No._____

In The
Supreme Court of the United States

CHARLES WALEN AND PAUL HENDERSON,
Plaintiffs-Appellants,

v.

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

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

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

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QUESTIONS PRESENTED

After North Dakota adopted a new legislative redistricting plan in 2021, Appellants challenged the creation of two new majority-Native-American subdistricts as drawn primarily based on race in violation of the Equal Protection Clause of the Fourteenth Amendment. At summary judgment, the three-judge district court assumed race predominated in the creation of the subdistricts, but still granted judgment in favor of Defendants. The district court relied on the racial makeup of the subdistricts and testimony to the legislature, inappropriately weighing and ignoring evidence about whether the districts were needed to comply with the Voting Rights Act (VRA).

The questions presented are:

1. Whether the district court erred by applying the incorrect legal standard when deciding that the legislature had good reasons and a strong basis to believe the subdistricts were required by the VRA.

2. Whether the district court erred by improperly weighing the evidence and granting inferences in favor of the *moving* party at summary judgment instead of setting the case for trial.

3. Whether the district court erred when it found that the legislature's attempted compliance with Section 2 of the VRA can justify racial sorting of voters into districts.

PARTIES TO THE PROCEEDING

The following were parties in the Court below:

Plaintiffs/Appellants: Charles Walen and Paul Henderson.

Defendants: Doug Burgum, in his official capacity; Michael Howe in his official capacity.

Defendant-Intervenors: The Mandan, Hidatsa, and Arikara Nation; Cesar Alvarez; and Lisa Deville.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

North Dakota legislators drew two new majority-Native-American subdistricts on their 2021 legislative plan primarily based on race without conducting any sort of analysis of whether the subdistricts were actually required by Section 2 of the Voting Rights Act, 52 U.S.C. § 10301 ("VRA"). In this racial-gerrymandering lawsuit challenging the legislature's decision to create those subdistricts, the district court assumed race guided the design of the districts, but found strict scrutiny was satisfied without conducting a trial.

In granting summary judgment to Defendants, the three-judge district court ignored evidence that District 9 was already majority-Native-American and electing a tribe member without subdistricting. It also failed to consider whether District 4, which had also previously elected a tribal member without subdistricting, resulted in more districts for Native Americans than their proportion of the population. The district court also weighed the evidence, reviewing the application of some of the *Gingles* preconditions and failed to examine the totality of the circumstances while drawing inferences in favor of the moving party, instead of Appellants.

Defendants, when attempting to carry their burden of showing compliance with the VRA as a defense, only presented conclusory statements professing a belief that racially focused districts were required. The district court then uncritically accepted this evidence. But shortly after the district court granted summary judgment to Defendants, a different single-judge district court determined that

one of the challenged districts actually violated the VRA.

Given the contrary evidence and lack of trial to test the facts, even if the district court was right on the law, it relied on facts construed *against* the non-moving party at summary judgment. In any event, this case should have been set for trial, not dismissed at summary judgment.

This Court should summarily reverse the district court and require it to set the case for trial to review the legislature's decision to create subdistricts based on race on a full evidentiary record. Or this Court should set the case for briefing and argument.

OPINION BELOW

The district court's opinion is available at 2023 US Dist. LEXIS 198167 and is reproduced at App. A1-A28.

JURISDICTION

This Court has jurisdiction over this direct appeal under 28 U.S.C. § 1253. The district court issued its judgment on November 2, 2023. Appellants filed their notice of appeal on January 2, 2024. App. A29-A30.

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant Constitutional provision is the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. The North Dakota 2021 redistricting plan.

The North Dakota Constitution requires the Legislative Assembly to develop a legislative redistricting plan following each decennial Census. N.D. Const. art. IV, § 2. Following the 2020 Census results, a Redistricting Committee developed a plan to present to the Legislative Assembly with the goal of implementing it in time for North Dakota's 2022 primary and subsequent general elections. App. A4; ECF 109-5, 20, 29.

North Dakota uses a "nested" system for legislative districts, with the population contained in each Senate district electing one Senator and two House members "at large or from subdistricts from those districts." N.D. Const. art. IV, § 2, App. A3. In certain circumstances, the legislature may create "subdistricts" for the election of House members by

dividing the Senate district into two parts with each subdistrict electing one House member. *Id.* In the 2021 plan, the legislature created subdistricts for the first time in Districts 4 and 9. ECF 104-17.

From the outset of the 2021 redistricting process, the Redistricting Committee took the position that the Voting Rights Act *required* the creation of subdistricts for the two Native American reservations (in Districts 4 and 9) but did little to establish the basis for that belief. As became apparent, the legislature chose to gerrymander Districts 4 and 9 to achieve its racial goals elsewhere.

At preliminary meetings in the summer of 2021, discussion of the subdistricts focused primarily on the threat of litigation under the VRA if the legislature did not draw the subdistricts on the plan. ECF 100-1, 38:10-14, 127:8-11, 128:13-14. The Redistricting Committee also heard testimony on the need for statistical analysis of North Dakota's elections before determining whether the updated population demographics required racially gerrymandered districts under the VRA. ECF 100-1, 39:9-40:18, 43:1-21. Despite the testimony the Committee heard, it never hired any experts or even casually considered the kind of statistical data traditionally analyzed when looking at the potential for racially polarized voting in a given area. ECF 100-8, 40:11-16, 44:1-7, 45:6-16.

Instead, the legislators singularly focused on the numerical ability to draw the Native-American districts, which they believed justified drawing the

subdistricts, based on the configuration the Senate districts. ECF 100-6, 23:14-18. The committee chair explained in the floor debate that the legislature had "no choice under federal law and the constitution," but to subdivide Districts 4 and 9. ECF 100-9, 22:2-17; ECF 100-8, 18:5-23.

