Nos. 21-1086 and 21-1087

IN THE

Supreme Court of the United States

JOHN H. MERRILL, Alabama Secretary of State, *et al.*,
Appellants,

v.

EVAN MILLIGAN, *et al.*,
Appellees.

JOHN H. MERRILL, Alabama Secretary of State, *et al.*,
Petitioners,

v.

MARCUS CASTER, *et al.*,
Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA AND ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF APPELLEES AND RESPONDENTS

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AMICUS CURIAE BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS

National Congress of American Indians, by and through undersigned counsel, submit the following brief as amicus curiae in this matter.[1]

INTERESTS OF *AMICUS CURIAE*

Amicus curiae National Congress of American Indians ("NCAI") is the Nation's oldest and largest organization of American Indian and Alaska Native tribal governments and their members. Since 1944, NCAI has served to educate the public, and tribal, federal, and state governments, about tribal self-government, treaty rights, and policy issues affecting Indian tribes and their members. Amicus is a member of the Native American Voting Rights Coalition that produced a 2020 report, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, documenting widespread, present-day discrimination and impediments to registration and voting. Dr. J. Thomas Tucker, et al., *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, Native American Rights Fund (2020), https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf [hereinafter, "Obstacles"]. Amicus has a substantial interest in ensuring that Section 2 of the Voting Rights Act, 52 U.S.C. § 10301 (formerly cited as

1. No party's counsel authored any part of this brief. No one, apart from counsel for *amicus*, contributed money intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief pursuant to Supreme Court Rule 37.3.

42 U.S.C. § 1973) ("VRA"), provides recourse to address racial discrimination that dilutes Native American votes and diminishes their political power.

SUMMARY OF ARGUMENT

NCAI respectfully submits this brief to provide the Court with an account of the ongoing and critical need for Section 2 of the VRA to safeguard against vote dilution in Native American communities caused by contemporary racial discrimination and voter suppression. This ongoing racial discrimination continues to impact Native Americans' ability to elect candidates of their choice and robs them of representatives who understand and respect their unique political status and urgent infrastructure needs.

Petitioners'[2] proposal to eliminate any consideration of race from "comparator" and remedial maps when remedying discriminatory single-member districts would run contrary to Section 2's express purpose, overturn longstanding case law, and undermine Section 2's effectiveness in Indian Country. Petitioners' "alternative" argument that Section 2 should not apply at all to single-member districts would require overturning decades of controlling law, would deny Native Americans recourse under Section 2, and would unduly raise the burden of proof to combat ongoing racial discrimination. A thorough examination of the racial discrimination occurring in South Dakota, New Mexico, and North Dakota demonstrates

2. For ease and clarity, Amicus will collectively refer to Petitioners and Defendants-Appellants as "Petitioners". Further, "Pet. Br." refers to Brief for Appellants, filed April 25, 2022.

that vote dilution through single-member districts persists today and undermines Native Americans' political power.

Moreover, Petitioners' relegation of racially discriminatory at-large and multimember districts to history is factually inaccurate. The invidious use of at-large districts still occurs in Indian Country. Indeed, the only Section 2 enforcement action brought by the Department of Justice during President Trump's tenure was a challenge, just two years ago, to an at-large method of election that prevented the election of Native American candidates of choice to a school board.

Lastly, Petitioners' elevation of certain specific redistricting principles, (particularly those that respect existing district maps and political boundaries) over other traditional redistricting principles and over *any consideration of race at all*, would uniquely burden Native American voters. Throughout Indian Country, reservations (many of which predate the creation of counties and some of which are larger than some states) are often split among numerous counties. States may not have considered reservation boundaries when forming counties. Or worse, may have formed them with the express purpose of diluting Native American influence. Petitioners' preference for existing political boundaries ignores the intentional racial discrimination of the past.

Here, Section 2 provided appropriate relief from a discriminatory map through proper consideration of race. The opinion below should be affirmed.

BACKGROUND

Native Nations are distinct, inherent sovereigns whose existence predates the founding of the United States. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 55–56 (1978). Tribes are recognized in the United States Constitution, Art. I, § 8; Art. VI, cl. 2, and in numerous treaties and laws. See N. Jessup Newton et al., Cohen's Handbook of Federal Indian Law §1.03(e) (2012). Native Americans have, at varying points in United States history, been forcibly removed from their homelands, subjected to attempted assimilation, and deemed wards of the government. *Id.* at §1.04; see also U.S. Dept. of Interior, Federal Indian Boarding School Initiative Investigative Report, pp. 25–63 (2022), https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf.

Native Americans are among the poorest citizens of the United States and often live on reservations that lack basic infrastructure. Some Native American homes lack running water, do not have addresses, and do not receive postal deliveries. Roads in and out are often unpaved or in poor condition. U.S. Census Bureau, Poverty Status in the Past 12 Months by Sex by Age, 2013-2017 American Community Survey 5-Year Estimates, Table B17001C and B17001 (2017); see also National Congress of American Indians, Tribal Infrastructure: Investing in Indian Country for a Stronger America (2017), https://www.ncai.org/attachments/PolicyPaper_RslnCGsUDiatRYTpPXKwThNYoACnjDoBOrdDlBSRcheKxwJZDCx_NCAI-InfrastructureReport-FINAL.pdf.

Participating in American democracy provides Native Americans the opportunity to remedy these injustices by

electing representatives who understand and honor Native Nations' political status within American federalism, who will advance treaty rights, advocate for basic resources, and respect and value Native Americans' contributions to this country.

Yet, throughout history and continuing today, Native Americans have been unjustly denied a fair chance to elect the representation of their choosing. A tribal member occupies a unique position as a citizen of her tribe, and of the town, county, and state in which she resides, as well as the United States. She is entitled to an undiluted vote for all elections for which she is eligible. Unfortunately, local and state officials responsible for running elections have denied Native Americans the opportunity to participate fully in American democracy, undermining the core values of the United States as a democratic republic created by and for the people, its citizens. A robust VRA is crucial to address the ongoing racial discrimination that weakens Native American participation in our democracy.

