No. 23-969

In the Supreme Court of the United States

CHARLES WALEN, ET AL., APPELLANTS

v.

DOUG BURGUM, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

After the 2020 census, the North Dakota Legislative Assembly adopted a redistricting plan that divided two state legislative districts, Districts 4 and 9, into subdistricts. Subdistrict 4A was drawn along the boundaries of the Fort Berthold Reservation. Subdistrict 9A encompassed the entirety of the Turtle Mountain Indian Reservation, as well as neighboring areas. Appellants are white voters who lived in Subdistricts 4A and 9B. They alleged that Subdistricts 4A and 9A constituted racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment. A three-judge district court rejected that claim, holding that even if race predominated in the drawing of the subdistricts, the State satisfied strict scrutiny because it had a strong basis in evidence to conclude that the subdistricts were required by Section 2 of the Voting Rights Act of 1965, 52 U.S.C. 10301. The questions presented are:

1. Whether appellants have Article III standing to challenge Subdistrict 9A when neither of them lived in that subdistrict.

2. Whether the district court correctly found that the North Dakota Legislative Assembly had a strong basis in evidence to conclude that Section 2 required the creation of Subdistrict 4A.

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the appeal should be dismissed with respect to Subdistrict 9A and the judgment below should be summarily affirmed with respect to Subdistrict 4A.

STATEMENT

1. When drawing legislative districts, States must balance an array of competing considerations while adhering to constitutional and statutory requirements. *Miller* v. *Johnson*, 515 U.S. 900, 915-916 (1995). This case concerns the constitutional and statutory requirements governing the use of race in districting.

The Equal Protection Clause of the Fourteenth Amendment prohibits racial gerrymandering—that is, the unjustified, predominant use of race in drawing districts. *Shaw* v. *Reno*, 509 U.S. 630, 642 (1993). Given

"'the complex interplay of forces that enter a legislature's redistricting calculus,'" this Court "ha[s] repeatedly emphasized that federal courts must 'exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race'" and must begin with a "presumption that the legislature acted in good faith." *Alexander* v. *South Carolina State Conf. of the NAACP*, 602 U.S. 1, 7, 10 (2024) (citation omitted). But if race "was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," that use of race is subject to strict scrutiny. *Cooper* v. *Harris*, 581 U.S. 285, 291-292 (2017) (citation omitted).

Section 2 of the Voting Rights Act of 1964 (VRA) prohibits voting practices that "result[] in a denial or abridgement of" any citizen's right "to vote on account of race or color." 52 U.S.C. 10301(a). A violation is established "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in [a] State or political subdivision are not equally open to participation by members of a class of citizens protected by" Section 2, "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).

In *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), this Court identified three "necessary preconditions" for a claim alleging that a districting map violates Section 2 by diluting minority voters' ability to elect candidates of their choice: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group must be "politically cohesive"; and (3) the "majority" must "vote[] sufficiently as a bloc" to allow it

"usually to defeat the minority's preferred candidate." *Id.* at 50-51. A plaintiff must also show, under the "totality of the circumstances," that the political process is not "equally open" to minority voters. *Id.* at 45-46; see *Allen* v. *Milligan*, 599 U.S. 1, 17-19 (2023). If those requirements are met, Section 2 requires the State to create a district in which minority voters have an opportunity to elect candidates of their choice.

2. This case concerns two subdistricts in North Dakota's 2021 legislative map.

a. The North Dakota Legislative Assembly must redraw the State's legislative map after each decennial census. N.D. Const. Art. IV, § 2. The Assembly must "fix the number of senators and representatives and divide the state into as many senatorial districts of compact and contiguous territory as there are senators." *Ibid.* Each senatorial district must be apportioned "at least two representatives," who may "be elected at large or from subdistricts." *Ibid.*

b. After the 2020 census, the Assembly established a Redistricting Committee and tasked it with developing a redistricting plan. J.S. App. 3a. Consistent with the State's existing map, the Committee decided to draw 47 legislative districts, each of which would elect one senator and two representatives. D. Ct. Doc. 100-1, at 181-183 (Feb. 28, 2023). Because North Dakota had a population of 779,094, the ideal district size was 16,576. D. Ct. Doc. 100-9, at 4 (Feb. 28, 2023).

