No. 24-1095

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RODNEY D. PIERCE and MOSES MATTHEWS,

Plaintiffs-Appellants,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS, ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections, JEFF CARMON III, in his official capacity as Secretary of the North Carolina State Board of Elections, STACY "FOUR" EGGERS IV, in his official capacity as a member of the North Carolina State Board of Elections, KEVIN N. LEWIS, in his official capacity as a member of the North Carolina State Board of Elections, SIOBHAN O'DUFFY MILLEN, in her official capacity as a member of the North Carolina State Board of Elections, PHILIP E. BERGER, in his official capacity as President Pro Tem of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Defendants-Appellees.

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On Appeal from the United States District Court for
the Eastern District of North Carolina
The Honorable James C. Dever III (No. 4:23-cv-193-D-RN)

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PRELIMINARY STATEMENT

Plaintiffs apparently believe they can prevail if they just use the words "obvious" and "obviously" enough times. *See* Br. 10, 26, 27, 31, 34, 42, 49, 51, 52. If any principle should be obvious, however, it is that this Court's "function is not to decide factual issues de novo," *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 123 (1969), and, even if it were inclined, it "cannot reverse just because it would have decided the matter differently," *Cooper v. Harris*, 581 U.S. 285, 293 (2017) (quotation and alteration marks omitted). Most every basis the district court found to deny preliminary relief rests on findings of fact. Plaintiffs ask too much in demanding not only the clean sweep necessary for vacatur, but *reversal* and an order commanding provisional relief from the appellate bench. Only fact-finding on appeal could accomplish that feat.

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Plaintiffs cite no § 2 case where that has occurred, and this is no time to begin. The Supreme Court recently reaffirmed that a "single-minded view of § 2 cannot be squared with the VRA's demand that courts employ a more refined approach." *Allen v. Milligan*, 599 U.S. 1, 26 (2023). The statute calls for "a searching practical evaluation" of the locality and challenged system. *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (citation omitted). That takes time. There is no "clear-cut" § 2 effects case. Br. 1. The district court delivered the most thorough analysis possible on the exceptionally expedited time frame Plaintiffs demanded. The Court should not accept Plaintiffs' request to retry their case on appeal. Where one sound basis for the ruling would compel affirmance, there are many here.

ARGUMENT

I. Plaintiffs Are Unlikely to Succeed

A. The Third Precondition

The district court correctly found multiple flaws in Plaintiffs' case under the third precondition. LD Br. 21-31. On appeal, Plaintiffs disregard the "deferential standard [for district-court findings] in vote dilution cases." *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1301 (11th Cir. 2020); *see Gingles*, 478 U.S. at 79. This Court's "function is not to reweigh the evidence presented to the district court," but to determine whether its findings "rested on substantial, credible evidence." *United States v. Charleston Cty., S.C.*, 365 F.3d 341, 349 (4th Cir. 2004). Under the correct standard, Plaintiffs' arguments fail.

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1. Appendix B

As Legislative Defendants demonstrated, the district court was well within its prerogative to discredit what Plaintiffs call Dr. Barreto's "Performance Analysis," presented at Appendix B of his report. Br. 31 (boldface omitted); JA291-293; *see* LD Br. 22-26. Plaintiffs' effort to rehabilitate Appendix B only proves its flaws—which may be why they now call it "unnecessary," Br. 31.

Plaintiffs admit Dr. Barreto originally reported that 2022 senate election results, supposedly reconstituted in SD2, showed Black-preferred candidates "winning 54.1% of the vote," Br. 33, and—after questioning—proposed a new analysis showing that "the Black-preferred candidate would lose by roughly 50 points," Br. 34. From that, it is indeed "clear what the district court meant when

it cited 'profound discrepancies' between Dr. Barreto's report and supplemental declaration." Br. 35 (quoting JA934). A swing of more than 50 points from an expert report to a supplement is as profound a discrepancy as there is. And it was just too pat that it happened to favor Plaintiffs.

Plaintiffs do not answer the many questions this raises. Dr. Barreto's original report "suggest[ed] that Black-preferred candidates could win in current District 2," but he was abruptly able to manufacture a finding that "did not suggest" this. Br. 33; *see* JA934. Plaintiffs' recitation of Dr. Barreto's purported rationale does not explain why he withheld that rationale until it was convenient. And it ignores that no one could evaluate Dr. Barreto's uncanny ability to make data do just as he liked, when he liked, because he refused to disclose his data—as the district court found, JA934. This begged the question (still unanswered) what other massive swings might follow from further examination. JA947 & n.12.