A. History of Denial of Native American Voting Rights

When the Fourteenth Amendment was ratified in 1868, U.S. Const., Amdt. 14, Native Americans were not considered American citizens, and they did not have the right to vote, nor the right to equal protection. See *Elk* v. *Wilkins*, 112 U.S. 94 (1884). Following the naturalization of select Native Americans, all Native Americans were unilaterally conferred citizenship through the 1924 Indian Citizenship Act. 43 Stat. 253, enacted June 2, 1924. This unilateral conferral of the rights of citizenship also created obligations for states, which they consistently sought

to avoid. States categorically continued to deny Native Americans the right to vote. See, *e.g.*, *Porter* v. *Hall*, 271 P. 411, 417 (1928), *overruled in part by Harrison* v. *Laveen*, 196 P.2d 456 (1948) (Indians, despite being U.S. citizens could not register because they were wards of the federal government); *Trujillo* v. *Garley*, Civ. No. 1353 (D.N.M. August 11, 1948) (finally rejecting New Mexico's argument that Indians were not state residents and therefore could not vote); *Allen* v. *Merrell*, 305 P.2d 490 (1956), *vacated as moot*, 353 U.S. 932 (1957) (upholding Utah's prohibition on Indian's right to vote but vacated following legislative action); 1957 Utah Laws ch. 38, 89–90.

As outright bans on Native Americans' right to vote subsided, some states moved to more insidious forms of vote denial. As with African Americans, literacy tests and poll taxes were utilized to disenfranchise Native Americans based on race. See, *e.g.*, Ariz. Rev. Stat. Ann. § 16-101(A)(4)–(5) (West 1956) (requiring reading the U.S. Constitution in English to vote); Alaska Const., Art. V, § 1 (1959) (stating a voter "shall be able to read or speak the English language as prescribed by law"). The 1965 VRA provided critical protections to Native Americans from discrimination.

But states continued to defy the VRA by devising qualifications that led to the outright denial of Native American voting rights through 2000. For example, until 1975, a South Dakota law prohibited members of "unorganized" counties to vote for the county officials that ran local government affairs including county clerks, judges, clerks of the court, etc. There were only three "unorganized" counties in South Dakota—all of which were overwhelmingly Native American and were

comprised entirely of Native American lands. *Little Thunder* v. *South Dakota*, 518 F.2d 1253, 1254–55 (8th Cir. 1975). State law also prohibited members of unorganized counties from running for county office until 1980. *United States* v. *South Dakota*, 636 F.2d 241 (8th Cir. 1980). In 1999, South Dakota *again* defined eligible voters to exclude Native Americans and brazenly allowed only residents of "noncontiguous pieces of land" to vote in sanitary district elections. 87% of the land and 200 tribal members serviced by the district were excluded. *United States* v. *Day County*, No. 99-1024 (D.S.D. June 16, 2000).

This is not ancient history.

B. Present Day Denial of Native American Voting Rights

The Native American Voting Rights Coalition (amicus is a member) completed a series of nine field hearings in seven states examining voting rights in Indian Country. One hundred twenty five witnesses from dozens of tribes generated thousands of pages of transcripts detailing the progress and ongoing barriers to voting. Witnesses included tribal leaders, community organizers, academics, politicians, and Native voters. They shared their experiences with voter registration and voting in federal, state, and local (non-tribal) elections. The resulting 2020 report concluded that "[a]lthough many other American voters share some of the same obstacles [to voting], no other racial or ethnic group faces the combined weight of these barriers to the same degree as Native voters in Indian Country." *Obstacles*, at 3.

The report determined that structural factors (the result of federal failure to honor treaty rights and other

trust obligations) such as poor roads, long distances to substandard postal services, lack of residential addresses, lack of broadband internet, lack of vehicles, and poverty, all contributed to low voter turnout. These structural barriers were compounded by hostile election officials who leveraged these barriers to make it even more difficult for Native Americans to vote. See, *e.g.*, *Blackfeet Nation* v. *Stapleton et al.*, No. 4:20-cv-00095-DLC (D. Mont. Oct. 14, 2020) (removal of on-reservation polling site when reservation had no mail delivery and in-person voting required 120 miles of travel).

Unfortunately, racism was also found to be a factor. This past General Election, the weekend before Election Day . . . a man in Glasgow, Montana, bordering the Fort Peck Indian Reservation, won the Halloween costume contest in full Ku Klux Klan ("KKK") attire. N. Mabie, Man Reportedly Dressed as KKK Won Costume Contest in Glasgow Bar (Nov. 2, 2020), https://www.greatfallstribune.com/story/news/2020/11/02/montana-r-man-kkk-costume-reportedly-wins-glasgow-bar-contest/6130962002/. Though mostly associated with the Deep South, the KKK has been prominent since at least the 1920s in locations that border the Fort Peck Reservation. A primary goal of the KKK was to undermine Native American voting rights. See A. Sturdevant, The Ku Klux Klan in Montana During the 1920s, 43, 60 (Carroll College, Apr., 1991), https://scholars.carroll.edu/handle/20.500.12647/2542?show=full. The General Counsel to the Fort Peck Assiniboine and Sioux Tribes relayed following the incident, "[t]his is why satellite voting sites are so important for our tribal members. Not everyone is comfortable going into places in Glasgow, and not everyone in Glasgow is going to make our tribal members feel welcome." Written Statement of

Jacqueline De León, Hearings before the Subcommittee on The Constitution of the Senate Committee on the Judiciary, 18 (Oct. 20, 2021), https://www.judiciary.senate.gov/imo/media/doc/De%20Leon%20Testimony1.pdf.