While the North Dakota constitution authorizes subdistricts, N.D. Const. art. IV, § 2, Districts 4 and 9 were the only districts that were subdivided on the plan. ECF 104-17, p. 1. All of the remaining districts elect House members at-large. *Id.*

The reasons to subdivide—beyond the fact the subdistricts simply could be drawn—are not clear. District 9 was drawn as barely majority-Native-American as a whole and had elected Senator Marcellais, a tribal member and former chair of the Turtle Mountain Tribe in a district with a greater majority of Native voters before the changes. Senator Marcellais offered an amendment to eliminate the subdistricts completely. ECF 100-9, 10:1-11:9. In so doing, he voiced his concern that the plan for subdistricts 9A and 9B "show 81 percent Native American" in one of the subdistricts, which he said "would be packing."[1] *Id.* The subdividing of District 9 resulted in Native American voters only

[1] Indeed, as discussed below, a single-judge district court later determined that District 9 as drawn was packed in violation of Section 2. *Turtle Mt. Band of Chippewa Indians v. Howe*, No. 3:22-cv-22, 2023 U.S. Dist. LEXIS 206894, at *53 (D.N.D. Nov. 17, 2023).

having a majority for one representative instead of two. ECF 100-9, 28:4-15.

District 4 had also elected a tribal member in the past without being subdivided.[2] See Biography of Dawn Charging, *available at* https://ndlegis.gov/biography/dawn-marie-charging

None of this mattered to the legislature, which ignored concerns that the *Gingles* preconditions were not satisfied and the racial design of the districts. ECF 100-7, 35:7-11; ECF 100-9, 28:4-15, 31:17-25, 37:24-38:15. The House and Senate narrowly voted to approve the creation of subdistricts in Districts 4 and 9 and then to approve the 2021 Plan in its entirety. ECF 100-8, 2:2-3:15, 62:19-22; ECF 100-9, 45:7-20.

Subdistrict 4A was drawn along the exact boundaries of the Fort Berthold Reservation. App. A6. District 9A closely followed the boundaries of the Turtle Mountain Reservation. App. A7. After the legislature approved the plan, Governor Burgum signed the 2021 Plan into law. App. A8.

B. The challenge to the subdistricts.

Appellants challenged the North Dakota Legislature's creation of subdistricts 4A, 4B, 9A, and 9B—the only subdistricts in the plan—as racially gerrymandered districts in violation of the Equal

[2] This Court can take judicial notice of past election results and the individuals elected because they are not subject to reasonable dispute. F.R.E. 201.

Protection Clause of the Fourteenth Amendment. App. A11 fn.2. Pursuant to 28 U.S.C. § 2284, a three-judge panel convened to hear the case.

After discovery, Appellants and Defendants filed competing motions for summary judgment. The district court ruled that there were disputed issues of material fact as to whether race predominated in the legislature's decision to create the two Native American subdistricts. App. A15. But it nevertheless proceeded to assume that race predominated the decision and analyzed whether the legislature had "good reason" and there was "strong evidence" that "the subdistricts are narrowly tailored to the State's compelling interest in complying with the VRA." App. A16-A17.

In so doing, the district court never considered past election returns, statistics about the districts prior to subdistricting, racially polarized voting analyses, the impact of partisanship on voting patterns, avoidance of packing, or other types of analyses this Court has found necessary to assert a VRA defense to racial gerrymandering.

The district court ultimately denied Appellants' motion for summary judgment and granted the motions filed by Defendants and Defendant-Intervenors, upholding the legislature's decision to racially subdivide Districts 4 and 9 as a matter of law. App. A27. This appeal followed.

REASONS FOR SUMMARILY REVERSING OR NOTING PROBABLE JURISDICTION

States frequently raise compliance with the Voting Rights Act (VRA) as a defense to a racial-gerrymandering claim. But determining whether the VRA required the racial sorting on the challenged plan involves an "intensely local appraisal" of the facts that apply to that district. *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986). Accordingly, mere references to population changes and general concerns about future litigation cannot provide sufficient justification for racial gerrymandering—this Court's precedents require more.

Federal courts cannot simply take a state's word that a racially drawn district was necessary to comply with the VRA. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 638 (1993); *Miller v. Johnson*, 515 U.S. 900, 921 (1995); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1272 (2015); *Wis. Legis. v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1249 (2022). But that is what the district court did in this case. The district court short-circuited the analytical process for the State's VRA defense by assuming the districts were drawn primarily based on race, then moved directly to the question of strict scrutiny. That approach led to at least three errors.

First, the district court engaged in no independent analysis into whether the VRA required the challenged districts based on the totality of the circumstances. Instead, it relied on the legislature's awareness of population demographics suggesting the districts could be drawn, and did not conduct any

sort of local appraisal—intense or otherwise. Instead, it cherrypicked conclusory legislative statements and public comments, taking them at face value and finding them dispositive to the defense of the plan. The district court ignored evidence that the districts were already electing tribal members. It ignored evidence that District 9 was majority-Native-American before subdistricting, including tribal members being elected for decades. It ignored evidence that subdividing led to a super-proportional result for Native Americans in District 4. Defendants' VRA defense requires far more than relying on mere legislative beliefs and requires affirmative evidence. The district court's analytical process also collapsed the analysis regarding the totality of the circumstances into a single factor—guaranteeing the success of Native American-preferred candidates of the Democratic Party—which is insufficient to show the VRA requires drawing districts based on race.

Second, instead of deciding this case at trial, the district court construed the evidence before it *against* the non-moving party (Appellants) when granting Defendants' motions for summary judgment. Not only do Defendants carry the burden when asserting Section 2 as a defense, but finding a potential violation of Section 2 requires a developed factual record and weighing facts. The district court cannot ignore evidence favoring Appellants at summary judgment and was required to draw inferences in favor of Appellants, not against them.

Third, the district court found that compliance with the VRA justifies, as a matter of law, the racial

sorting it assumed took place in the creation of the subdistricts. While this Court has always assumed, without deciding, that compliance with Section 2 is enough to meet strict scrutiny, the district court took a shortcut without sufficient evidence. On these facts, compliance with Section 2 of the VRA cannot justify prohibited racial sorting.