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Plaintiffs' rush to propose "this figure must have been a typo" betrays their assertion now that it did not matter, Br. 34-35, and intimates a powerful incentive to mislead. Meanwhile, Plaintiffs' suggestion "there is no 'fuller' dataset" for Dr. Barreto to analyze, Br. 35, ignores Dr. Alford's position that Dr. Barreto should have looked beyond "the two most recent general election cycles" and also examined "Democratic primary elections." JA677; *see also* JA685. The district court properly credited that criticism. JA934. That is more than the substantial evidence sufficient for affirmance. Plaintiffs cite no case

where a credibility finding like this was deemed clearly erroneous. *See* LD Br. 25-26 (cases affirming such findings).

Plaintiffs suggest Dr. Barreto's credibility flaws should have been cabined to the data they dislike. Br. 35. But the district court had no duty to credit the opinions of a witness it did not trust. Moreover, the same deficiencies applied to other data Dr. Barreto considered. Even if "statewide elections" are immune from the belatedly identified flaw, Br. 35, Appendix B displays results from the 2020 state house and senate contests and the 2022 house contests, which are not statewide data. JA291-293. But Dr. Barreto did not reexamine those elections—which purportedly support Plaintiffs' case—to see if they might be undermined according to the logic he selectively applied to the 2022 senate election data. Meanwhile, as "exogenous elections," the statewide contests "should be used only to supplement the analysis of the specific election at issue." *Clay v. Bd. of Educ. of City of St. Louis*, 90 F.3d 1357, 1362 (8th Cir. 1996). The district court was not bound by Dr. Barreto's self-serving opinion that "it is far more probative to analyze" exogenous elections than endogenous elections. Br. 35 (quoting JA854); *see, e.g.*, *Wright*, 979 F.3d at 1301 (recognizing that a trial court "may consider endogenous elections more important than exogenous elections").

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Plaintiffs also try trickery, contending that "Legislative Defendants' expert replicated Dr. Barreto's analysis…." Br. 32. Not true. Dr. Alford conducted a "replication" only of Dr. Barreto's polarized voting analysis, reported at Appendix A of his report. *See* JA678-685; § I.A.2, *infra*. Dr. Alford did not replicate the performance analysis of Appendix B (in part because Dr. Barreto's

refusal to produce his data "limited the scope of [Dr. Alford's] analysis," JA674).

Plaintiffs then say a "StatPack" on the General Assembly's website validates Appendix B. Br. 32. But they did not cite that to the district court, D.Ct.Doc.17 at 12-14; D.Ct.Doc.42 at 5-7, and cannot claim clear error from materials not identified below, *see Tamari v. Bache & Co. (Leb.) S.A.L.*, 838 F.2d 904, 907 (7th Cir. 1988). Moreover, the StatPack "simply contains no statistical evidence" of racial voting preferences. *Growe v. Emison*, 507 U.S. 25, 41 (1993). Plaintiffs draw assumptions from *partisan* information, but the district court would not have had to credit them. *See Wright*, 979 F.3d at 1308 (affirming the minimal weight district court gave to partisan election outcomes where "[n]o statistical analysis was presented" concerning racial preferences). The same is true of the 2022 SD3 election Plaintiffs cite. *See* Br. 31 & n.8. If Plaintiffs wanted that data analyzed, it should have been in an expert report.

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2. Appendix A

Perhaps recognizing that Appendix B is unsalvageable, Plaintiffs rely principally on Dr. Barreto's "racially polarized voting analysis" in Appendix A of his report and call it "sufficient as a matter of law." Br. 28-29. But the Supreme Court held an analysis like this does not address the third precondition "at all." *Cooper*, 581 at 304 n.5; *see* LD Br. 23 n.2.

The analysis Plaintiffs reference is Dr. Barreto's "statistically significant finding of racially polarized voting in North Carolina," JA280, as he reported at Appendix A, *see* JA285-90; Br. 28-31; LD Br. 23 n.2. The Supreme Court

rejected an identical analysis in *Cooper*, which showed that North Carolina "elections exhibited 'statistically significant' racially polarized voting." *Cooper*, 581 U.S. at 304 n.5. Unimpressed, the Supreme Court found it irrelevant that "(to no one's great surprise)…in North Carolina, as in most States, there are discernible, non-random relationships between race and voting." *Id.* This analysis "fails to meaningfully (or indeed, at all) address the relevant local question" under the third precondition. *Id.* The *Covington* decision summarily affirmed in the Supreme Court explained this point at length. *See Covington v. North Carolina*, 316 F.R.D. 117, 170 (M.D.N.C. 2016), *aff'd*, 581 U.S. 1015 (2017); LD Br. 27-31. Those decisions, together with *Bartlett v. Strickland*, 556 U.S. 1 (2009), announced the standards governing the third precondition.

