstrated an injury that personally and individually affects him.

North Dakota's legislative district plan is atypical.[6] Each district elects one Senator and two representatives at large. The legislature had not created subdistricts in any recent plan and created only four subdistricts when designing the plan in 2021: 4A, 4B, 9A, and 9B. These subdistricts stick out of the redistricting scheme like four sore thumbs given the State's historic redistricting principle of not creating subdistricts. *See, e.g., Bartlett v. Strickland*, 556 U.S. 1, 8 (2009) (evaluating whether traditional redistricting principle must give way to Section 2).

In a typical single-member district plan, only voters in the racially gerrymandered district suffer the stereotyping harm. This is because the remaining non-gerrymandered districts do not suffer the racial stereotyping harm: that harm is generalized and diluted across the rest of the districts. But under the North Dakota approach where all other districts except the racially gerrymandered districts are elected at large, *both* subdistricts within an election

[6] North Dakota's nested plan for its legislature is not the typical design but is not unique because states like Arizona and Oregon use a similar design to North Dakota.

district are necessarily drawn primarily based on race. As a result, voters of both subdistricts suffer the stereotyping harm within the same district because both suffer the same violation of the state's criteria based on race. Furthermore, opting for racially gerrymandered subdistricts in a two-seat multimember district is the exercise of a binary choice which necessarily makes both districts racially gerrymandered.

Harms are district-specific. *Gill v. Whitford*, 585 U.S. 48, 66 (2018). In other words, a racial-gerrymandering plaintiff "has standing to assert only that his own district has been so gerrymandered." *Id.* Of course, that is *precisely* what Mr. Henderson alleges here, and that is why the district court found he had standing.

CONCLUSION

This Court should summarily reverse, vacate and remand for trial, or note probable jurisdiction.

Respectfully submitted this 20th day of May, 2024.

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