In drawing districts, the Committee prioritized ideal district size, continuity and compactness, preserving political subdivisions and communities of interest, and complying with federal and state law. See, *e.g.*, D. Ct. Doc. 100-9, at 4-6. The Committee was also attuned to the Native American reservations within the State. J.S.

App. 5a. The Committee aimed to avoid splitting reservations across districts, sought input from the Assembly's Tribal and State Relations Committee, and heard testimony from leaders of tribes with reservations in the State. See, *e.g.*, D. Ct. Doc. 100-1, at 163-169; D. Ct. Doc. 100-3, at 4-82 (Feb. 28, 2023); D. Ct. Doc. 100-9, at 8; D. Ct. Doc. 104-14, at 29.

As relevant here, the Committee also considered whether to create subdistricts to provide more effective representation for reservation residents—and, conversely, whether the State could face suits under Section 2 of the VRA if it failed to create subdistricts for certain reservations. See D. Ct. Doc. 104-14, at 28-29. Because the ideal district size was 16,576, the ideal subdistrict population was 8,288. See D. Ct. Doc. 104-14, at 29. Only two Native American reservations approximated that size. *Ibid.* The Fort Berthold Reservation—home to the Mandan, Hidatsa, and Arikara Nation (MHA Nation)—had a total population of 8,350, of which roughly 5,500 identified as Native American. *Ibid.*; see J.S. App. 23a; D. Ct. Doc. 104-7, at 1 (Feb. 28, 2023). The Turtle Mountain Indian Reservation—home to the Turtle Mountain Band of Chippewa Indians—had a population of roughly 4,800 Native Americans and was located in an area with a population of more than 9,000 Native Americans. J.S. App. 23a; D. Ct. Doc. 100-6, at 23 (Feb. 28, 2023); D. Ct. Doc. 100-4, at 27-28 (Feb. 28, 2023).

The Committee heard testimony about prior subdistricting efforts to account for Native American reservations. South Dakota, for example, had previously created two subdistricts for reservations. D. Ct. Doc. 100-6, at 30. And in North Dakota, the MHA Nation had

brought suit in 1991, asserting that a subdistrict was required under the VRA. D. Ct. Doc. 104-14, at 29. The MHA Nation lost that case because it was "unable to meet the first *Gingles* precondition based on the Native American population in District 4 in the 1990 Census." *Ibid.* "[B]ut today," the Committee explained, the Native American populations in "two reservations"—the Fort Berthold Reservation and the Turtle Mountain Indian Reservation—"appear to meet th[e] threshold" sufficient to constitute a majority in a subdistrict. D. Ct. Doc. 100-6, at 21; see *id.* at 37; D. Ct. Doc. 104-14, at 29.

The MHA Nation "urge[d] the legislature to split the one at-large State House district to two single-member State House districts in District 4." D. Ct. Doc. 104-7, at 1. Mark Fox, Chairman of the MHA Nation's Tribal Business Council, testified that "voting history in District 4" showed "tribal member candidates of choice are routinely outvoted by the majority vote in the district," even though the tribal members won the precincts on the reservation. D. Ct. Doc. 104-10, at 2 (Feb. 28, 2023). Although Chairman Fox recognized that subdistricting would not "guarantee that a tribal member would be elected," he was "confident" it would "increase the representation of [the MHA Nation's] issues and concerns to the legislative body." D. Ct. Doc. 104-7, at 2.

Several Committee members spoke in favor of subdividing both districts to avoid VRA liability. See, *e.g.*, D. Ct. Doc. 100-6, at 21-22, 24 (Sen. Holmberg); *id.* at 26 (Rep. Boschee); *id.* at 38-39 (Sen. Poolman). Meanwhile, Representative Jones, who represented District 4, argued against "subdivid[ing] a small portion of the state based on something to do with a sovereign nation." *Id.* at 32. He stressed that 40% of his district was "not

tribal," and "want to have two representatives." *Id.* at 31. But he recognized that his Native American constituents were "more in favor of having a subdistrict" because "[t]hey think that it will give them representation that's closer to them." *Id.* at 35.