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Plaintiffs ignore these cases in addressing Appendix A—and do not cite *Bartlett* at all—even though the district court dissected them. *See* JA934-40. Instead, Plaintiffs rely on decisions that do not address the third precondition. *See* Br. 28-30. *Milligan* had no occasion to address legally significant polarization because Alabama did not "dispute" its presence, 599 U.S. at 22 (citation omitted), as Plaintiffs acknowledge, Br. 29. The same is true of *Charleston County. See* 365 F.3d at 348-49 (finding that "the County does not even attempt to argue that its racially polarized voting is legally insignificant"). "Cases are 'not precedential for propositions not considered.'" *Alonso-Juarez v. Garland*, 80 F.4th 1039, 1054 (9th Cir. 2023) (citation omitted); *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990); *United States v. Campbell*, 22 F.4th 438, 448 (4th Cir. 2022); *New Georgia Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020).

Moreover, in rejecting a "single-minded view of § 2" in favor of "a more refined approach," 599 U.S. at 24, *Milligan* undercuts the suggestion that a certain percentage of white bloc voting could be "sufficient as a matter of law," Br. 29. Plaintiffs' position about what the law commands suffers from a lack of—law.

Plaintiffs also err in asking this Court to assume the role of fact-finder. They propose, for example, that it calculate the prospects of success for Black candidates of choice in SD1 and SD2. Br. 30. This is unserious. The question of legal significance "will vary" by case "according to a number of factors," that are "illustrative, not comprehensive." *Gingles*, 478 U.S. at 56 & n.24. This Court does not "make such findings in the first instance," *Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 56 F.3d 556, 575 (4th Cir. 1995), and "[i]t is literally black letter law" that "counsel's arguments are *not* evidence in a case." *Long v. Hooks*, 972 F.3d 442, 463 (4th Cir.), *as amended* (Aug. 26, 2020). Plaintiffs did not present their math below.

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Besides, Appendix A shows "a significant degree of crossover voting." *Abrams v. Johnson*, 521 U.S. 74, 92 (1997) (citation omitted). It shows white support for Black candidates of choice above 20% and sometimes reaching 30% in North Carolina and areas Dr. Barreto studied. *See* JA285-89. In *Abrams*, the Supreme Court found white crossover voting rates "rang[ing] from 22% to 38%" to be high and that, along with evidence of Black-preferred-candidate victories "in local and statewide elections," it justified a district court's finding that the third precondition was unmet. 521 U.S. at 92-93. The district court's findings are to the same effect and equally justified.

3. Legal Significance

The district court's decision stands independently on its finding that Plaintiffs' evidence, even if credited, lacks legal significance. LD Br. 27-31. Plaintiffs' contrary view contradicts every recent Supreme Court holding on point.

Plaintiffs propose it is enough if they "prove[] that white bloc voting will usually defeat the minority-preferred candidate."[1] Br. 38. But, in a vacuum, that means nothing—defeat the minority-preferred candidate *where* and in *what* circumstances? Case law fills in the missing link, requiring proof that "a majority bloc voting exist[s] at such a level that the candidate of choice of African-American voters would usually be defeated *without a VRA remedy*." *Covington*, 316 F.R.D. at 168 (emphasis added). Accordingly, where a legislature or § 2 challenger cannot prove majority-minority districts are necessary, the third precondition is unmet. *Cooper*, 581 U.S. at 302; *Covington*, 316 F.R.D. at 167-69.

In dismissing this rule, Plaintiffs ignore most relevant case law. Br. 39-40. They do not cite *Bartlett*, much less account for its statement that evidence a crossover district will perform defeats the third *Gingles* precondition. 556 U.S. at 16 ("It is difficult to see how the majority-bloc-voting requirement could be met in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate."). They mischaracterize *Cooper* and *Covington* as holding that the third precondition is

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[1] Appendix A of Dr. Barreto's report does not satisfy even that standard.

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met if polarized voting actually cancels an ability to elect "in the challenged districts." Br. 40. That is not a quote from *Cooper* or *Covington*, and it could not have been because the "challenged districts" in those cases were majority-minority districts challenged as racial gerrymanders *unjustified* by § 2. The whole point of those cases was that a "*future*" district "drawn without regard to race" was a complete unknown. *Cooper*, 581 U.S. at 304. That did not matter, however, because "§ 2 liability could [not] be established," given that "a meaningful number of white voters" voted for the Black-preferred candidates. *Id.* at 303. The third precondition is not met "[w]hen voters act that way." *Id.*

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Plaintiffs misread *Cooper* further by representing that it held a crossover district "can be a lawful and effective VRA remedy." Br. 39. That again is not in *Cooper*. Rather, the Court found "no evidence that a § 2 plaintiff could demonstrate the third *Gingles* prerequisite" and thus no evidence that "§ 2 liability could be established." *Cooper*, 581 U.S. at 302-03. That does not describe a VRA remedy, but a scenario where nothing needs remedying. Where "a VRA remedy" is unnecessary, no § 2 violation arises. *Covington*, 316 F.R.D. at 168. Any other holding would contravene *Bartlett*'s holding "that § 2 does not require crossover districts." 556 U.S. at 23; LD Br. 31.