The district court applied the wrong legal standard at the wrong stage of the case. Rather than resolve this case—riddled with contested facts—at summary judgment, the district court should have set the case for trial where it could properly weigh the facts and judge the credibility of witnesses before it. In addition, the district court applied the wrong legal standard with respect to its VRA analysis, giving far too much weight to the legislature's purported goal of compliance and finding as a matter of law that the few cursory steps taken by the legislature wholly justifies districts drawn primarily based on race. This Court should summarily reverse the decision of the district court, *see Statewide Reapportionment Advisory Comm. v. Theodore*, 508 U.S. 968 (1993) (summarily reversing three-judge panel decision in redistricting case), and require the case to proceed to trial.

I. The district court erred in concluding that there was sufficient evidence to determine the subdistricts were required to comply with the Voting Rights Act.

A. The district court applied the wrong legal standard when it reviewed the legislature's decision-making.

The district court assumed that race predominated in the creation of the subdistricts but then concluded in fewer than five pages of analysis (one that was simply reprinting a legislative report) that this racial sorting was allowed by the Constitution because the VRA required it.[3] But the district court failed to consider that "[s]trict scrutiny remains, nonetheless, strict." *Bush v. Vera*, 517 U.S. 952, 978 (1996). Instead, it took a shortcut, finding that, because the legislature seemed to believe some of the *Gingles* preconditions existed for the subdistricts, that was enough to allow it to racially gerrymander. But the legislature was required to conduct some kind of analysis to support its claim of VRA compliance as a compelling government interest. Or, at minimum, the district court should have conducted that analysis. But no one in this case

[3] The district court's approach here is in sharp contrast to other district courts considering Section 2 claims against legislative plans. *See e.g., Alpha Phi Alpha Fraternity v. Raffensperger*, 587 F. Supp. 3d 1222, 1326 (N.D. Ga. 2022) (over 100 reported pages of analysis on preliminary injunction related to Section 2); *Singleton v. Merrill*, 582 F. Supp. 3d 924, 1035 (N.D. Ala. 2022) (same).

did. And when another district court undertook such an analysis, it found District 9 violated the VRA.

North Dakota's claim that it was just trying to follow the VRA when it drew districts based on race is not unusual. Jurisdictions facing lawsuits about racial predominance in drawing district plans regularly point to the VRA as justification. *See, e.g.*, *Shaw*, 509 U.S. at 638 ("the State's purpose here was to comply with the Voting Rights Act"); *Miller*, 515 U.S. at 921 ("the State's true interest in designing the Eleventh District was creating a third majority-black district to satisfy the Justice Department[]"); *Ala. Legislative Black Caucus*, 135 S. Ct. at 1272 (State claimed that "insofar as [its] redistricting embodied racial considerations, it did so in order to meet this §5 [of the VRA] requirement"); *Wis. Legis.*, 142 S. Ct. at 1249 (Governor "claim[ed] that the VRA required the seven majority-black districts that he drew").

It makes sense that jurisdictions would attempt to rely on the VRA to justify race-based districting because while "the Equal Protection Clause restricts consideration of race . . . the VRA demands consideration of race." *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018). But merely asserting the conclusory justification that a state believes a particular racially sorted district is necessary for compliance with the VRA is not enough. Nor is this belief—however earnest—sufficient to demonstrate the necessary "strong basis in evidence" before concluding the VRA requires a particular district. Even if Defendants stood on better evidentiary footing in this regard, the district court must also

determine if the VRA *actually* requires such a race-predominant district configuration in the first place because the district must be "necessary under a *proper interpretation* of the VRA." *Cooper v. Harris*, 581 U.S. 285, 306 (2017) (emphasis added); *see also Miller*, 515 U.S. at 921.[4]

1. The district court's analytical process.

The district court completely failed in its obligation to determine if Defendants' interpretation of the VRA was proper. Instead, it cited largely lay commentary from just five non-expert members of the public[5] discussing the growth of Native American populations and various elements of the *Gingles* preconditions. App. A21-A22. It also cited the final report of the Redistricting Committee, which focused primarily on whether the legislature had the *numerical* ability to draw a majority-Native-American subdistrict in Districts 4 and 9. App. A22-A25). Besides this loose consideration of the *Gingles* preconditions, the only additional factor referenced was the success of Native-American-preferred candidates who are Democrats. App. A26. The

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[4] On previous occasions when this Court considered defenses from jurisdictions that claimed they were following Section 2, it has consistently found those claims were not based on a correct interpretation of Section 2. *See, e.g., Vera*, 517 U.S. at 979 (*Gingles* prong 1); *Cooper*, 581 U.S. at 306 (*Gingles* prong 3); *Wis. Legis.*, 142 S. Ct. at 1250 (*Gingles* 1 and totality); *Abbott*, 138 S. Ct. at 2334-35 (lack of sufficient inquiry).

[5] None of the witnesses provided any statistical analyses relied on by the legislature.

district court then concluded that "the Redistricting Committee considered possible voter dilution claims under Section 2 by Native American voters and whether Native American voters **would be able to satisfy the *Gingles* preconditions without the subdistricts**." App. A25 (emphasis added).

The district court never considered past election returns, statistics about the districts prior to subdistricting, racially polarized voting analyses, the impact of partisanship on voting patterns, avoidance of packing, or other types of analyses this Court has found necessary to assert a VRA defense to racial gerrymandering. Instead, it relied on the fact that the districts could be drawn.

