No. 23-484

In the Supreme Court of the United States

JOSE TREVINO, ET AL.,
Petitioners,
v.
SUSAN SOTO PALMER, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR NATIONAL REPUBLICAN REDISTRICTING TRUST, REPRESENTATIVE MARIO DÍAZ-BALART, AND REPRESENTATIVE TONY GONZALES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The National Republican Redistricting Trust ("NRRT") is the central Republican organization tasked with coordinating and collaborating with national, state, and local groups on the fifty-state congressional and state legislative redistricting effort. NRRT's mission is threefold.*

First, it aims to ensure that redistricting faithfully follows all federal constitutional and statutory mandates. Under Article I, § 4 of the U.S. Constitution, the State Legislatures are primarily entrusted with the responsibility of redrawing the States' congressional districts. *See Growe v. Emison*, 507 U.S. 25, 34 (1993). Every citizen should have an equal voice, and laws must be followed to protect the constitutional rights of individual voters, not political parties or other groups.

Second, NRRT believes redistricting should be conducted primarily by applying the traditional redistricting criteria States have applied for centuries. This means districts should be sufficiently compact and preserve communities of interest by respecting municipal and county boundaries, avoiding the forced combination of disparate populations as much as possible. Such sensible districts follow the principle that legislators represent individuals living within

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* Under Rule 37.2, the parties' counsel of record received timely notice of the intent to file this brief. Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

identifiable communities. Legislators do not represent political parties, and we do not have a system of statewide proportional representation in any State. Article I, § 4 of the U.S. Constitution tells courts that any change in our community-based system of districts is exclusively a matter for deliberation and decision by our political branches—the State Legislatures and Congress.

Third, NRRT believes redistricting should make sense to voters. Each American should be able to look at their district and understand why it was drawn the way it was.

To advance these principles, NRRT regularly files *amicus* briefs in redistricting cases.

Mario Díaz-Balart is the Republican Congressman representing Florida's 26th Congressional District.

Tony Gonzales is the Republican Congressman representing Texas's 23rd Congressional District. Texas 23 has been the subject of Voting Rights Act litigation in the 2000s, 2010s, and 2020s.

SUMMARY OF THE ARGUMENT

"The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if [some minority] voters are likely to favor that party's candidates." *Baird* v. *Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992) (Easterbrook, J.). But according to the decision below, the VRA condemns a Latino-majority district that a Latina woman just won with non-Hispanic white *and* Latino support. That decision transforms the VRA from a tailored response to racial discrimination to a Democrats-always-win requirement. If this is how the VRA works now, its race-centered requirements have passed their constitutional expiration date.

Washington recently redrew its Legislative District 15 to include a majority of Latino voters. In the first election using the map, a Latina woman overwhelmingly prevailed—with substantial Latino support and majority non-Hispanic white support—over a white candidate. Nonetheless, Democrats alleged that the district denies Latinos equal political opportunities. The voters elected the wrong type of Latina—a Republican. Mocking the Voting Rights Act, the district court determined with minimal analysis that the win by a Latina candidate was practically irrelevant. This brief makes three points.

First, the decision below conflicts with this Court's precedents, which hold that candidates' races are relevant to whether a plaintiff has proved legally significant majority bloc voting. If the majority group votes for minority candidates—and near-majority portions of the minority group do too—a § 2 plaintiff cannot show racial (rather than political) bloc voting.

Second, relegating the crucial fact of majority support for minority candidates to be balanced away in a totality-of-the-circumstances analysis—as the court below did—contradicts this Court's insistence on rigorous application of the preconditions for § 2 liability, including significant racially polarized voting. The decision below did not *mention* this actual election result in its analysis of the racial bloc precondition, instead relying on fabricated models of hypothetical elections. Even in the totality-of-the-circumstances, the court found that Latino candidate success was lacking and ordered a race-based map.

Third, if the court was right that a majority-Latino district's election of a Latina with white support contradicts § 2, its decision raises constitutional problems. There is no compelling government interest in forcing states to draw district lines that benefit white Democrats. If the VRA has become a tool to help Democrats rather than minorities—and the proliferation of partisan operative lawsuits that look mighty like partisan gerrymandering suits suggests that it has—the VRA's extraordinary race-based remedies have outlasted their constitutional shelf life.

The decision below "engages in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike[and] share the same political interests." *Miller* v. *Johnson*, 515 U.S. 900, 911–12 (1995) (cleaned up). As District 15's most recent election shows, that assumption is wrong. Much to Democrats' chagrin, many Latinos support Republicans. The Constitution's promise of equal protection forbids government treatment based on racial assumptions. The Court should grant certiorari.

REASONS FOR GRANTING THE WRIT

I. The Voting Rights Act covers racial discrimination, not political failure.

Section 2 of the VRA prohibits voting procedures that deny or abridge "the right of any citizen of the United States to vote on account of race or color," including by giving a group "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. As Justice Marshall explained over forty years ago, § 2 does not apply when a "lack of success at the polls [i]s the result of partisan politics" rather than "racial vote dilution." *Mobile* v. *Bolden*, 446 U.S. 55, 109 (1980) (dissenting opinion). That basic premise runs through this Court's § 2 jurisprudence. As Judge Easterbrook summarized, § 2 is "a balm for racial minorities, not political ones—even though the two often coincide." *Baird*, 976 F.2d at 361. Sorting the two out is critical to a proper § 2 analysis.