Ultimately, the Committee voted to create subdistricts in Districts 4 and 9. D. Ct. Doc. 100-7, at 39 (Feb. 23, 2023). Subdistrict 4A is drawn along the boundaries of the Fort Berthold Reservation. J.S. App. 6a. Subdistrict 9A encompassed the Turtle Mountain Indian Reservation, as well as neighboring areas. *Id.* at 6a-7a.

c. The Legislative Assembly held a special session to consider the plan. In the House, several representatives questioned whether there was sufficient evidence of racially polarized voting to warrant subdistricts. D. Ct. Doc. 100-8, at 6, 13-14, 36, 40, 43-44 (Feb. 28, 2023). A Committee member explained that the Committee had "collected information for many weeks," *id.* at 46, including information about the previous litigation in North Dakota, *id.* at 53, and the use of subdistricts in South Dakota, *id.* at 10, 21, 24-25, as well as tribal representatives' testimony, *id.* at 32, 45.

In the Senate, several senators likewise discussed whether the subdistricts were warranted. D. Ct. Doc. 100-9, at 21, 28. Senator Kannianen, for example, thought it "clearcut" that the third *Gingles* precondition —whether the majority votes sufficiently as a bloc to allow it to defeat the minority's preferred candidate—was not satisfied for District 9. *Id.* at 28-29. But he acknowledged that for District 4, his own district, "if a judge just looked at the last couple of elections, of course, they'd say that that third precondition is met." *Id.* at 30.

Both the House and Senate voted to approve the subdistricts before approving the map as a whole. D. Ct. Doc. 100-8, at 3-62; D. Ct. Doc. 100-9, at 24-45. On November 11, 2021, Governor Burgum signed the redistricting plan into law. J.S. App. 8a.

3. The plan was challenged in two separate lawsuits —a constitutional challenge in this case and a statutory challenge under Section 2 in a separate case.

a. In this case, which was heard by a three-judge district court under 28 U.S.C. 2284(a), appellants Charles Walen and Paul Henderson asserted that Subdistricts 4A and 9A constituted racial gerrymanders in violation of the Equal Protection Clause. J.S. App. 1a-2a. Walen and Henderson are white voters who lived in Subdistricts 4A and 9B, respectively, when the suit was filed. *Id.* at 10a-11a. The MHA Nation and individual tribal members intervened to defend Subdistrict 4A. *Id.* at 2a. The parties cross-moved for summary judgment. *Ibid.*

Appellants emphasized that the State had "invoked the VRA to justify creating the Subdistricts." D. Ct. Doc. 99, at 28 (Feb. 28, 2023). Although they recognized that "[a] legislature's compliance with the VRA may be a compelling interest," they asserted that the Assembly had not done enough to conclude that Section 2 required subdistricts here. *Ibid.* In particular, appellants argued that the Assembly had failed to "conduct a functional *Gingles* analysis" or "any racial polarization studies." *Id.* at 31.

The State argued that appellants lacked standing to challenge Subdistrict 9A because neither appellant lived in that subdistrict. D. Ct. Doc. 102, at 2 (Feb. 28, 2023). On the merits, the State argued that race did not predominate in drawing the subdistricts and, in any

event, that "compliance with the VRA is a compelling interest that satisfies strict scrutiny." *Id.* at 31 & n.26. The State introduced an expert report concluding, based on a functional analysis, that each of the *Gingles* preconditions was met for Subdistricts 4A and 9A. D. Ct. Doc. 100-10, at 3, 7, 10 (Feb. 28, 2023).

The MHA Nation argued that appellants lacked standing to challenge both subdistricts. D. Ct. Doc. 108, at 1 (Feb. 28, 2023). On the merits, the MHA Nation argued that race did not predominate in drawing the boundaries of Subdistrict 4A and that appellants' equal-protection claim fails regardless because (i) Subdistrict 4A was in fact required to comply with the VRA and (ii) at minimum, the legislature had good reason to believe that was the case. *Id.* at 18-39. The MHA Nation also submitted expert reports, including one showing racially polarized voting in District 4. D. Ct. Doc. 109-8 (Feb. 28, 2023); see D. Ct. Doc. 109-18 (Feb. 28, 2023), D. Ct. Doc. 109-19 (Feb. 28, 2023).