But even if the legislature conducted a searching inquiry or functional analysis into the *Gingles* preconditions—and there is no evidence in the record to suggest it did—this is not enough as a matter of law. Section 2 requires an "intensely local appraisal" of the conditions in the jurisdiction. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 437 (2006) ("*LULAC*") (quoting *Gingles*, 478 U.S. at 79); *see also Wis. Legis.*, 142 S. Ct. at 1251. This intensely local appraisal is required by the statute to determine if the vote dilution the legislature and district court believed was present without subdistricting was "on account of race or color," 52 U.S.C. § 10301(a), or was caused by some

other factor, which was Defendants' burden when asserting a VRA defense to racial gerrymandering.[6]

2. Factors the district court failed to consider.

The anemic analyses undertaken by both the legislature and the district court into what the VRA requires were significantly less robust than what this Court has found insufficient in past cases. For example, the Wisconsin Supreme Court performed a comparatively detailed analysis of Section 2 compliance before being reversed by this Court. That analysis included (1) a detailed review of racially polarized voting statistical evidence and electoral history going back 30 years, *Johnson v. Wis. Elections Comm'n*, 2022 WI 14, ¶45, 400 Wis. 2d 626, 656 (Wis. March 1, 2022); (2) population growth trends, *id.* at ¶48, 400 Wis. 2d at 658; (3) avoidance of packing, *id.* at ¶49, 400 Wis. 2d at 658-59. But this Court found even that level of analysis

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[6] This matters in the context of considering the preconditions because "what appears to be bloc voting on account of race may, instead, be the result of political or personal affiliation of different racial groups with different candidates." *Solomon v. Liberty County Comm'rs*, 221 F.3d 1218, 1225 (11th Cir. 2000). And "partisan motives are not the same as racial motives." *Brnovich v. Dem. Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021); *see also Cooper*, 581 U.S. at 335 (Alito, J., concurring in the judgment in part and dissenting in part) (without "extraordinary caution" courts will invite "losers in the redistricting process to seek to obtain in court what they could not achieve in the political arena.") (quoting *Miller*, 515 U.S. at 916). These are the exact issues that should be weighed out at trial, not at summary judgment as a matter of law.

insufficient, *Wis. Legis*. 142 S. Ct. at 1250. The district court's analysis here was nowhere near as comprehensive as the Wisconsin Supreme Court's.

The district court's approach here is also in sharp contrast to the processes followed in *Bethune-Hill*. For example, in *Bethune-Hill*, the district court originally upheld all 12 challenged districts, but found that District 75 was the only one that constituted a racial gerrymander. *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 182 (2017). The remaining districts were found not to have an actual conflict with the state's traditional redistricting principles.[7] *Id*. at 185.

The district court still upheld District 75 because it concluded it was drawn to comply with the VRA after reviewing evidence establishing (1) the pre-existing nature of the ability-to-elect district; (2) that the legislature conducted a functional analysis that included turnout rates, prison populations, and contested electoral history results; and (3) statistical evidence of racially polarized voting. *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 558-59 (E.D. Va. 2015).

When this Court upheld the decision regarding District 75, it relied on exactly these facts. First, District 75 was already an existing ability-to-elect district, unlike the brand-new subdistricts created

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[7] As discussed below, the district court found disputes of fact regarding racial predominance when—unlike *De Grandy*—there was a direct conflict with North Dakota's traditional redistricting principle of not subdividing districts.

for the first time here. *Bethune-Hill*, 580 U.S. at 195. Second, the functional analysis that supported the Black voting-age population included in District 75 was comprehensive, including turnout rates, a study of contested elections going back more than a decade, and a "careful assessment of local conditions and structures." *Id.* at 196-97. All of those facts undergirded the conclusion that a majority-Black district was required to elect candidates of choice. *Id.* But that kind of comprehensive analysis is entirely absent in this case, where the evidence before the district court only showed—at most—that the legislature relied on the fact a majority-Native-American subdistrict could be drawn based on population. The district court in this case cites no basis to conclude that Native American candidates of choice were not being elected from existing districts, which was critical to the finding in *Bethune-Hill*, and it could not. Both Districts 4 and 9 had elected or were electing Native American candidates without being subdivided. ECF 100-10, p. 4; Dawn Charging, *available at* https://ndlegis.gov/biography/dawn-marie-charging

The district court also cites no analysis of any local conditions before reaching its conclusions.[8] This

[8] When *Bethune-Hill* was returned to that district court for trial, it found the 11 remaining districts were drawn primarily based on race and that the legislature did not engage "in an analysis of *any* kind to determine the percentage of black voters necessary to comply with Section 5" of the VRA in those districts. *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 176 (E.D. Va. 2018). In this case, unlike *Bethune-Hill* on remand, the district court

failure of proof demonstrates the incorrect legal standard the district court applied.

The district court in this case erred from the outset because it simply took Defendants' asserted positions regarding compliance with Section 2 of the VRA at face value. It never actually considered what the legislature did and, more importantly, what the legislature did not do. The cursory analyses undertaken by the legislature and then the district court fail to reach even the modest levels this Court found insufficient in *Wis. Legis*. And this Court should reverse for this lack of evidence alone.

B. The district court erred by finding all the *Gingles* factors were met, ignoring evidence of racial makeup and past candidate success.

The district court also ignored evidence plainly in the record demonstrating the enacted maps were not "narrowly tailored" to comply with the VRA.

The legislature subdivided only two districts on the entire 2021 plan, both of which created majority-Native-American subdistricts for the first time. ECF 104-17, p. 1. District 9 was already majority-Native-American before subdistricting and had been electing a Native-American candidate. ECF 100-10, p. 4.

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ratified the decision of the legislature to select a level of Native American support "without evidentiary foundation." *Id*. at 179.

Senator Marcellais, who is Native American and a former tribal chairman of the Turtle Mountain Tribe, won election multiple times across the *entirety* of District 9. Likewise, District 4 had elected Dawn Charging in past elections.

With these elections, the district court was required at summary judgment to assume tribal members were the preferred candidate of Native American voters because there is evidence in the record (provided by Defendants' own expert) that the election of Native Americans occurs only "because they have sufficient support among Native voters to overcome their Anglo opponents." ECF 108, Ex. 18 at 69.[9] At minimum, this provides strong circumstantial evidence that the third *Gingles* precondition cannot be met. Because Native Americans have regularly been able to elect their candidate of choice in districtwide elections, there is no indication that "a white majority votes sufficiently as a bloc usually to defeat the candidates chosen by [Native Americans]." *Gingles,* 478 U.S. at 63. But in the face of this evidence, the district court somehow found the State had "good reasons" for slicing up both districts despite failing to analyze the issue when it should have drawn this inference in Appellants' favor.