Yet, it is not just the hostility of border towns that make voting difficult. Election officials still engage in racial discrimination that echoes the overt discrimination thought to be of the past. In Utah, in 2018, the San Juan County clerk backdated a false complaint against a Native American candidate. The clerk's fraud occurred after decades of court battles over the single-member districts in the county resulted in Native Americans having a chance to elect two candidates of choice for county commissioners. *Navajo Nation* v. *San Juan County*, 929 F.3d 1270, 1274 (10th Cir. 2019). The District Court reinstated the Native candidate to the ballot and found the clerk likely violated the Native candidate's constitutional rights. *Grayeyes* v. *Cox*, No. 4:18-CV-00041, 2018 WL 3830073, at *9 (D. Utah Aug. 9, 2018). This deception echoes a 1972 case in the very same county where a clerk misled two Navajo candidates about filing deadlines. The Federal Courts ordered those candidates back on the ballot as well. *Yanito* v. *Barber*, 348 F. Supp. 587, 593 (D. Utah 1972).

In 2018, a Native community activist from Montana testified that when she returned voter registration cards the clerk hassled her over the number of voter registration cards returned. There was no legal limitation, but the clerk arbitrarily limited the number of registration cards she could return. She had collected them from impoverished Native Americans living miles from the clerk's office. *Obstacles*, at 45. This hearkens back to a VRA case regarding an unfair at-large voting system in

Montana, where the Court recounted how "[an] Indian testified that he was given only a few voter registration cards and when he asked for more was told that the county was running low. Having driven a long way to get the cards, he asked his wife, who is white, to go into the county building and request some cards. She did and was given about 50 more cards than he was." *Windy Boy* v. *County of Big Horn*, 647 F. Supp. 1002, 1008 (D. Mont. June 13, 1986).

Native plaintiffs have won or settled to their satisfaction 70 of 74 voting rights cases brought between 2008 and the publication of *Obstacles* in June 2020. *Obstacles,* at 18. This recent record of success is, unfortunately, indicative of the discriminatory facts underlying many of the cases in Indian Country. Section 2 is indispensable to the fight for Native Americans to participate fairly in American democracy and effectuate change in their communities.

ARGUMENT

I. Eliminating the Consideration of Race from the Section 2 / *Gingles* Analysis is Unworkable and Would Result in Discriminatory Outcomes in Indian Country

Congress passed the VRA to "banish the blight of racial discrimination in voting." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). Congress amended the VRA in 1982 to clarify that the law does not require intentional discrimination. It aims to eliminate all "discriminatory election systems or practices which operate, designedly or otherwise, to minimize or cancel out the voting strength and political effectiveness of minority groups." S. Rep.

No. 97–417, p. 28 (1982) (S. Rep.). The 1982 amendment specified that a violation was established if "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(b). The purpose of these amendments was to provide "the broadest possible scope in combating racial discrimination." *Chisom* v. *Roemer*, 501 U.S. 380, 403 (1991) (citations omitted).

Petitioners seek to disturb longstanding precedent and upend Congress's intent.

First, Petitioners argue that Section 2 does not allow vote dilution claims for single-member districts. See Pet. Br. 50–52. This Court has long recognized that an "equally open" electoral process that provides a group with a fair chance to "elect a representative of its own choice" allows for vote dilution claims, including vote dilution through single-member districts that have a discriminatory impact on the basis of race. See, *e.g.*, *Growe* v. *Emison*, 507 U.S. 25, 40 (1993) (Scalia, J. writing for a unanimous court). Petitioners' radical departure from settled law would foreclose relief under the VRA and decimate the modest gains made by Native Americans.

Second, Petitioners ask this Court to impose an additional, unreasonable burden on Section 2 plaintiffs. Petitioners urge that the "relevant benchmark for 'equally open' electoral districts is a race-neutral redistricting plan." That is, a Section 2/*Gingles* claim can only proceed

where a "comparator" or "illustrative" map (drawn to determine whether a minority majority district is possible) and the remedial map (drawn to remedy vote dilution where a Section 2 violation is found) are drawn without any consideration of race. Pet. Br. at 44–45.

Petitioners' argument relies on technology that draws maps according to certain, programmed districting principles that purportedly do not take race into consideration at all. Petitioners selectively rely on evidence below (from inapposite testimony from some of Respondents' experts) that thousands or millions of maps were "generated" with no consideration of race, and they did not include two majority-minority districts. Pet. Br. at 54–56. Petitioners urge that this "fact" should supersede the unanimous factual findings and conclusions of law from a three judge district court—based on Respondents' demographic experts—that race did not predominate over traditional redistricting principles. Petitioners essentially urge that certain redistricting principles (like respecting existing political boundaries) should act as vetoes over the intentional consideration of race to remedy racial discrimination. Instead, Petitioners attempt to render Section 2 practicably useless by prohibiting race from being considered at all in the *Gingles* analysis. Petitioners' arguments should be rejected.

A. *Gingles* Strikes the Correct Balance

This Court has already considered how to balance race and legitimate state interests, such as traditional redistricting principles, when evaluating whether a vote dilution claim results from discrimination. In *Thornburg* v. *Gingles*, this Court set forth the prerequisites for

vote dilution challenges: 1) a minority group must demonstrate that it is large and compact enough to constitute a majority in a single-member district; 2) a minority group must demonstrate it is politically cohesive; and 3) a minority group must demonstrate the majority group votes sufficiently as a group to defeat the minority group's preferred candidate. *Thornburg* v. *Gingles* 478 U.S. 30, 50–51 (1986). If, and only if, all three *Gingles* preconditions are met, the consideration proceeds to an analysis of the "totality of the circumstances" to determine whether a defendant has violated Section 2. *Id.* at 48. So, even where plaintiffs can establish the *Gingles* preconditions—and that is by no means a rubber stamp[3]—they must then demonstrate that a Section 2 violation has occurred by putting on evidence regarding the "totality of the circumstances," starting with the "senate factors." *Id.* at 36.