The district court granted summary judgment in favor of the State and the MHA Nation. J.S. App. 2a. The court held that appellants had standing to challenge both subdistricts. *Id.* at 9a-12a. On the merits, the court first found that there was a genuine issue of material fact as to "whether race was the *predominant* motivating factor for the Legislative Assembly's decision to draw subdistricts." *Id.* at 15a. But the court held that even if race predominated, "the State's decision to draw subdistricts in districts 4 and 9 is narrowly tailored to the compelling interest of compliance with the VRA." *Id.* at 27a. The court explained that the State had a strong basis in evidence to conclude that "the subdistricts were required by the VRA." *Id.* at 26a. In-

deed, as to Subdistrict 4A, the court concluded that respondents had offered "compelling and unrefuted evidence" that "Native American voters would in fact have a viable Section 2 voter dilution claim" had District 4 not been subdivided. *Id.* at 27a.

b. In a separate suit, the Turtle Mountain Band of Chippewa Indians and Spirit Lake Tribe challenged the redistricting plan under Section 2. *Turtle Mountain Band of Chippewa Indians* v. *Howe*, No. 22-cv-22, 2023 WL 8004576, at *1 (D.N.D. Nov. 17, 2023). The plaintiffs alleged that the redistricting plan "dilutes Native American voting strength by unlawfully packing subdistrict 9A * * * with a supermajority of Native Americans and cracking the remaining Native American voters in the region into other districts." *Ibid.* The district court agreed, permanently enjoining the State from using District 9, its subdistricts, or a neighboring district in future elections. *Id.* at *17. When the State failed to submit a timely remedial map, the court adopted a remedial map. 22-cv-22 D. Ct. Doc. 164, at 2-3 (Jan. 8, 2024).

The State has appealed that decision to the Eighth Circuit. *Turtle Mountain Band of Chippewa Indians* v. *Howe*, No. 23-3655 (argued Oct. 22, 2024). In the meantime, the district court's remedial map was used in the 2024 election. Under that map, appellant Henderson's home—which was in Subdistrict 9B under the 2021 map at issue here—is in District 15. 22-cv-22 D. Ct. Doc. 125, at 8-9 (Nov. 17, 2023).

DISCUSSION

Appellants renew their contention that the North Dakota Legislative Assembly engaged in unconstitutional racial gerrymandering in drawing Subdistricts 4A and 9A. But appellants lack Article III standing to

assert a racial-gerrymandering challenge to Subdistrict 9A because they never lived in that subdistrict and have not shown that they personally were subjected to any racial classification. The Court should thus dismiss the appeal as to Subdistrict 9A for lack of jurisdiction.

As to Subdistrict 4A, the district court correctly held that the Legislative Assembly had a strong basis in evidence to conclude that Section 2 required that subdistrict. Indeed, the district court concluded, based on undisputed evidence, that Section 2 *actually did* require the State to create Subdistrict 4A—a conclusion that appellants do not contest. The district court thus correctly rejected appellants' challenge to Subdistrict 4A, and its factbound application of established legal principles to this unusual case does not warrant plenary review. Instead, the Court should summarily affirm the judgment below as to Subdistrict 4A.

A. Appellants Lack Article III Standing To Bring A Racial-Gerrymandering Challenge To Subdistrict 9A

1. The "constitutional wrong" inflicted by racial gerrymandering "occurs when race becomes the 'dominant and controlling' consideration" in drawing a specific district. *Shaw* v. *Hunt*, 517 U.S. 899, 905 (1996) (*Shaw II*) (citation omitted). The harms inflicted by such a use of race include being "personally . . . subjected to a racial classification" and "being represented by a legislator who believes his 'primary obligation is to represent only the members' of a particular racial group." *Alabama Leg. Black Caucus* v. *Alabama*, 575 U.S. 254, 263 (2015) (*ALBC*) (citations omitted). Those harms "directly threaten a voter who lives in the district," but not "a voter who lives elsewhere." *Ibid.* (emphasis omitted).