B. The First Precondition

The first precondition also is not satisfied. LD Br. 31-38. Plaintiffs try to sow confusion, asserting that the district court "assumed that the first *Gingles* precondition was satisfied." Br. 1. It assumed that based on Demonstration District A, even though contrary arguments had "force." JA925.

But the district court expressly held that Demonstration District B-1 is a crossover district, not a majority-minority district. JA929. That finding is crucial because Plaintiffs' *Purcell* argument rests on Demonstration District B-1. *See* § II.A, *infra*. Plaintiffs propose that Demonstration District B-1 "form[s] a permissible *remedial* map regardless of whether [it] is majority-Black" because it "would be an effective crossover district." Br. 19. That is wrong. *Bartlett* held that a crossover district cannot contravene North Carolina's Whole County Provisions (WCP), given that § 2 does not require crossover districts. 556 U.S. at 7, 25-26. Because the district court did not clearly err in finding Demonstration District B-1 is a crossover district, and because it contravenes the WCP, as Plaintiffs admit, Br. 19, it is illegal and cannot be used. LD Br. 34.

1. Demonstration District B-1

The district court's finding that Demonstration District B-1 is not a majority-minority district, JA930, turns on a sound evaluation of margins of error, LD Br. 32-34. It is Plaintiffs who attempt to "turn[] the law on its head" in contending that the district court *had* to credit their data from the American Community Survey (ACS). Br. 20. No position could be more contrary to the clear-error standard. *Gingles*, 478 U.S. at 78 ("This determination is peculiarly dependent upon the facts of each case…." (citation omitted)).

Plaintiffs claim they "are aware of no case holding that" a district court "has 'discretion' to reject" a showing of majority-minority status under the ACS. Br. 21. In fact, their brief (Br. 36 n.11) cites a case that did just that: it rejected the ACS (and looked only to the decennial census) as the basis for ascertaining

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majority-minority status, because "the margins of error in the 2011-2013 ACS for the District's VAP are too wide to establish" it. *Missouri State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1033 (E.D. Mo. 2016). The Eighth Circuit affirmed on this ground. *Missouri State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 932-33 (8th Cir. 2018). Other courts have issued similar holdings. *See, e.g.*, *McConchie v. Scholz*, 567 F. Supp. 3d 861, 887 (N.D. Ill. 2021) (three-judge court) ("the Census Bureau itself states that ACS data should not be used for redistricting"); *Benavidez v. Irving Indep. Sch. Dist., Tex.*, 690 F. Supp. 2d 451, 460 (N.D. Tex. 2010) ("Here, the use of the ACS data does not similarly meet the high standards and thorough coverage of the decennial census."); *Rios-Andino v. Orange Cnty.*, 51 F. Supp. 3d 1215, 1225 (M.D. Fla. 2014) (concluding, based on ACS error, "that Plaintiffs have not met their burden of proof with respect to the numerosity element of the first *Gingles* precondition"); *cf. Perez v. Perry*, No. 11-cv-360, 2017 WL 962686, at *3 (W.D. Tex. Mar. 10, 2017) ("Even with aggregated data, block group estimates may contain large margins of error."). This authority refutes Plaintiffs' assertion that ACS "margins of error" are not "relevant." Br. 25 n.6.

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Plaintiffs cite no authority for the puzzling position that the district court had to ignore margins of error. Courts routinely consider "a statistical margin of error" in weighing evidence in VRA cases. *See Johnson v. Hamrick*, 196 F.3d 1216, 1223 (11th Cir. 1999) (finding error in unexplained decision to *ignore* margins of error previously recognized); *Kumar v. Frisco Indep. Sch. Dist.*, 476 F. Supp. 3d 439, 493 (E.D. Tex. 2020) (weighing margin of error in ultimately finding first

precondition met). The law Plaintiffs cite addresses the different issue of whether the first precondition in areas with large number of non-citizens requires an evaluation of "citizenship," as the Supreme Court has signaled is necessary. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 429 (2006); Br. 20-21. That legal standard has nothing to do with whether any given *showing* of citizenship is *credible*. *Compare Benavidez*, 690 F. Supp. 2d at 460 (no), *with Kumar*, 476 F. Supp. 3d at 493 (yes). The district court did not find CVAP under the ACS legally irrelevant; it weighed the information in its "discretion." JA928-929. Even if the evidence could have been weighed differently, "the very premise of clear error review is that there are often 'two permissible'—because two 'plausible'—'views of the evidence.'" *Cooper*, 581 U.S. at 299; *see also Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021).

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Plaintiffs are wrong to contend "Demonstration District B-1's Black CVAP was *uncontested*." Br. 24. Legislative Defendants prominently argued that CVAP "is less reliable than VAP," that it comes from "a rolling statistical estimate with accompanying margins of error," and that it "is less reliable than Census data and not intended to be used in redistricting." JA465 (quotation marks omitted). Those assertions challenged the accuracy of the reported CVAP figure and placed Plaintiffs on notice that margins of error were in play.