Further, the record shows that legislators warned about possible packing as a result of the

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[9] *But see Turtle Mt. Band of Chippewa Indians*, 2023 U.S. Dist. LEXIS 206894, at *38 ("District 9 at-large presents a much closer call" on the third *Gingles* precondition). If anything, this disagreement emphasizes the need for a trial.

subdistricting. ECF 100-9, 11:3-9. The district court ignored this evidence even though it was also part of the analysis of one of Defendants' own experts.[10] Dr. Hood explained in his report that an undivided District 9 was already a majority-Native-American district because it "is comprised of 51.7% Native American voting age population." ECF 100-10, p. 4. Thus, according to Dr. Hood, District 9 "under Section 2 of the Voting Rights Act . . . would be described as a minority, opportunity-to-elect district." *Id.*

Whether District 9 *must* be kept whole to avoid violating the VRA is not the question to be answered here. But it is notable that Defendants' expert found that subdividing District 9 effectively sacrificed a district in which Native Americans formed the majority of the electorate in a district that elects two House members at-large—and one where a Native American candidate was already succeeding—in favor of a subdistrict in which Native Americans form the majority in a district that elects just one House member. *See, e.g.*, *Monroe v. City of Woodville,* 688 F. Supp. 255, 264 (S.D. Miss. 1988), *vacated on other grounds by* 493 U.S. 915 (1989) (vote-dilution claim failed when city was already majority-minority); *see also Monroe v. City of Woodville*, 881 F.2d 1327, 1334 (5th Cir. 1989) ("visceral response"

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[10] Dr. Hood was not an expert who provided information to the legislature but was only retained once this lawsuit was filed. He is also testified in the single-judge VRA case that the *Gingles* preconditions were *not* present in District 9. *Turtle Mt. Band of Chippewa Indians*, 2023 U.S. Dist. LEXIS 206894, at *20-21. This would obviously be a topic of cross-examination in a trial in this case if a trial had been held.

that majority-Black city was not electing Black candidates must violate Section 2 was incorrect).[11]

Yet when a single-judge district court[12] undertook its Section 2 analysis of the same plan, it determined that District 9 *violated* the VRA. *Turtle Mt. Band of Chippewa Indians*, 2023 U.S. Dist. LEXIS 206894 at *53-54. Not only does this undercut the district court's findings in this case, but it also supports Appellants' argument that the legislature engaged in the exact racial gerrymandering without properly considering the requirements of the VRA. But the legislature "may not trade off the rights of some members of a racial group against the rights of other members of that

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[11] The district court's failure to construe this evidence in favor of Appellants again highlights how the district court incorrectly weighed evidence at summary judgment, which is discussed in more detail below.

[12] Because 28 U.S.C. § 2284(a) requires a three-judge panel whenever a federal "action is filed challenging… the apportionment of any statewide legislative body," the case should have been heard by a three-judge district court. *Allen v. State Bd. of Elections*, 393 U.S. 544, 562 (1969) (applying Section 5 of the VRA); *Page v. Bartels*, 248 F. 3d 175, 190 (3d Cir. 2001); *see also Garcia v. Hobbs*, S. Ct. Dkt. 23-467 (vacating and remanding). That is especially true when Section 2 is legislation that implements the Fourteenth and Fifteenth Amendments. *City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980). At the very least, a three-judge panel in the VRA case could have addressed the apparent inconsistency between the racial-gerrymandering ruling on appeal here and the VRA case before a single judge. In the meantime, the single-judge district court decision is on appeal to the Eighth Circuit, which has recently found there is no private right of action under Section 2. *Turtle Mt. Band of Chippewa Indians v. Howe*, Appeal Nos. 23-3697, 24-1171 (8th Cir.).

group." *LULAC*, 548 U.S. at 437; *Shaw v. Hunt*, 517 U.S. 899, 916–18 (1996) ("*Shaw II*"). In other words, the legislature could not reduce the Native-American population of District 9 and then "fix" that reduction by creating the subdistricts. The legislature instead should have drawn Section-2-compliant Senate districts with two House seats instead of a racial gerrymander. But the district court instead determined that this racial gerrymander was appropriate based on the VRA. A trial on the merits could have addressed the interplay of these issues at the very least.

Ultimately, it cannot be the case that using subdistricting to *reduc*e the number of legislative seats in which Native Americans are the majority and were already succeeding in electing Native American candidates is somehow "narrowly tailored" to comply with the requirements of the Voting Rights Act, as the *Turtle Mt. Band of Chippewa Indians* later found. That is precisely why an intensely local appraisal is required under Section 2.

C. The district court did not correctly apply the required totality-of-the-circumstances review.

Further, while the *Gingles* preconditions are *necessary* to a showing of liability under Section 2, they are not *sufficient* because "courts must also examine other evidence in the totality of circumstances." *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994); *accord Wis. Legis.*, 142 S. Ct. at 1249. This is because "equal openness remains the touchstone" of a Section 2 claim. *Brnovich*, 141 S. Ct.

at 2338. And while the legislature need not *prove* a Section 2 violation before embarking on a racial gerrymander, "a strong basis" in the evidence cannot be reasonably inferred at any stage of litigation (especially not at summary judgment) in the absence of a more robust analysis into the Senate Factors than was undertaken here.