Accordingly, this Court has consistently held that "a plaintiff who resides in a district which is the subject of

a racial-gerrymander claim has standing to challenge the legislation which created that district," but "a plaintiff from outside that district lacks standing absent specific evidence that he personally has been subjected to a racial classification"—that is, that he was placed in a particular district because of his race. *Shaw II*, 517 U.S. at 904; see, *e.g.*, *ALBC*, 575 U.S. at 263. Voters who live outside the challenged district "do[] not suffer" the "special representation harms racial classifications can cause in the voting context." *United States* v. *Hays*, 515 U.S. 737, 745 (1995). Absent "specific evidence" that an out-of-district plaintiff "has personally been subjected to a racial classification," such a plaintiff is thus "asserting only a generalized grievance." *Ibid.*

2. Under a straightforward application of those principles, appellants lack standing to challenge Subdistrict 9A. Walen lives in Subdistrict 4A and thus has standing to challenge that subdistrict, but he has not argued that he suffered any injury from Subdistrict 9A. Henderson likewise never lived in Subdistrict *9A*; rather, he lived in Subdistrict *9B* before it was eliminated by the *Turtle Mountain* injunction. Because Henderson never lived within the district lines that he alleges were drawn based on race, see *ALBC*, 575 U.S. at 263—and has never attempted to show that he personally was placed in a subdistrict because of his race—he lacks standing to challenge Subdistrict 9A.

Henderson asserts that the alleged racial gerrymandering of one subdistrict in District 9 necessarily resulted in the racial gerrymandering of the other. J.S. Reply 12-13. But this Court has repeatedly rejected equivalent arguments. In *Hays*, for instance, Louisiana residents who lived in District 5 asserted that a neighboring district, District 4, had been drawn along racial

lines. See 515 U.S. at 741-742. This Court explained that even if plaintiffs were right about District 4, "that does not prove anything about the legislature's intentions with respect to District 5, nor does the record appear to reflect that the legislature intended District 5 to have any particular racial composition." *Id.* at 746. It did not matter that "the racial composition of District 5 would have been different if the Legislature had drawn District 4 in another way"; that incidental effect was insufficient to establish a "cognizable injury under the Fourteenth Amendment." *Ibid.* Put differently, "an unconstitutional use of race in drawing the boundaries of majority-minority districts" does not establish "an unconstitutional use of race in drawing the boundaries of neighboring majority-white districts." *Sinkfield* v. *Kelley*, 531 U.S. 28, 30-31 (2000) (per curiam).

So too here. Henderson's argument is that any consideration of race in drawing Subdistrict 9A "necessarily involves an unconstitutional use of race in drawing the boundaries of neighboring" Subdistrict 9B. *Sinkfield*, 531 U.S. at 29. But Henderson has offered no evidence that the Assembly ever considered the racial composition of Subdistrict 9B in deciding where to draw the boundary line. And although "the racial composition of [Subdistrict 9B] would have been different if the Legislature had drawn [Subdistrict 9A] in another way," that does not suffice to establish a "cognizable injury under the Fourteenth Amendment." *Hays*, 515 U.S. at 746.

The district court found that Henderson had standing for a different reason: It believed that he had been "denied a preferred state representative" because the division of District 9 meant that he could only vote for one representative rather than two. J.S. App. 12a. But

that is not a harm caused by the alleged use of race in drawing district lines; instead, it is a grievance premised on the difference in representation associated with subdistricting of any kind—regardless of where and how subdistrict lines were drawn. And that is not the sort of injury this Court's precedents require for a plaintiff who seeks to assert a racial-gerrymandering claim, which is premised on the distinct representational and stigmatic harms associated with using race to draw a particular district's boundaries. See pp. 10-11, *supra*.

B. The District Court Correctly Held That Subdistrict 4A Survives Strict Scrutiny

The district court held that, even if race predominated in creating Subdistrict 4A, that use of race survives strict scrutiny because it was narrowly tailored to comply with Section 2. J.S. App. 27a. That analysis was correct and does not warrant this Court's plenary review. Indeed, this unusual case would be an especially poor candidate for plenary consideration: The State asks this Court to take up a new argument that directly contradicts its position below, and appellants challenge a grant of summary judgment that was principally based on their own failure to meaningfully contest the evidentiary showing made by the State and the MHA nation.