Petitioners attempt to render Section 2 unworkable by prohibiting race from being considered at all in the *Gingles* analysis.[4]

3. See *Brnovich v. Democratic Nat'l Comm.*, 549 U.S. ___ (2021). (Kagan, J., dissenting) (pointing out that there have been as few as nine winning cases since *Shelby County*, and each involving "an intensely local appraisal" of a "controversial polic[y] in specific places.").

4. While Petitioners argue that "race cannot predominate in redistricting, no matter what the reason," Pet. Br. at 37, that is not necessarily so. Indeed, a state can satisfy strict scrutiny if it proves that its race-based sorting of voters is narrowly tailored to comply with the VRA. *Wisconsin Legislature* v. *Wisconsin Elections Com'n*, 142 S. Ct. 1245, 1249 (2022). And race may be used where necessary to remedy identified past discrimination. If compliance with the VRA was not compelling interest, a "State could be placed in the

But such a position is in direct opposition to the first *Gingles* precondition that requires plaintiffs (usually through experts) to demonstrate that a district (or districts) can be drawn with minority populations that are large and compact enough to constitute majorities in those districts. *Id.* at 50–51. Such a demonstration inherently requires the consideration of race.

It is folly to imagine a scenario where race should not play a role in the *Gingles* analysis. It would be akin to a murder trial where the witnesses were not permitted to disclose or describe the death of the victim.

B. Discrimination Based on Race is Prevalent Throughout Indian Country

Section 2 and the *Gingles* framework provide a coherent way for often impoverished Native American plaintiffs to seek redress from intentional discrimination through circumstantial evidence. Petitioners' proposed scheme not only impedes the ability to identify or provide meaningful relief to address Section 2 violations, it also ignores the fact that maps with disparate impacts may exist because of ongoing racial discrimination.

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impossible position of having to choose between" VRA compliance and "compliance with the Equal Protection Clause." *LULAC* v. *Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., concurring in judgment in part and dissenting in part). Additionally, "eradicating the effects of past racial discrimination" is a "compelling interest entirely distinct from the [VRA]." *Shaw* v. *Reno*, 509 U.S. 630, 656 (1993).

Native Americans face racial discrimination in their everyday interactions, including when they exercise their voting rights. Specifically, racial discrimination dilutes Native Americans' voting power through the continued use of at-large districts and gerrymandered single and multimember districts.[5]

What follows is a narrative of vote dilution in single-member districts in South Dakota, New Mexico, and North Dakota. These present-day instances of racial discrimination are illustrative and demonstrate that Section 2 should continue to ensure that Native Americans have a fair chance to elect candidates who represent their interests.

(1) Section 2 Must Protect Against Vote Dilution in South Dakota

Four months ago—not forty years ago—two Native American women were turned away from a hotel whose owner had posted a notice that no Indians were allowed to stay at her property since she was unable to tell "who

5. Cases since 2000 include: *United States* v. *Benson County.*, Civ. A. No. A2-00-30 (D.N.D. Mar. 10, 2000); *Bone Shirt* v. *Hazeltine*, 461 F.3d 1011 (8th Cir. 2006); *Cottier v. City of Martin*, 604 F.3d 553 (8th Cir. 2010); *Large* v. *Fremont Cty.*, 709 F. Supp.2d 1176 (D. Wy. 2010); *Jackson* v. *Bd. of Trs. of Wolf Point Sch. Dist. No. 45-45A*, No. CV-13-65-GF-BMM-RKS, (D. Mont. Mar. 13, 2014); *Navajo Nation* v. *San Juan County.*, 929 F.3d 1270 (10th Cir. 2019); *Turtle Mountain Band of Chippewa Indians* v. *Jaeger*, No. 3:22-cv-00022-PDW-ARS (D.N.D. Feb. 7, 2022); *Navajo Nation* v. *San Juan County*, No. 1:22-cv-00095 (D.N.M. Feb. 10, 2022); *Lower Brule Sioux Tribe* v. *Lyman County*, No. 3:22-cv-3008 (D.S.D. May 18, 2022).

is a bad Native or a good Native." *NDN Collective, et al.* v. *Restel Corp.*, No. 5:22-cv-05027-RAL (D.S.D. Mar. 24, 2022). The same owner then placed a man with an assault rifle in the hotel lobby. *Id.* Given persistent racial tensions within South Dakota communities, it is not surprising that in a survey examining barriers faced by Native American voters only 5% of Native American respondents in South Dakota expressed trust in their local, non-tribal governments. See Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada and South Dakota, The Native American Voting Rights Coalition (Jan. 2018), https://vote.narf.org/wp-content/uploads/2018/10/2017 NAVRCsurvey-full.pdf.

For the entirety of South Dakota's history through the present day, election officials have thwarted Native Americans' political power through racial discrimination. The resulting lack of representation has led to gross neglect of places like the Pine Ridge Reservation, which has poor road infrastructure, inadequate housing, and poverty. Indeed, more than half of Pine Ridge Reservation's residents have incomes of less than $10,000 a year. Written Testimony of President Julian Bear Runner, Tribal Infrastructure: Roads, Bridges, and Buildings (July 11, 2019), www.congress.gov/116/meeting/house/109756/documents/HHRG-116-ll24-20190711-SD-004.pdf.

Securing rights through suffrage is difficult when, for example, less than ten years ago, in 2014, a sheriff was posted at the satellite polling location for the Pine Ridge Reservation. He stood with his hand on his gun, intimidating potential voters.