1. The district court failed to review the totality of the circumstances at all.

The question the district court should have answered is not merely whether a mechanical application of the three (or any) *Gingles* preconditions could be met. Instead, it should have determined whether the legislature had "good reasons" for thinking "**the Act demanded**" the race-based districts. *Cooper*, 581 U.S. at 301 (emphasis added); *see also Wis. Legis.*, 142 S. Ct. at 1249. While that standard may fall short of pre-enactment proof of a Section 2 violation, it requires more than the lip service the district court paid to the totality-of-circumstances analysis here. Indeed, courts cannot reduce that searching analysis to a single factor, as the district court did here by relying solely on the *Gingles* preconditions plus one additional factor. *Wis. Legis.*, 142 S. Ct. at 1250; *De Grandy*, 512 U.S. at 1020-21.[13]

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[13] Further, the Circuits that have reached this issue have found that finding vote dilution should be based on the totality of the circumstances of evidence weighed at trial with detailed

In fact, the district court relied on a statement from the Tribal and State Relations Committee that the "population base" of Native Americans existed in those two districts as a key reason for drawing them—almost identical to the claims the Governor made in *Wis. Legis.*, 142 S. Ct. at 1249. The focus on "population base" may go to establishing the first *Gingles* precondition of a sufficiently numerous minority population, but it is not sufficient to show Section 2 required the district in question. *Id.*

This is a situation where "the [district court] asked the wrong question with respect to narrow tailoring." *Ala. Legislative Black Caucus*, 575 U.S. at 279. Instead of focusing on equal openness, *De Grandy*, 512 U.S. at 1014, which is the textual basis for a Section 2 claim, the district court instead—under the most generous interpretation—focused only on a mechanical application of some of the three *Gingles* preconditions while ignoring the totality of the circumstances.[14] The district court's reliance on

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factual findings, not at summary judgment. *Ga. State Conference of the NAACP v. Fayette Cty. Bd. of Comm'rs*, 775 F.3d 1336, 1343 (11th Cir. 2015) ("Normally, claims brought under § 2 of the VRA are resolved pursuant to a bench trial, with judgment issued under Federal Rule of Civil Procedure 52."); *see also Cousin v. McWherter*, 46 F.3d 568, 575 (6th Cir. 1995) (requiring more detailed factual findings even after a trial); *McIntosh Cnty. Branch of the NAACP v. City of Darien*, 605 F.2d 753, 757, 759 (5th Cir. 1979) (same).

[14] Even if only the *Gingles* preconditions applied, evidence before the district court at the very least raised questions about the nature of partisanship. Dr. Hood's report found an almost perfect overlap of partisanship and race, leading to questions that required the weighing of evidence—specifically

Abbott illustrates this error.[15] App. A19. *Abbott* did not reach the question of a full analysis under Section 2 because Texas could not even point to any "'legislative inquiry' that would establish the need for its manipulation of the racial makeup of the district." *Abbott*, 138 S. Ct. at 2335. Thus, *Abbott* does not stand for the proposition that a mere cursory legislative inquiry into Section 2 liability can justify a racially drawn district. Rather, it emphasizes that the *failure* to undertake any such inquiry is fatal to using Section 2 as a defense, which is also exactly what the district court found in *Bethune-Hill* on remand. 326 F. Supp. 3d at 179-80. This is precisely what the legislature failed to do in this case and is a legally insufficient basis for judgment in their favor as a matter of law.

2. The district court failed to consider the impact of proportionality as to District 4.

Unlike District 9, which was already majority-Native-American, District 4 contains 31.0% Native American voting age population as a whole. ECF 100-10, p. 8. That means the decision to subdistrict ensures that Native Americans will now hold the majority in 50% of the total seats in the House from District 4. Because Native Americans will be the majority in a proportion of districts greater than their population, the district court also failed to

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that the polarized voting in question was racial in nature. ECF 100-10, pp. 5-7, 9-10.

[15] *Abbott* was also decided after "multiple trials," 138 S. Ct. at 2317, not at summary judgment.

consider the impact of proportionality on whether Section 2 required the district. Proportionality is generally measured from a relevant area as opposed to a statewide basis. *De Grandy*, 512 U.S. at 1022-23.

Whatever Section 2 required of the legislature in District 4, it does not mean that a "failure to maximize" the number of Native-American-majority districts violates the statute.[16] *Id*. at 1016. In *De Grandy*, this Court reversed a decision about House districts based on the population of Dade County, which was approximately 50% Latino voting age. The challenged plan provided Latino supermajorities in 9 of the 18 districts that were located primarily in the county. *Id*. at 1014. When it looked at all districts located in Dade County,[17] Latino voting age population again nearly mirrored the percentage where Latino voters were a majority. *Id*. That resulted in this Court concluding that the districts did not violate Section 2 because they provided equal political opportunity. *Id*. at 1020. But the same provisions could not result in super-proportionality, where Latino voters obtain more seats than they

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[16] Defendant-Intervenors claimed in their Motion for Summary Judgment to have enough evidence that at-large elections in District 4 would have violated the VRA. ECF 108. But the district court did not indicate any consideration of this in its opinion. As discussed below, it would have been inappropriate for the district court to consider the analysis offered by Defendant-Intervenors at summary judgment.

[17] Even with these districts, the total Latino-majority districts would have been less than proportional statewide. *De Grandy*, 512 U.S. at 1014, 1021.

would otherwise be entitled to as a portion of the population. *Id*. at 1016-17.

That is exactly what happened here. The district court should have looked at the relevant area of review of District 4, which is the "smaller geographical scale" where any Section 2 claim would be litigated. *Id*. at 1022. And in that review area, despite being only 31% of the population of District 4, the district court upheld a plan—as necessary to avoid liability under the VRA—where Native American voters receive 50% of the House districts.[18] Using the logic from *De Grandy*, the legislature here provided Native American voters with effective political power that is more than 60% above their numerical strength, claiming that was required by Section 2. *Compare* ECF 100-10, p. 8 *with De Grandy*, 512 U.S. at 1017 n.13.

This is another part of the totality of the circumstances that the district court completely failed to consider. In order for the district court to correctly decide this case, whether at summary judgment or at trial, it must conduct a more detailed analysis of the basis for its conclusions about vote dilution. It failed to do so here and must be reversed.

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[18] This Court has made clear that racial classifications of any kind must be temporary. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll*., 600 U.S. 181, 212 (2023) ("*SFFA*"). But under the district court's interpretation, Section 2 will continue to require or allow states to racially sort voters beyond proportionality with "no end … in sight." *Id*. at 213.

II. The district court improperly resolved this racial-gerrymandering case on summary judgment.

Even if this Court were to agree that the cursory analysis conducted by the district court and legislature could be enough to justify a racial gerrymander, it falls well short of satisfying Defendants' burden of proof at summary judgment. Summary judgment is warranted only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In other words, there must be "a complete failure of proof concerning an essential element of the nonmoving party's case [that] necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Critically, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986).