1. The State's assertion that complying with Section 2 is not a compelling interest is forfeited and meritless

This Court has long assumed that compliance with the VRA is a compelling interest that can justify the narrowly tailored use of race in redistricting. See, *e.g.*, *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 595 U.S. 398, 401 (2022) (per curiam); *Cooper* v. *Harris*,

581 U.S. 285, 292 (2017); *Bethune-Hill* v. *Virginia State Bd. of Elections*, 580 U.S. 178, 193 (2017); *Bush* v. *Vera*, 517 U.S. 952, 977 (1996) (plurality opinion). The State now urges (Resp. 2) the Court to reverse course and hold the opposite. That argument is not properly presented, and it lacks merit in any event.

a. As an initial matter, neither the State nor any other party presented the argument below. To the contrary, as the State admits (Resp. 2), it affirmatively "rel[ied] upon" the opposite view. In moving for summary judgment, the State argued that the Assembly "had a compelling governmental interest in complying with the Voting Rights Act." D. Ct. Doc. 102, at 30. Appellants, for their part, likewise recognized that "compliance with the VRA may be a compelling interest." D. Ct. Doc. 99, at 28. The district court thus proceeded on the same understanding, without considering the argument the State now presses. See J.S. App. 13a, 16a. This Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and the State offers no good reason to consider an argument that no party raised below—and that even appellants urge the Court not to consider (J.S. 36).

Indeed, this case would be a particularly inappropriate vehicle for taking up the State's new assertion that compliance with Section 2 of the VRA cannot justify the predominant use of race in districting because the State itself maintains that "race was *not* the predominate consideration in drawing the challenged election map." Resp. 3. (emphasis added). That argument has particular force as to Subdistrict 4A. The Legislature was certainly aware of Subdistrict 4A's racial composition. See pp. 3-7, *supra*. But a "legislature always is *aware* of race when it draws district lines" and such awareness

does not establish racial predominance. *Shaw* v. *Reno*, 509 U.S. 630, 646 (1993) (*Shaw I*); see *Allen* v. *Milligan*, 599 U.S. 1, 32-33 (2023) (plurality opinion). Instead, a challenger must show that the "legislature subordinated traditional race-neutral districting principles * * * to racial considerations." *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995); see *Alexander* v. *South Carolina State Conf. of the NAACP*, 602 U.S. 1, 7-8, 17-18 (2024).

Here, Subdistrict 4A simply tracks the boundaries of the Fort Berthold Reservation. J.S. App. 6a. The legislature's choice to follow those political boundaries was entirely consistent with "traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests." *Miller*, 515 U.S. at 916. Indeed, as geographic areas over which tribes exercise "significant sovereign functions," *McGirt* v. *Oklahoma*, 591 U.S. 894, 909 (2020), reservations are fundamentally distinct from surrounding land, regardless of the racial makeup of their inhabitants. A legislature's decision to follow reservation boundaries thus does not suggest that it subordinated traditional districting principles to race.

b. In any event, the State's new argument is wrong: Compliance with a proper interpretation of Section 2 of the VRA is a compelling government interest. Section 2's "exacting requirements" limit race-conscious remedies to "'instances of intensive racial politics' where the 'excessive role of race in the electoral process . . . denies minority voters equal opportunity to participate.'" *Allen*, 599 U.S. at 30 (brackets and citation omitted). This Court recently reaffirmed that Section 2 is a valid exercise of Congress's authority to enforce the Fifteenth Amendment. *Id.* at 41. In so doing, the Court

specifically rejected the argument that the Fifteenth Amendment "does not authorize race-based redistricting as a remedy for § 2 violations," emphasizing that "for the last four decades, this Court and the lower federal courts" have in some circumstances "authorized race-based redistricting as a remedy for state districting maps that violate § 2." *Ibid.*

When a State has good reasons to believe that Section 2 requires a majority-minority district, it has a compelling interest in fulfilling its statutory obligations. In general, States "have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied." *Shaw I*, 509 U.S. at 654; see *Students for Fair Admissions, Inc.*, v. *President & Fellows of Harvard College*, 600 U.S. 181, 207 (2023). And if VRA compliance "were not a compelling State interest, then a State could be placed in the impossible position of having to choose between compliance with [the statute] and compliance with the Equal Protection Clause." *LULAC* v. *Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part) (discussing Section 5).

Adhering to that settled understanding does not, as the State asserts (Resp. 7-11), allow a statute to override the Constitution. It simply recognizes that the Equal Protection Clause permits consideration of race when it is narrowly tailored to advance a compelling government interest—and that districts drawn to comply with Section 2 further a compelling interest in complying with a valid exercise of Congress's constitutional authority to eliminate the discriminatory effects of past and present racial distortion of the political process. See *Allen*, 599 U.S. at 41.