A law enforcement officer inside the entry of a polling place on the Pine Ridge satellite voting office during the 2014 election. Photo by Donna Semans, Four Directions. Obstacles, at 46.

Redress is also difficult because South Dakota remains hostile to the VRA. In 1975, the same year the 8th Circuit stopped South Dakota from overtly banning Native Americans from voting for their county officials, Congress reauthorized the VRA and expanded its geographic coverage formula. See *Little Thunder v. South Dakota*, 518 F.2d at 1253. The next year, the DOJ used its updated trigger formula under Section 4(b) to subject two of those offending counties to preclearance. In response, South Dakota Attorney General William Janklow said the VRA was "garbage" and instructed noncompliance, alleging the

VRA unconstitutionally infringes on states' rights. *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1036 (D.S.D. Sept. 15, 2004). Subsequently, the covered counties passed more than 600 election actions, but submitted fewer than 10 for preclearance until challenged in 2002. *Quick Bear Quiver v. Nelson*, 387 F. Supp. 2d 1027 (D.S.D. July 13, 2005); L. McDonald, et al., Voting Rights in South Dakota: 1982-2006, 175 Cal. Rev. L. Soc. Just. 195 (2007).

Lack of attention and resources allocated to Indian Country likely attributed to this unchecked defiance. *Id.* at 206. Nevertheless, the VRA has proved instrumental to securing voting rights in South Dakota in the face of ongoing racial discrimination. See *Poor Bear* v. *Jackson County*, 5:14-CV-5059-KES (D.S.D. June 17, 2016) (closer polling places); *Janis* v. *Nelson,* Civ. No. 09-cv-05019 (D.S.D. Dec. 30, 2009) (non-imprisoned Native Americans convicted of felonies can vote consistent with South Dakota law); *Fiddler* v. *Sieker*, Civ. No. 86-3050 (D.S.D. Oct. 24, 1986) (remedying rejection of voter registrations); *American Horse* v. *Kundert*, Civ. No. 84-5159 (D.S.D. Nov. 5, 1984) (closer polling places).

Despite these efforts to stamp out discrimination, Native Americans continue to encounter racism when they attempt to vote. In 2012, election administrators humiliated Native American voters by making them vote in a chicken coop with feathers on the floor and no bathroom facilities. *Obstacles*, at 87.

(a) Section 3's Pocket Trigger Preclearance Coverage Has Twice Been Invoked in South Dakota Following Racial Gerrymanders of Single-Member Districts

Even within this shameful context, South Dakota's most persistent form of discrimination has been through vote dilution. Indeed, a Native county commissioner protested the usage of the chicken coop in Buffalo County. *Id.* Her election followed a 2003 lawsuit that required the county to redraw its commissioner districts and hold a special election for two out of its three single-member districts.

At that time in Buffalo County the population was 85% Native American, but Native Americans were unable to gain control of the three-member county commission for decades because officials malapportioned the districts: 1,550 people in one district, 350 in a second, and 100 in the third, with nearly all Native Americans in the largest district. The board of county commissioners only agreed to redraw the districts after litigation. See Def.'s Answer, *Kirkie* v. *Buffalo County*, Civ. No. 03-5025, 10 (D.S.D. Apr. 28, 2003).

Eventually, the county acknowledged that its plan had been discriminatory and agreed to federal observers and preclearance under the VRA's Section 3(c) pocket trigger through 2013. Consent Decree, *Kirkie* v. *Buffalo County*, Civ. No. 03-5024 (D.S.D. Feb. 12, 2004); see also Hearing on Legislative Proposals to Strengthen the Voting Rights Act Before Subcomm. on the Const., Civ. Rts., and Civ.

Liberties of the H. Comm. on the Judiciary (Oct. 17, 2019) (Testimony of Bryan L. Sells), https://congress.gov/116/meeting/house/110084/witnesses/HHRG-116-JU10-Wstate-SellsB-20191017.pdf (hereinafter "Sells Testimony"). Yet, racial hostilities persist. The year after preclearance expired, in 2014, the Buffalo County Auditor refused to provide on-reservation early voting access for more than 1,200 Crow Creek tribal members but provided full voting services at Gann Valley - population 12. This was despite funding being secured to cover an additional site. *Obstacles*, at n.270.

In 1963, South Dakota's attorney general advised that Native Americans in Charles Mix County could not vote because their names did not appear on the county's tax rolls. S.D. Atty. Gen., Report of the Atty. Gen. 106 (1963-1964). And in 2000, Charles Mix County failed to redistrict its commissioner district lines that had been in place since 1968. Complaint, *Blackmoon* v. *Charles Mix County*, Civ. No. 05-4017 (D.S.D. Jan. 27, 2005).

The map the county refused to change resulted in a 19.02% deviation from population equality. Despite the Native American population constituting one third of the county, no Native American had ever been elected to the three-person commission. After mediation, the county entered into a consent decree authorizing Section 3 preclearance for any changes to voting standards, practices, procedures, prerequisites, or qualifications to be enacted by the county through 2024, and changes to voting to be enacted by South Dakota through 2014. *Blackmoon* v. *Charles Mix County.*, No. 05-4017, slip op. (D.S.D. Dec. 4, 2007) (consent decree); see also Sells Testimony at 14–16.

(b) Section 2 Has Recently Prevented the Invidious Use of Single-Member Districts

In the seminal 2004 case, *Bone Shirt v. Hazeltine*, the District Court issued a 144-page opinion, including a 40-page overview of the racial discrimination, with contemporary evidence of discrimination, faced by Native Americans in South Dakota. *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d, at 1053. Through examination of the *Gingles* factors, the court held that the state legislature had gerrymandered House Districts to dilute Native American voting power. There, the state legislature had gerrymandered so one District was packed with 86% of the voting-age population. *Id.* at 981. The Court explicitly rejected defendants' claim that the lines they had drawn were based on partisanship and not race. *Id.* at 1008. Defendants' own witness admitted the lines were based on race, not political party. *Id.* at 999. Consequently, by using maps that considered race, the Court redrew maps that complied with Section 2 after defendants declined to offer any suggested maps. *Bone Shirt v. Hazeltine*, 387 F. Supp. 2d 1035, 1043 (D.S.D. Aug. 18, 2005), *aff'd*, 461 F.3d 1011 (8th. Cir. 2006).