There is also no merit in Plaintiffs' challenge to the district court's investigation of error margins. *See* Br. 24-25. Whereas Legislative Defendants had argued that known error margins render CVAP "the wrong metric here," JA465, the district court did not take their word for it and examined those

margins for itself. Plaintiffs now accuse it of being too judicious. Their view that the district court should not have looked at the Census Bureau website, *see* Br. 24-25, ignores that Census information is the paradigm of judicially noticeable material. *See United States v. Gregory*, 871 F.2d 1239, 1245 (4th Cir. 1989) ("we take judicial notice of the fact that no less than 50% of the relevant labor pool is comprised of women"); *United States v. Bailey*, 97 F.3d 982, 985 (7th Cir. 1996) ("We take judicial notice that on the average, a sixty-five-year-old white male United States citizen in 1992 could expect to live 15.4 more years."); *Hollinger v. Home State Mut. Ins. Co.,* 654 F.3d 564, 571-72 (5th Cir. 2011) ("United States census data is an appropriate and frequent subject of judicial notice"). Their position equally condemns the three-judge court in *McConchie*, which disregarded "expert testimony that the ACS data was the best alternative data source" after examining information on the Census Bureau's website. *See* 567 F. Supp. 3d at 887-88 & n.17; *see also Benavidez*, 690 F. Supp. 2d at 464.

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Besides, Plaintiffs forget that they moved for a preliminary injunction and that the "procedures…are less formal and evidence…is less complete than in a trial on the merits." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *see G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 725 (4th Cir. 2016), *vacated on other grounds*, 580 U.S. 1168 (2017). The district court's role was to determine whether Plaintiffs are likely to succeed at a *future* trial, it was not bound by formal evidentiary rules, and the court did not err in declining to take the parties' assertions at face value. The court did not err in weighing the best information available on the tight time frame Plaintiffs demanded.

2. Demonstration District A

The district court did not find that Demonstration District A satisfies the first precondition, and this Court is not postured to "make such findings in the first instance." *Columbus-Am.*, 56 F.3d at 576. If the issue matters to the outcome, the Court should remand.

Plaintiffs' arguments lack merit in any event. They insist they did not need to account for the "cascade of changes" that Demonstration District A would impose on a "statewide Senate districting plan." JA923. But they cite no case where a successful § 2 plaintiff has shown the first precondition on an isolated illustrative district. Br. 17-18. They simply quote *Milligan*, Br. 17, a case where the § 2 challengers presented a complete congressional plan, *see* 599 U.S. at 20 ("A map offered by another of plaintiffs' experts…produced districts roughly as compact as the existing plan."). *Milligan* explained that "§ 2 never requires adoption of districts that violate traditional redistricting principles." *Id.* at 30 (quotation and alteration marks omitted). The statute cannot be read to require bizarre districts neighboring the proposed majority-minority districts. Only a full plan can establish the first precondition.

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C. The Totality of Circumstances

The district court's order stands independently on its ultimate vote-dilution determination under the totality of circumstances. If it sounds improbable that the district court "obviously" "erred in its analysis of every relevant Senate factor," Br. 43, that's because it is. The clear-error standard "extends not only to the district court's ultimate conclusion of vote dilution, but

also to its finding that different pieces of evidence carry different probative values in the overall section 2 investigation." *Wright*, 979 F.3d at 1301 (quotation marks omitted). Plaintiffs fail to demonstrate clear error as to any factor, let alone all.

1. Plaintiffs (and their *amici*) incorrectly contend that the ultimate finding of vote dilution follows a showing of the *Gingles* preconditions in all but "very unusual" cases. Br. 42-43 (quoting *Harris v. McCrory*, 159 F. Supp. 3d 600, 623 (M.D.N.C. 2016), a Fourteenth Amendment case); Amici Br. 19. The Supreme Court has said no such thing. It recently reaffirmed that the totality showing is Plaintiffs' "to prove," not Legislative Defendants' to disprove. *Abbott v. Perez*, 138 S. Ct. 2305, 2331 (2018). And it more recently emphasized that § 2 claims "rarely" succeed because the statute's "exacting requirements...limit judicial intervention to those instances of intensive racial politics where the excessive role of race in the electoral process denies minority voters equal opportunity to participate." *Milligan*, 599 U.S. at 29-30 (quotation and alteration marks omitted). This inquiry is not a mere formality.

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2. In their haste below, Plaintiffs did little to prove vote dilution under the totality of circumstances, and the district court's findings are "more than…permissible." *Brnovich*, 141 S. Ct. at 2349.