2. The Assembly had good reasons to conclude that Subdistrict 4A was required to comply with the VRA

To satisfy strict scrutiny, a State's use of race must be "narrowly tailored" to achieve a compelling government interest. *ALBC*, 575 U.S. at 279. But as this Court has consistently recognized, States must have "'breathing room' to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed." *Wisconsin Legislature*, 595 U.S. at 404 (citation omitted). Accordingly, where "a State invokes § 2 to justify race-based districting," it need show only that "it had a strong basis in evidence for concluding that the statute required its action," *id.* at 402 (citation omitted)—*i.e.*, that the State had "good reasons" to believe that the VRA required the challenged district. *Cooper*, 581 U.S. at 292-293.

a. The district court did not err in holding that the Legislative Assembly had good reasons to believe that Subdistrict 4A was required by Section 2. This Court has held that "[i]f a State has good reason to think that all the '*Gingles* preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district." *Cooper*, 581 U.S. at 302. And here, the Legislative Assembly had a strong basis in evidence to conclude all three *Gingles* preconditions were satisfied.

The first precondition is clear-cut: The evidence before the Legislative Assembly showed that the Native American population of the Fort Berthold Reservation was sufficiently large and geographically compact to be a majority in a reasonably configured subdistrict. J.S. App. 21a-26a; see pp. 4-5, *supra*. Appellants do not argue otherwise.

The second precondition is also largely undisputed, based on evidence before the Legislative Assembly showing that the Native American population on the Fort Berthold Reservation is "politically cohesive." *Thornburg* v. *Gingles*, 478 U.S. 30, 51 (1986). Among other things, Chairman Fox testified that, in the 2016 and 2020 elections, tribal members "easily won the precincts on the reservation but lost in the overall election." D. Ct. Doc. 104-10, at 2; see also D. Ct. Doc. 100-5, at 61-62 (Feb. 28, 2023); D. Ct. Doc. 104-7, at 1-2. Similarly, a tribal member who ran for political office in 2020 testified that the "portions of the district on the reservation strongly supported" her and other Native American candidates. D. Ct. Doc. 100-7, at 4.

As to the third precondition, the Legislative Assembly had good reasons to conclude that "the white majority" in District 4 "votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. Again, the Redistricting Committee heard evidence that candidates of choice for Native American voters in recent District 4 elections had lost their respective elections because the white majority voted against the Native American candidate of choice. See D. Ct. Doc. 104-10, at 2; D. Ct. Doc. 100-7, at 4. Chairman Fox, for example, testified that "tribal member candidates and tribal member candidates of choice are routinely outvoted by the majority vote in the district." D. Ct. Doc. 104-10, at 2; D. Ct. Doc. 100-5, at 68. Describing a school board election, he explained that "[w]hen a Native American or enrolled member did not run in an election, the turn-out was typically somewhere around 60 to 70 people," but when a tribal member entered the race, turn-out jumped to "at or around * * * just under 500 people." D. Ct. Doc. 100-5, at 68.

Chairman Fox testified that "whenever a Native American * * * runs," "a large amount of non-Indian people would come out to vote to make sure that the election would go that different way." *Ibid.* And during the full Senate's consideration of the plan, District 4's senator—who opposed subdistricting—conceded that "if a judge just looked at the last couple of elections, of course, they'd say that that third precondition is met in District 4." D. Ct. Doc. 100-9, at 30.

b. The undisputed evidence that the State and the MHA Nation introduced in the district court further confirmed that the Legislative Assembly had good reasons to conclude that Section 2 required Subdistrict 4A—in fact, it established that the State actually would have violated the statute had it failed to create the subdistrict. Among other things, that evidence showed that the Fort Berthold Reservation had a majority Native American voting age population and "scores very high on measures of compactness," D. Ct. Doc. 109-8, at 3 (Feb. 28, 2023); D. Ct. Doc. 100-10, at 8; that "in every single contest" analyzed, there was "overwhelming evidence" of racially polarized voting in District 4, D. Ct. Doc. 109-8, at 10, 21; D. Ct. Doc. 100-10, at 9-10; and that there was "strong evidence of white voters blocking Native voters in their ability to elect candidates of choice at the full district level," D. Ct. Docs. 109-8, at 16, 21; 100-10, at 9-10. Appellants failed to introduce *any* evidence to contradict those reports. The district court thus concluded that "compelling and unrefuted evidence" showed "that as to district 4, without the subdistrict, Native American voters would in fact have a viable Section 2 voter dilution claim." J.S. App. 27a.