South Dakota remains hostile toward Native American voting rights. Section 2's protections against vote dilution continue to provide an important check. In the most recent redistricting session, a state senator had to push back on arguments that "somehow the VRA is merely a guideline" since "that simply isn't true." *S. Leg. Redistricting Comm. & H. Leg. Redistricting Comm.*, at 1:06:30 (S.D., Oct. 12, 2021) (response of Representative Spencer Gosch, House Committee Chair), https://sdpb.

sd.gov/sdpbpodcast/2021/interim/hlr10122021a.mp3. Weakening Section 2's protections would allow vote dilution to resume.

The abuse of gerrymandered single-member districts persists in other states as well. For example, this past redistricting cycle, tribes in New Mexico and North Dakota were forced to bring Section 2 claims when single-member district maps designed to dilute their voting strength were adopted.

(2) Section 2 Must Protect Against Vote Dilution in New Mexico

In recent years, New Mexico has tried to increase Native American voting rights. For example, New Mexico gives tribes authority to request early voting sites. N.M. Stat. Ann. § 1-6-5.8 (West 2021). Yet, these recent strides sit atop a long legacy of voter disenfranchisement. By 2007, nineteen cases had been brought to vindicate Native American voting rights in New Mexico. D. McCool et al., Native Vote: American Indians, The Voting Rights Act, And The Right To Vote, p. 46 (Cambridge Univ. Press 2007).

Even when changes at a statewide level are implemented, racism and hostility persist at a local level. In 1975, San Juan County sought to exclude Navajo and other reservation residents from a school district bond election by limiting eligible voters to real estate owners. *Prince* v. *Board of Educ. of Cent. Consolid. Indep. Sch. Dist. No. 22*, 88 N.M. 548, 550 (D.N.M. Dec. 22, 1975). And in 1980, the DOJ sued to eliminate the use of at-large districts when the demographics favored non-Hispanic

whites. *United States* v. *San Juan County*, No. 79-5007-JB (D.N.M. settled Apr. 8, 1980). Racial prejudice continues to this day. Nearly two-thirds of San Juan County is comprised of Navajo Nation tribal lands, and the town bordering the tribal lands, Farmington, has been a hotbed of racial tension.

Following the 1974 kidnap and murder of three Navajo men as part of a local practice known as "Indian rolling," the New Mexico Advisory Committee on Civil Rights conducted an investigation and issued a 174 page report detailing racial discrimination in the administration of justice, delivery of health services, employment, and economic environment in various respects. See N.M. Advisory Comm. To The U.S. Comm'n On Civ. Rts., The Farmington Report: A Conflict Of Cultures (July 1975), https://babel.hathitrust.org/cgi/pt?id=uiug.30112045537286&view=1up&seq=2. In 2005, the committee followed up and found conditions had improved, but that there were still concerns of ongoing racial discrimination. See N.M. Advisory Comm. To The U.S. Comm'n On Civ. Rts., The Farmington Report: Civil Rights For Native Americans 30 Years Later (Nov. 2005), https://www.usccr.gov/pubs/docs/122705_FarmingtonReport.pdf. The Navajo Nation Human Rights Commission issued its own investigation and documented continued discrimination and barriers to Navajo civic engagement in a series of field hearings in border communities including Farmington in 2008 and 2009. See Navajo Hum. Relations Comm'n, Assessing Race Relations Between Navajos And Non-Navajos 2008-2009: A Review Of Border Town Race Relations (July 2010), https://www.nnhrc.navajnsn.gov/docs/NewsRptResolution/071810_Assessing_Race_Relations_Between_Navajos_and_Non-Navajos.pdf. The

report outlined how witnesses testified that while there was some improvement "racism will . . . always be here." *Id.* Another witness described overheard racial slurs and remarks about an elder's dress, and another person testified how "[n]on-Indian personnel with no experience are making $13.00 an hour, whereas, Native American personnel with experience are earning $8.00 an hour." *Id.* Yet another described allegations of discrimination at the San Juan Regional Medical Center concerning patient safety and quality of patient care. *Id.* at 33–36. In 2011, two San Juan County men pled guilty to racially motivated hate crimes for branding a Navajo man with a swastika. See D. Carroll, Two plead guilty to branding of disabled Navajo man, Reuters U.S. News (August 18, 2011) https://www.reuters.com/article/us-hate-crime-newmexico/two-plead-guilty-to-branding-of-disabled-navajo-man-idUSTRE77H70420110818.

It is within this disturbing context that now, despite comprising less than 40 percent of County residents, non-Hispanic whites control four of five Board of Commissioner seats in San Juan County. Navajo residents are currently packed in one district when they are compact and politically cohesive enough to constitute the majority in at least one other district. After refusal last year by the Board of Commissions to adopt an equitable redistricting plan, the Navajo Nation, Navajo Nation Human Rights Commission, and individual plaintiffs brought suit under Section 2. *Navajo Nation, et al.* v. *San Juan County, New Mexico, et al.*, 1:22-cv-00095 (D.N.M. Feb. 10, 2022).