As to the first Senate factor, the district court correctly applied the principle that "the most relevant 'historical' evidence is relatively recent history, not long-past history." *Veasey v. Abbott*, 830 F.3d 216, 232 (5th Cir. 2016). Plaintiffs cite no case reversing a district court for weighing the evidence in that way. They point (at 44) to a finding in *North Carolina State Conf. of NAACP v.*

McCrory, 831 F.3d 204 (4th Cir. 2016), that from 1980 to 2013, the "Department of Justice issued over fifty objection letters" under VRA § 5, *id.* at 224, but only "some" letters found discriminatory intent, *id.*, and only six post-dated 2000 and just one post-dated 2010. U.S. Department of Justice, *Voting Determination Denials for North Carolina*, 2015, at https://www.justice.gov/crt/voting-determination-letters-north-carolina (visited Feb. 8, 2024). Similarly, of the "fifty-five successful cases under § 2" *McCrory* referenced from the "same time period," nearly all were from before 2000. *See* 831 F.3d at 224; Anita S. Earls, *Voting Rights in North Carolina: 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 577 (2008). *McCrory*, the only example Plaintiffs cited from the past decade, explained that its holding "does not mean, and we do not suggest, that any member of the General Assembly harbored racial hatred or animosity." 831 F.3d at 233. Likewise, the court in *Covington* made "no finding that the General Assembly acted in bad faith or with discriminatory intent in drawing the challenged districts." 316 F.R.D. at 124 n.1; *see* Br. 45-46 (erroneously relying on *Covington*).[2]

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On the second factor, Plaintiffs erroneously double count the question of legally significant racially polarized voting and conflate it with the question of the *extent* of polarization. *Gingles*, 478 U.S. at 37. A court only reaches the Senate factors if the third precondition is shown, so that approach makes little sense.

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[2] This also refutes Plaintiffs' argument on the eighth factor, which erroneously relies on racial-gerrymandering decisions that found legal mistake, not bad faith. *See* Br. 47-48.

Here, even assuming the third precondition could be shown, high levels of crossover voting enable Black candidates of choice to prevail without majority-minority districts. *See* JA942. Plaintiffs do not dispute that point of fact. Quite the opposite, they insist that Demonstration District B-1 "will perform as a crossover district." Br. 63.

Plaintiffs also misconstrue the third factor, which evaluates whether—in addition to the challenged scheme (here, district lines)—other factors "enhance the opportunity for discrimination." *Gingles*, 478 U.S. at 37 (citation omitted). That is necessarily a present-tense inquiry because only existing election features can combine with the challenged feature to enhance dilution. Yet Plaintiffs point to redistricting plans from "last decade," which cannot contribute to vote dilution today. Br. 45.

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Plaintiffs attack the district court's finding on the fifth factor, declaring that "of course" race discrimination caused "the socioeconomic disparities that Dr. Burch discusses." Br. 46. But Plaintiffs did not show that causal link. Hyperbole is not evidence, the Burch report does not prove causation, JA412, and the district court did not have to credit it.

Plaintiffs' argument on the sixth factor simply challenges the "different probative values" the district court arrived at "in the overall section 2 investigation." *Wright*, 979 F.3d at 1301. The district court in 2024 did not have to weigh evidence concerning racial appeals the same way the district court affirmed in *Gingles* weighed different evidence—which Plaintiffs erroneously propose were findings made on appeal. *Compare* Br. 47 ("the Supreme Court

pointed to….") *with Gingles*, 478 U.S. at 40 ("the court found that…."). Plaintiffs again miss "the very premise of clear error review" that different trial courts may permissibly reach different conclusions in different cases at different times. *Cooper*, 581 U.S. at 299.

On the seventh factor, Plaintiffs argue that the success of Black candidates must be measured only in the area of the districts they challenge. Br. 47-48. But that is not what they argued below. They claimed that "black North Carolinians are slightly underrepresented in some offices relative to their share of the population." D.Ct.Doc.17 at 20; *see also* JA429. They got the law right the first time. *See Gingles*, 478 U.S. at 37 (looking to "the extent to which members of the minority group have been elected to public office in the jurisdiction").

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Plaintiffs' discussion of the ninth factor ignores the harms flowing if the General Assembly departed from the WCP to hit a racial quota. *See* LD Br. 43.

3. Plaintiffs attack the district court's finding that politics (not race) explains voting patterns, but neither of their two arguments has merit.

Plaintiffs first attack Dr. Alford's methodology, arguing he did not disentangle the effects of racial and partisan polarization because he did not use a "regression analysis." Br. 50. But Dr. Alford's study *did* find that partisan affiliation, rather than race, better predicted voter choice in all the elections he studied, JA681-684, and Plaintiffs point to no record evidence showing that a "regression analysis" is required.