In the equal-protection context, this is a particularly exacting standard because racial gerrymandering cases generally require "a developed record" and are usually decided "after the respective District Courts ha[ve] made findings of fact." *Hunt v. Cromartie*, 526 U.S. 541, 552 n.8 (1999) (collecting cases). Here, the district court erred in granting summary judgment to Defendants on the thin record before it, which denied Appellants the opportunity to cross-examine witnesses, probe their testimony, and further develop evidence for the finder of fact.

Although the district court accurately identified the summary-judgment standard described above, it thoroughly misapplied it to the record. An Equal Protection claim challenging districts involves applying a two-prong test with shifting burdens. First, the plaintiff must prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916. If a plaintiff can make this showing, "[t]he burden then shifts to the state to prove that its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." App. A13 (quoting *Cooper,* 581 U.S. at 291).

A. The district court's decision on racial predominance was wrong.

As to the first prong, the district court found that "conflicting views of the evidence present a fact question as to whether race was the predominant motivating factor for the Legislative Assembly's decision to draw subdistricts in districts 4 and 9." App. A15 (emphasis in original). But with the reality that Districts 4 and 9 were the only subdistricts on the plan, the decision to subdistrict created an actual conflict with the state's otherwise-consistent application of its traditional practice of not subdistricting in other districts. While an actual conflict between race and those principles is not required, *Bethune-Hill*, 580 U.S. at 188, the conflict here shows there was no dispute—these subdistricts were drawn primarily based on race.

Nevertheless, the district court proceeded to "[a]ssum[e] without deciding that race was the predominate motivating factor," and moved immediately to the second prong. App. A15. After a perfunctory declaration that a legislature's mere assertion of compliance with the VRA constitutes a compelling state interest, the district court proceeded to consider whether the legislature's race-based subdistricting was "narrowly tailored" to that end.

B. The district court erred in granting summary judgment to Defendants because reaching that result required weighing the evidence and drawing inferences in favor of the moving party.

Turning to the second prong, the district court correctly flagged that a state can prove its actions are "narrowly tailored," by showing it had "a strong basis in evidence" and "good reasons" to think the VRA required the "race-based district lines." App. A20 (quoting *Wis. Legis.,* 142 S. Ct. at 1250). But, in ruling for Defendants at summary judgment, the district court converted this "breathing room" into a blank check. The fact that a state is obligated to prove its actions are the product of "good reasons" prevents granting summary judgment on the question, because reaching that conclusion requires weighing evidence. And this Court has overturned lower courts that improperly applied strict scrutiny at the summary-judgment phase of racial gerrymandering cases.

In a similar case before this Court on appeal from a summary-judgment ruling finding racial predominance, the district court had ruled in favor of the plaintiffs because the purportedly "uncontroverted material facts" proved the legislature "used criteria with respect to [the challenged district] that are facially race driven." *Cromartie*, 526 U.S. at 545. But this Court disagreed. Despite finding that the evidence in the record before it "tend[ed] to support an inference that the State drew its district lines with an impermissible racial motive," *id*., at 548-49, it concluded the district court erred when it granted summary judgment because the record contained enough contradictory evidence that the motive of the legislature was grounded in partisanship, not race. *Id.* at 549-50. Thus, "[a]ccepting appellants' political motivation explanation as true, *as the District Court was required to do in ruling on appellees' motion for summary judgment*… appellees were not entitled to judgment as a matter of law." *Id.* at 551 (emphasis added). Here, the district court committed the same error.

While all parties agree for purposes of summary judgment about the facts surrounding *how* the legislature passed the maps, what those facts mean—or what can be *inferred from* them—is very much at issue. For example, Appellants moved for summary judgment relying on the same floor speeches and committee testimony as Defendants. *See generally,* ECF 98, 101, 107, 111. 113 114, 115. And the district court highlighted some of these exact facts in its order to support its ruling in favor of Defendants. *See* App. A4-A8; A21-A27. But doing

so was the opposite of what was required: "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson,* 477 U.S. at 255.

Appellants have already shown a number of shortcomings in the legislature's inquiry into what Section 2 requires, many of which are underscored by *Turtle Mt. Band of Chippewa Indians*, 2023 U.S. Dist. LEXIS 206894. Not only is the legislature and district court's back-of-the-napkin analysis related to *Gingles* dispositive, but Appellants also provided evidence demonstrating the legislature was aware the proposed subdistricts could *violate* Section 2. In addition to examples of this evidence already discussed above in Section I(B)(2), Appellants highlighted further evidence in their Motion for Summary Judgment. This included the discussion among redistricting committee members concerning racial concentrations produced by subdistricting in District 9, and the fear that the new districts will cause minority residents on the reservation to "only be able to have one representative." ECF 98 at 14. Indeed, apart from receiving testimony from a few lawyers and a handful of stakeholders (some with a personal interest in the creation of racially gerrymandered subdistricts) the record reveals the legislature's failure to grapple with whether the VRA actually "demanded" the creation of subdistricts, as legislators assumed.

Instead of inferring from the evidence that the legislature did not adequately consider the issue of VRA compliance, "as the District Court [is] required to do in ruling on appellees' motion for summary

judgment," *Cromartie,* 526 U.S. at 551, the district court did the opposite. Ruling in favor of Defendants, the district court highlighted contrary evidence it thought was sufficient to conclude that the legislature satisfied strict scrutiny. But this is not appropriate at summary judgment—and the fact that the district court found some testimony from the public persuasive is a weighing of evidence that is not allowed at summary judgment before witnesses can be cross-examined.