(3) Section 2 Must Protect Against Vote Dilution in North Dakota

As recently as 1920, North Dakota courts required Bureau of Indian Affairs Superintendents as well as other witnesses to testify that Native Americans attempting to exercise their right to vote "live[d] just the same as white people" and were "civilized". *Swift* v. *Leach*, 178 N.W. 437, 438-40 (D.N.D. May 26, 1920). There is an expansive history of Native American voter suppression in North Dakota. Compare *State ex rel. Tompton* v. *Denoyer*, 72 N.W. 1014 (1897) (Spirit Lake Tribe challenging denial of voting precinct on the Spirit Lake Reservation in 1897), with *Spirit Lake Tribe* v. *Benson County.,* N.D., No. 2:10-CV-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010) (2010 finding that the County's removal of the polling place likely violated Section 2).

When Native Americans were credited with the surprise election of Heidi Heitkamp in 2012 by fewer than 3,000 votes, the state legislature immediately began suppressing the Native American vote. Following Senator Heitkamp's election—just two years after the bipartisan rejection of voter ID reform where state legislators learned some Native Americans did not have residential addresses on their homes—the legislature eliminated all failsafe mechanisms for voters whose IDs did not have residential address. *Id.* In 2014, there were reports of widespread disenfranchisement of Native Americans. Eventually, following four years of litigation the case was settled, and included provisions for voters without a residential address to vote. *Brakebill* v. *Jaeger* ("Jaeger I"), No. 1:16-CV008, 2016 WL 7118548, at *1 (D.N.D. Aug. 1, 2016).

This past year the North Dakota Redistricting Committee (and afterwards the full Senate) approved a house districting proposal that the Turtle Mountain Chippewa Indians and the Spirit Lake Tribe later challenged. See *Turtle Mt. Band of Chippewa Indians* v. *Jaeger*, No. 3:22-CV-22, 2022 WL 2528256, at *3 (D.N.D. July 7, 2022). Chairmen of the Turtle Mountain and Spirit Lake Nation submitted a letter to the Governor of North Dakota pointing out that calls for redistricting hearings near reservations were ignored. This was especially troubling because many Native Americans lacked the means to travel to Bismarck to participate in the hearings. Instead, the tribes were given an email notice of the hearing in Bismarck with one day's notice. The letter also called attention to the 2016 election for the United States House of Representatives that demonstrated extreme racial polarization. A Native American candidate was preferred by 98% of Native American voters, but only received 21% of the vote from white voters. The letter proposed a redistricting plan that would allow the members of Spirit Lake and Turtle Mountain to vote as a cohesive unit given the racially polarized voting in North Dakota. Despite the outcry for equal participation, Native Americans were packed into a single state house sub-district and cracked into two other districts dominated by white voters who bloc vote against Native Americans' preferred candidates.

The use of Section 2 by Native Americans does not mean race predominates. Recently, individual non-Native plaintiffs sought to eliminate a sub-district of North Dakota primarily made up of Mandan, Hidatsa, and Arikara ("MHA") Nation members. *Walen et al.* v. *Burgum et al.*, No. 1:22-CV-31, 2022 WL 1688746, *3 (D.N.D. May 26, 2022). The plaintiffs argued that

the creation of the sub-district constituted racial gerrymandering in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* But the court, in denying plaintiffs' motion for a preliminary injunction, found that the proposed district was "facially compact and contiguous," and further found that the district was drawn consistent with traditional redistricting principles and that there was no evidence that race predominated over those principles. *Id.*

In addition, the evidence showed that tribal members were sufficiently numerous and compact to form a reasonably drawn majority single-member district, the group was politically cohesive, and there was no evidence of voting history to show that tribal member candidates of choice are routinely outvoted by the majority vote in the district. Decl. of M. Fox, Ex. 8 at 1, *Walen et al.* v. *Burgum et al.*, (Apr. 7, 2022) (No. 1:22-CV-31). In 2020 and 2016, respectively, two tribal members running for the State House in North Dakota easily won the precincts on the reservation lands but lost in the overall election. *Id.* at 2. If single-member districts were utilized, it is likely that both tribal candidates would have won. *Id.* Native American preferred candidates in District 4 of North Dakota lose every single race in the full district for a block rate of 100%. See Decl. of L. Collingwood, Ex. A, *Walen et al.* v. *Burgum et al.*, (Apr. 7, 2022) (No. 1:22-CV-31). Native Americans cohesively prefer the same candidates for political office, but consistently lose due to redistricting issues. See *id.* Having met the requirements of *Gingles*, Section 2 of the VRA requires the establishment of this majority-minority district. Despite winning this matter, the defense proved costly, and Petitioners' arguments—should they prevail here—would dim the prospects of winning such a case in the future.

These cases show that a Section 2 that considers race in vote dilution claims remains urgent and compelling.

(4) Section 2 Must Protect Against At-Large and Multimember Districts that Continue to Dilute Native American Votes

Petitioners are simply wrong in implying that at-large and multimember districts are discrimination tools of the past. Pet. Br. at 37. For example, just this past year, Lyman County, South Dakota agreed that its at-large system for County Commissioners was in violation of the VRA. Litigation ensued, however, because Lyman County refuses to implement its single-member districts for another two years. *Lower Brule Sioux Tribe* v. *Lyman County*, Case No. 3:22-cv-3008 (D.S.D. May 18, 2022). In 2000, Benson County, North Dakota, entered into a consent decree with the Department of Justice over its at-large method of election, *United States* v. *Benson County*, Civ. A. No. A2-00-30 (D.N.D. Mar. 10, 2000), but has returned to an out-of-compliance at-large system for at least the past 10 years. Voting Links, N.D. Sec'y of State (July 14, 2022), https://vip.sos.nd.gov/Portal ListDetails.aspx?ptlhPKID=133&ptlPKID=4#content-start.