Plaintiffs next attack Dr. Alford for comparing Black and white candidates, arguing that his study ignored "the correlation between the 'race of

the voter' and votes for particular candidates." Br. 50 (citation omitted). But Dr. Alford's model was designed to account for both race and partisanship (i.e., it did examine voter behavior by race). And it provided the evidence of partisan polarization lacking in *Charleston County*, which rejected an argument that partisanship drove polarized voting based on evidence that "minority voters give more cohesive support to minority Democratic candidates than to white Democratic candidates," and vice-versa for white voters. 365 F.3d at 352. The district court did not err in crediting Dr. Alford's analysis.

II. All Equitable Considerations Foreclose an Injunction

The district court did not abuse its discretion in finding every relevant equitable factor bars an injunction.

A. The *Purcell* Doctrine Prohibits an Injunction

The Court can and should make quick work of this appeal under the *Purcell* doctrine. Plaintiffs' position that "[t]here is no ongoing election" in SD1 and SD2, Br. 58, ignores that candidates from both parties are campaigning for those seats for the general election. LD Br. 48 & n.4. Moreover, Plaintiffs do not meaningfully address the district court's finding of fact that new renditions of those districts would "necessitate a new statewide Senate districting plan." JA923; *see also* JA960. Plaintiffs have no basis to deny that an injunction would necessarily inflict massive upheaval in potentially every contested primary across North Carolina, as the district court described at length. JA958-959. *Purcell* forbids that outcome.

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The fulcrum of Plaintiffs' *Purcell* position is that "it is undisputed that Demonstration Districts B-1 and B-2 would be a valid remedy for a VRA violation." Br. 61. It is a mystery where Plaintiffs got that idea. *See* LD Br. 34, 47-48 (disputing this); JA464-465 (disputing this); JA479 (disputing this).[3] Plaintiffs invite this Court to contravene *Bartlett*—a case Plaintiffs do not cite—by imposing a crossover district that breaches the WCP. 556 U.S. at 7, 23-25. That is not an option. By consequence, Plaintiffs have no *Purcell* position short of demanding "chaos and confusion." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring).

Plaintiffs also invite the Court to ignore "*Purcell*'s heavy gate, blaring sirens, and flashing red lights," JA962, as well as the Supreme Court's most recent application of *Purcell* in a § 2 case, *see* Br. 58-59. They flippantly note that "May 14 is over three months away," Br. 58, but the senate primaries are not scheduled for May 14. Election day is March 5, and voting is happening *now*. JA958-959. Plaintiffs cite no *Purcell* case where the timing was measured by a proposed special election that would be caused by an injunction. Rather, the time line is measured by the *scheduled* election. *See Milligan*, 142 S. Ct. at 879 ("The District Court declined to stay the injunction for the 2022 elections even though the primary elections begin (via absentee voting) just seven weeks from now, on March 30."). The drop-dead date for an injunction passed long ago.

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[3] Plaintiffs make unfounded assertions of undisputed propositions on other occasions. To be clear, Legislative Defendants dispute just about all Plaintiffs' assertions.

Plaintiffs point to a racial-gerrymandering order the Supreme Court issued in 2016, *see* Br. 59, but no analysis accompanies that order to guide this Court here. *See McCrory v. Harris*, 577 U.S. 1129 (2016). The most likely explanation for the difference in outcomes as compared to *Milligan* is that the Supreme Court in *McCrory* weighed the equities differently in a constitutional case asserting the right to be free from racial classifications. But here, Plaintiffs assert no constitutional rights and *invite* racial classifications.

B. Other Equitable Factors Prohibit an Injunction

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The grounds to affirm do not end with *Purcell*.

1. Plaintiffs insist the district court's finding of undue delay "is legal error," Br. 62, but cite no authority supporting that proposition or reversal. Plaintiffs do not, and could not, dispute the legal principle "that a party requesting a preliminary injunction must generally show reasonable diligence." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). That is the only issue of law here, and the district court got it right. *See* JA954; JA962.

That leaves the factual question whether Plaintiffs' delay was unreasonable. As a general matter, "[a]scertaining whether a delay is 'undue' is not simply a matter of counting days but, rather, depends on the 'totality of the circumstances' in the particular case." *Amyndas Pharms., S.A. v. Zealand Pharma A/S*, 48 F.4th 18, 37 (1st Cir. 2022) (pleading amendment context); *see Schmidt v. Farm Credit Servs.*, 977 F.2d 511, 516 (10th Cir. 1992) (same in laches context); *Boutros v. Tan*, No. 2:13-cv-01306, 2013 WL 3338660, at *2 (E.D. Cal. July 2, 2013) (same in provisional-injunction context). Delays of just a few weeks can

be unjustified. *See, e.g.*, *Occupy Sacramento v. City of Sacramento*, No. 2:11-cv-02873, 2011 WL 5374748, at *4 (E.D. Cal. Nov. 4, 2011) ("[U]nder the circumstances here, twenty-five days constitutes undue delay."). Consequently, this Court reviews the district court's determination only for abuse of discretion. *See White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990).