c. Appellants did not dispute below and do not dispute in this Court that the VRA *in fact* required the

Legislative Assembly to create Subdistrict 4A. Instead, appellants assert only that the Assembly did not do enough to assure itself that the subdistrict was required before adopting the challenged map. But, as the district court explained, "[t]he undisputed record shows the Legislative Assembly did perform a contemplative and thorough pre-enactment analysis as to whether the subdistricts were required by the VRA and whether Native American voters would have a viable Section 2 claim without the subdistricts." J.S. App. 26a; pp. 3-7, *supra*.

Appellants insist (J.S. 4, 15) that the Legislative Assembly's analysis of the third *Gingles* precondition fell short because it did not consider racial polarization studies or similar statistical data. But—as appellants concede (J.S. 23)—a State need not *prove* that a Section 2 violation would result absent a particular districting choice. Instead, all that is required is a "a strong basis in evidence." *Wisconsin Legislature*, 595 U.S. at 402 (citation omitted). And the nature of the required evidentiary showing depends on the difficulty of determining whether the *Gingles* preconditions are satisfied in any given case; there is no need to undertake a particular kind of statistical inquiry when the facts do not call for one.

In *Gingles* itself, for example, the Court explained that "[t]he number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances." 478 U.S. at 57 n.25. So too with the manner of proof. Particularly when racially polarized voting is severe and obvious, legislators can rely on uncontroverted information about constituent demographics and electoral outcomes—as the Assembly did here. See, *e.g.*, D. Ct. Doc. 100-9, at 28. In *Bethune-Hill*, for example, the Court

found the strong-basis-in-evidence standard satisfied by a legislator's "careful assessment of local conditions and structures" unaccompanied by elaborate studies or expert analysis. 580 U.S. at 195. Appellants' demand for more "ask[s] too much from state officials charged with the sensitive duty of reapportioning legislative districts." *Ibid.*

Appellants further assert (J.S. 30-35) that the district court failed to consider contrary evidence and improperly drew inferences against the non-moving party. But as to Subdistrict 4A, appellants do not identify evidence that the court failed to consider—because they failed to introduce any evidence to rebut the showing put forward by the State and the MHA Nation.[1] Nor do appellants identify any improper inferences as to Subdistrict 4A. There are no factual disputes about what evidence was before the Legislative Assembly, and the district court grounded its holding in that "undisputed record." J.S. App. 26a.

Finally, appellants object (J.S. 11 & n.3) to the length of the district court's analysis. But this was not the usual districting case where both sides make a comprehensive evidentiary presentation including extensive expert testimony. Here, appellants neither offered any

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[1] Appellants assert (J.S. 6 n.2, 19, 32) that the district court failed to account for the election of Dawn Charging in 2004. But the district court cannot be faulted for failing to expressly address an election that appellants did not rely on below. In any event, the result of a single election that occurred two decades ago does not undermine the Assembly's determination that Section 2 required Subdistrict 4A given the more probative elections in 2016 and 2020. See D. Ct. Docs. 100-3, at 73; 100-7, at 14; cf. *Gingles*, 478 U.S. at 57 ("[T]he fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting.").

expert evidence of their own nor attempted to rebut the evidence introduced by the State and the MHA Nation. There was nothing improper about granting summary judgment on the resulting one-sided record. And appellants fail to justify their request (J.S. 34) for a remand to allow them another opportunity to gather and introduce evidence they failed to present on the first go-round.[2]

CONCLUSION

The appeal should be dismissed with respect to Subdistrict 9A, and the judgment below should be summarily affirmed with respect to Subdistrict 4A.

Respectfully submitted.

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[2] On November 4, 2024, this Court noted probable jurisdiction in *Louisiana* v. *Callais*, No. 24-109, and *Robinson* v. *Callais*, No. 24-110, which also involve a racial-gerrymandering challenge to a district drawn to comply with Section 2. But *Callais* arose in very different circumstances, and the legal questions presented there do not overlap with the legal questions presented here. Accordingly, the Court need not hold this case pending its disposition of *Callais*.