And indeed, as recently as two years ago, the DOJ brought an enforcement action under Section 2. The suit sought to remedy an at-large school district that prevented Native Americans from electing candidates of choice on a seven member board. DOJ Office of Public Affairs, Justice Department Reaches Agreement with Chamberlain School District, South Dakota, under the Voting Rights Act (May 28, 2020), https://www.justice.

gov/opa/pr/justice-department-reaches-agreement-chamberlain-school-district-south-dakota-under-voting. The DOJ explained the action was brought "based on the well-established case law that follows the Supreme Court's decision in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986)." *Id.*; see also D. McCool et al., Native Vote: American Indians, the Voting Rights Act, and the Right to Vote, p. 45 (Cambridge Uni. Press 2007) (In 2007, the most common Section 2 challenges brought by Native Americans were of at-large elections).

The use of these tactics in Indian Country counsels great caution before upending well-settled law, and should remind the Court that discrimination against Native Americans continues to this day.

II. Elevating Certain "Traditional" Redistricting Principles over Others and over any Consideration of Race Uniquely Burdens Native American Communities

Petitioners urge that certain redistricting principles, specifically those honoring political boundaries and protecting prior district shapes ("core retention"), be given priority over other redistricting principles (including respecting communities of interest), to the complete exclusion of any consideration of race. This scheme would be devastating to Native Americans. And, while the preservation of communities of interest has long been recognized as a critical redistricting principle, and one that considers race (at least to some extent), see *Miller* v. *Johnson*, 515 U.S. 900, 920 (1995), Petitioners would suppress this important principle to preference "core retention" of existing districts.

But "core retention" is not among the longstanding traditional redistricting criteria. See *Shaw* v. *Reno*, 509 U.S. 630, 646–47 (1993). It can perpetuate continued discrimination. See, *e.g.*, *North Carolina* v. *Covington*, 585 U. S. ___, at *2-6 (2018) (per curiam) (policy of core preservation perpetuated a racial gerrymander). Perhaps for that reason, Alabama's Guidelines make incumbent protection and core retention "decidedly lower level criterion" and "expressly leave room for other principles to be assigned greater weight." *Singleton, et al.*, v. *Merrill*, No. 2:21-CV-1291-AMM, 172–74 (N.D. Ala. Jan. 24, 2022).

Similarly, respecting political boundaries such as county lines is particularly problematic in Indian Country. In states like South Dakota, North Dakota, Arizona, and New Mexico, Native American populations are often spread out across multiple counties. Respecting those political boundaries can devastate Native Americans' ability to vote as a cohesive unit.

For example, reservation lands of nine tribal Nations are split amongst thirteen different counties in South Dakota - effectively diluting Native American voting power in county elections. In one instance, a majority of the members of the Oglala Sioux Tribe live on the Pine Ridge Indian Reservation. The reservation consists of lands in four separate counties—Oglala Lakota, Bennett, Jackson, and Sheridan. Similarly, the Cheyenne River Tribe is split amongst five different counties—Dewey, Haakon, Meade, Stanley, and Ziebach. The Rosebud Tribe, located in the Rosebud Sioux Indian Reservation, spans five different counties—Gregory, Lyman, Mellette, Todd, and Tripp.

Other states with large Native populations face similar issues of dispersal of tribal members across multiple counties. In North Dakota, the Fort Berthold Indian Reservation is split amongst McLean, Mountrail, Dunn, McKenzie, Mercer, and Ward counties. Spirit Lake Nation, like the MHA Nation, is split amongst five different counties—Benson, Eddy, Ramsey, Wells, and Nelson. In Arizona, the Tohono O'odham Nation is split amongst Maricopa, Pima, and Pinal counties. In New Mexico, the Laguna Pueblo Reservation is split between Cibola, Sandoval, Valencia, and Bernalillo counties. Similarly, the Santa Clara Pueblo is split across Rio Arriba, Sandoval, and Santa Fe counties.

These unique features of Native American land clash with modern political divisions—making it difficult for Native Americans to have adequate representation, and much needed political power, in state and local political bodies.

In Indian Country, there are places where some "traditional" redistricting principles, particularly those relating to political boundaries, *entrench* the political power of the majority. And those principles must be balanced, as required by *Gingles*, with other traditional redistricting principles as part of the totality of the circumstances, even if those factors demand an appreciation of racial issues. The unique history of Native Americans illustrates that district drawing based on political boundaries is not "race neutral".

In Fremont County, Wyoming, for example, the Arapaho and Shoshone tribes were historically distinct and even adverse tribes with different territories. See

Large v. *Fremont County*, *Wyo.*, 709 F. Supp. 2d 1176, 1197 (D. Wyo. 2010). When members of the two tribes sued the county, alleging that the at-large method of voting violated the VRA, the tribes sought recognition as a politically cohesive group. *Id.* Testimony showed that the tribes share a significant history of discrimination, are bonded by intermarriage and blended culture, experience the same economic and educational disparities, and vote as a bloc in county elections regardless of their tribal affiliations. *Id.* at 1201. The court rejected the defendants' argument that the tribes remain distinct because the Arapaho outnumber the Shoshone, and found the tribes were politically cohesive. *Id.* The tribes' unique shared experiences as Native American minorities united their interests for the purpose of political representation. This is the type of subtle point that Section 2 analysis can bring out and consider. It involves numerous factors—only one of which is race—but it would likely be impossible if race could not be considered in the *Gingles* analysis.

Ensuring that the Native American vote is protected requires an understanding of the unique physical and cultural composition of tribal communities across the United States. Native American communities of interest must be kept together to have meaningful representation. Petitioners' analysis favors discriminatory redistricting principles under the guise of race-neutrality, thus fundamentally harming the Native American vote.

CONCLUSION

Native Americans continue to face racial discrimination that prevents the full exercise of their political power. Section 2 must endure to protect Native Americans from vote dilution that prevents them from electing candidates of choice. The decision of the district court should be affirmed.

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