Failing to acknowledge that standard, Plaintiffs make no serious attempt to meet it. Their argument is forfeited on that basis. *Hensley ex rel. N.C. v. Price*, 876 F.3d 573, 580 n.5 (4th Cir. 2017). Plaintiffs' *ipse dixit* falls short in all events. They do not explain the cause of their delay, and it was lengthy in light of the extreme speed they demanded and partially obtained from the court below. It does not matter that Legislative Defendants sought and obtained time to file opposition briefs. Br. 62. Legislative Defendants are not the parties demanding expedition or a mandatory injunction, and they do not contend there is "an egregious and clear-cut" issue. Br. 1. Plaintiffs do not cite or discuss the elements of estoppel. And Plaintiffs have measured every case event in *days* and are the ones "estopped" from disputing that their delay, too, should be measured in days. Br. 62.

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2. Contrary to their protestations, Br. 56-57, Plaintiffs are seeking mandatory injunctive relief. Plaintiffs do not demand preservation of "the last *uncontested* status between the parties which preceded the controversy." Br. 56 (citation omitted). Plaintiffs ask this Court to "instruct the district court to adopt Demonstration Districts B-1 and B-2 as remedial districts." Br. 63. Those districts did not exist before this controversy and cannot constitute the *status quo*.

As the district court rightly noted, JA908, this Court held in *Wise v. Circosta*, 978 F.3d 93 (4th Cir. 2020) (en banc), that a change in election administration immediately before an election "establish[ed] the status quo." *Id.* at 98. Plaintiffs ignore *Wise*.

Plaintiffs insist that the challenged map "*is* the controversy; it did not precede it." Br. 56. But the same was true in *Wise*, which is what the dissenting opinion argued. 978 F.3d at 110-111, 117 (Wilkinson, J., dissenting). Plaintiffs do not approach the heightened mandatory-injunction standard, for reasons explained. Repeatedly calling their points "obvious" does not make them so.

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3. Plaintiffs misread the decision below in contending it held a legislature "can immunize itself" from § 2 liability by pointing to the absence of legislative-record evidence justifying majority-minority districts. Br. 52-53. The district court did not treat this consideration as an immunity, but as one factor to balance. *See* JA897; JA905 (citing equitable factors); JA954-JA955 (same). Redistricting is "the most difficult task a legislative body ever undertakes." *Covington*, 316 F.R.D. at 125 (citation omitted). It is inequitable for litigants to stay silent during redistricting and three weeks later announce "an egregious and clear-cut violation" and demand an immediate return to the drawing board. Br. 1. Moreover, the absence of evidence supporting § 2 liability creates an intolerable risk that a hasty injunction will cause an equal-protection violation. LD Br. 50-51. Plaintiffs do not account for this constitutional infringement in their perfunctory discussion of equitable balancing. Br. 55.

Plaintiffs point to a letter by the Southern Coalition of Social Justice (SCSJ) concerning vote dilution, Br. 53, but do not mention the district court's finding concerning that letter, LD Br. 51 n.6. As the court explained, the organization "asked that the county grouping for SD 1 and 2 be changed" but "did not request any majority-minority districts." JA904 (citation omitted). The strong basis in evidence standard requires "good reason to believe that § 2 requires drawing a majority-minority district," *Cooper*, 581 U.S. at 302, so a letter *not* requesting such a district does not speak to that standard.[4] In fact, Plaintiffs *criticize* the county grouping the SCSJ requested. Br. 31 & n.8. It is passing strange for them to now rely on a letter asking for that configuration.

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4. Plaintiffs ask this Court to enhance the equitable harms of their demanded injunction by ordering that any remedy be enacted by the General Assembly in "no more than 7 days." Br. 63. The Fifth Circuit recently issued a writ of mandamus for a district court's affording "merely five legislative days" for a remedial redistricting, which the Fifth Circuit deemed too "rushed." *In re Landry*, 83 F.4th 300, 304 (5th Cir.), *stay denied*, 144 S. Ct. 6 (2023). The same demand here (five legislative days at most) fares no better. As the Fifth Circuit explained, in *Milligan*, the Alabama legislature received "six weeks to propose a new redistricting plan." *Id.* North Carolina law directs that the General

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[4] Two possible senate groupings equally comply with the WCP in northeast North Carolina, and the General Assembly elected a different grouping in 2023 than it did in 2022. The SCSJ's request was not for a majority-minority district but a reversion to the grouping elected in 2022.

Assembly receive at least 14 days to configure remedial redistricting plans. N.C. Gen. Stat. § 120-2.4(a). That an injunction would afford far less than that proves the equities cut against it.

CONCLUSION

The Court should affirm the district court's order.

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February 8, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2024, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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