For example, the district court noted that the "Redistricting Committee heard from the leaders of [Native American tribes]." App. A21. It highlighted testimony from the "Chairman of the Standing Rock Sioux Tribe" that covered compliance with the VRA even though the subdistricts in Districts 4 and 9 did not apply to that particular tribe.[19] *Id.* And it reproduced a large portion of the Redistricting Committee's final report to the Legislative Assembly, which summarized other oral and written testimony received by the committee and discussions the committee had while in session, as well as some recent Census figures. App. A22-A25. While these figures could be useful and the testimony of voters and lawyers was sincere, it is insufficient to

[19] The district court also failed to consider whether relying on the testimony of a Native-American individual from another tribe was appropriate, given that the relevant minority it reviewed was the particular tribes. The district court apparently assumed all Native Americans should be treated as the relevant minority, yet this evidence is insufficient to prove that all Native American tribes vote cohesively.

establish the "good reasons" needed to survive strict scrutiny. And this is particularly true at summary judgment, where the district court is not yet permitted to weigh the competing evidence.

Nevertheless, the district court summarily concluded that "[t]his is sufficient pre-enactment analysis to establish it had good reasons to believe the subdistricts were required by the VRA." App. A25. But even if that legal standard is correct, this is the kind of judgment that is appropriate only *after* a trial. That is the stage where witnesses can be subject to cross-examination and the district court can appropriately weigh the evidence and make credibility determinations. That is the stage where the contrary evidence presented by the State in the single-judge Section 2 case can be weighed with the claims of Defendants in this case. *See, e.g.*, *Turtle Mt. Band of Chippewa Indians*, 2023 U.S. Dist. LEXIS 206894, at *21 (Dr. Hood testifying at trial that *Gingles* 3 was not met in District 9). Further, Defendants' arguments on the appeal of the *Turtle Mt. Band of Chippewa Indians* decision claiming a lack of statistical evidence of a VRA violation could be tested. Appellants' Brief, Appeal No. 23-3655, pp. 53-55 (8th Cir.), filed January 30, 2024.

The district court should have tried this case. And if its ruling on summary judgment is upheld, state legislatures will have acquired far more than "breathing room" to navigate the often-conflicting mandates of the VRA and the Equal Protection Clause—they will have found a statutory shield to racially gerrymander. *Wis. Legis.,* 142 S. Ct. at 1250. This Court can and must correct that misadventure.

The evidence put forth here by Defendants is not enough for a court to bless a racial gerrymander as a matter of law at summary judgment. This Court should reverse the district court.

III. The district court erred in determining that compliance with the Voting Rights Act justifies this racial gerrymander.

The district court also introduced another danger into federal-court review of redistricting plans. This Court has been crystal clear about the dangers of using race to justify legislative decision making in the absence of exceedingly compelling circumstances that demand it, especially in the context of voting because "Racial gerrymandering, *even for remedial purposes*, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters." *Shaw*, 509 U.S. at 657 (emphasis added). This is because "[w]hen the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Miller*, 515 U.S. at 911-12 (quoting *Shaw*, 509 U.S. at 647).

In spite of this background, the district court incorrectly determined that this Court "has long held that compliance with the VRA is a compelling government interest." App. A13. But this is not only wrong as a matter of fact, it is wrong a matter of law because it subordinates the Constitution to the VRA, especially in the context of relying on such a thin record of a potential Section 2 violation.

In a series of racial-gerrymandering cases, this Court has assumed, without deciding, that compliance with the VRA could be a compelling government interest. *Miller*, 515 U.S. at 921 (leaving open the question); *Shaw II*, 517 U.S. at 911 ("again we do not reach that question"); *Vera*, 517 U.S. at 977 ("we assume without deciding that compliance with the results test, as interpreted by our precedents, . . . can be a compelling state interest"); *Cooper*, 581 U.S. at 301 ("we have long assumed that complying with the VRA is a compelling interest"); *Alabama Legis. Black Caucus*, 575 U.S. at 275-79; *Bethune-Hill*, 580 U.S. at 193 (compliance with Section 5).

In every case involving compliance with Section 2 as a defense to a racial gerrymandering case, the Court has struck down the plan at issue. The only apparent case where this Court has ever reached the question of whether the VRA constituted a compelling interest for purposes of strict scrutiny was highly fact intensive and related solely to Section 5, not Section 2. *See Bethune-Hill*, 580 U.S. at 193.

This case, coming to the Court in this procedural posture, represents an exceptionally poor vehicle for this Court to find that *Section 2* justifies race-predominant redistricting for the first time—especially when the exact map has been found to violate Section 2. Race-based district must at least be required by "a *constitutional* reading and application of those laws." *Miller*, 515 U.S. at 921 (emphasis added). Thus, this Court should also reject

the district court's approach because Section 2 cannot justify the districts at issue here.

IV. Summary reversal is the correct remedy in this case.

This Court has previously summarily reversed a three-judge district court that improperly applied a Section 2 analysis on a far-more-developed record. In *Burton ex rel. Republican Party v. Sheheen*, the district court conducted an exhaustive analysis of South Carolina's redistricting plans under the Voting Rights Act. 793 F. Supp. 1329 (D.S.C. 1992). That analysis took place after a full trial on the merits. *Id.* at 1339. That district court "rejected redistricting plans submitted by all parties and adopted its own plan." *Statewide Reapportionment Advisory Comm. v. Beasley*, 99 F.3d 134, 135 (4th Cir. 1996).

After adoption of the district court's plan, both parties directly appealed to this Court, which summarily reversed in a one-sentence order: "The judgment is vacated and the cases are remanded to the United States District Court for the District of South Carolina for further consideration in light of the position presented by the Acting Solicitor General in his brief of the United States filed May 7, 1993." *Theodore*, 508 U.S. at 968. No other information or reasoning was provided by this Court, but the briefing filed by "the Solicitor General had maintained that the three-judge court had failed to apply a proper § 2 analysis to the plans." *Beasley*, 99 F.3d at 135. Unlike that case, this appeal is even easier.

Sheheen involved a developed evidentiary record, analysis of expert reports, and an appraisal of the facts and circumstances over the course of a trial. In contrast, the record here is sparse. The district court opinion is abbreviated and contains almost no substantive analysis related to Section 2. This case must be sent back to the district for further development of a proper record, and with the benefit of the appropriate Section 2 analysis.

CONCLUSION

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

Respectfully submitted this 4th day of March, 2024.

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