The Court's earliest rejection of partisan gerrymandering claims masquerading as voting rights claims was in *Whitcomb* v. *Chavis*, when the Court said that VRA claims could not succeed if "the failure [of a racial group] to have legislative seats in proportion to its populations emerges more as a function of losing elections than of built-in bias against [the group]." 403 U.S. 124, 153 (1971). A claim that the group's votes had been "cancelled out," then, was "a mere euphemism for political defeat at the polls." *Ibid.* In other words, the VRA does not apply if a racial group with "equal opportunity to participate in and influence the selection of candidates and

legislators" and candidates "satisfactory to [it]" simply "suffers the disaster of losing too many elections." *Ibid.* That is not "invidious discrimination." *Ibid.*

A decade after *Whitcomb*, Congress amended § 2 of the VRA to cover discriminatory results. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 134. Congress "retained the statutory language restricting relief under § 2 to 'denial[s] or abridgment[s] of the right . . . to vote on account of race or color,'" a "constitutional imperative[] given that the scope of Congress' remedial power under the Civil War Amendments is defined in large part by the wrongs they prohibit." *League of United Latin Am. Citizens, Council No. 4434* v. *Clements*, 999 F.2d 831, 854 (5th Cir. 1993) (en banc).

The accompanying Senate Report said "that a proper application of the results test requires courts to 'distinguish[] between situations in which racial politics play an excessive role in the electoral process, and communities in which they do not.'" *Id.* at 855 (quoting S. Rep. No. 97-417, 97th Cong., 2d Sess., 33 (1982)); see *Thornburg* v. *Gingles*, 478 U.S. 30, 44 n.7 (1986) (identifying this Senate Report as the "authoritative source for legislative intent"). "[F]ollowing *Whitcomb*," Congress "accorded this inquiry into 'racial bloc voting,' that is, whether 'race is the predominant determinant of political preference,' dispositive significance: Absent a showing of 'racial bloc voting,'" "it would be exceedingly difficult for plaintiffs to show that they were effectively excluded from fair access to the political process under the results test.'" *Clements*, 999 F.2d at 855 (cleaned up) (quoting Senate Report 148). Thus,

"plaintiffs must supply affirmative proof of 'racial bloc voting,'" for the "'mere existence of underrepresentation plus a history of dual schools' plainly does not suffice to make out a violation of § 2." *Ibid.* (quoting Senate Report 34).

That brings us to this Court's decision in *Gingles*, which required three preconditions to potential § 2 liability: (1) "the minority group must be able to demonstrate that it is sufficiently large and geographically compact"; (2) "the minority group must be able to show that it is politically cohesive"; and, (3) "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed, usually to defeat the minority's preferred candidate." 478 U.S. at 50–51 (citation omitted). "Justice Brennan's discussion of the first and second *Gingles* factors received majority support," but "[w]ith respect to the third element," "five justices rejected Justice Brennan's proposed standard for proving racial bloc voting." *Clements*, 999 F.2d at 855.

Justice White's concurring opinion disagreed with Justice Brennan that "there is polarized voting if the majority of white voters vote for different candidates than the majority of the blacks, regardless of the race of the candidates." 478 U.S. at 83. "Under Justice Brennan's test," there would "be a violation in a single-member district that is 60% black, but enough of the blacks vote with the whites to elect a black candidate who is not the choice of the majority of black voters." *Ibid.* As Justice White said, "[t]his is interest-group politics rather than a rule hedging against racial

discrimination," and it is "at odds" with *Whitcomb*. *Ibid.*

Justice O'Connor, joined by Chief Justice Burger and Justices Powell and Rehnquist, agreed with "Justice White in maintaining that evidence that white and minority voters generally supported different candidates did not constitute legally significant racial bloc voting where these patterns were attributable to partisan affiliation rather than the race of the candidate." *Clements*, 999 F.2d at 856. For instance, "[e]vidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates." *Gingles*, 478 U.S. at 100 (O'Connor, J., concurring in judgment). "[E]xplanations of the reasons why white voters rejected minority candidates would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account," and "conclu[ding] that the race of the candidate is always irrelevant in identifying racially polarized voting conflicts with *Whitcomb*." *Ibid.*

On the same logic, if majority group voters affirmatively *support* a minority candidate, it would seem near impossible that legally significant racially polarized voting exists. In this scenario—played out below as non-Hispanic white voters (and many Latinos) supported the Latina winner—any polarized

voting of significance is political, not racial. And the VRA has nothing to say about partisan advantages.

In this sense, § 2 cases could be compared to employment discrimination suits where the "hiring decisions are made by voters." *Milwaukee Branch of the NAACP* v. *Thompson*, 116 F.3d 1194, 1200 (7th Cir. 1997) (Easterbrook, J.). "[I]f the outcome does not discriminate against" minority candidates, courts properly infer "that the rules for conducting elections (including the drawing of district lines) do not provide minority voters 'less opportunity' to 'participate in the political process and to elect representatives of their choice.'" *Ibid.* (quoting 52 U.S.C. § 10301(b)). Any other inference—or ignoring the issue altogether—fails to identify legally significant racial polarization.

An appropriate consideration of candidate races recognizes that "the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *Johnson* v. *De Grandy*, 512 U.S. 997, 1014 n.11 (1994). Often, "losses by the candidates [minority] voters prefer may have more to do with politics than with race." *Baird*, 976 F.2d at 361. "[W]hen racial antagonism is not the cause of an electoral defeat suffered by a minority candidate, the defeat does not prove a lack of electoral opportunity but a lack of whatever else it takes to be successful in politics (say, failure to support popular programmatic initiatives, or failure to reflect the majority's ideological viewpoints, or failure to appreciate the popularity of an incumbent)." *Uno* v. *Holyoke*, 72 F.3d 973, 981 (1st Cir. 1995). "Section 2 does not bridge that gap—nor should it." *Ibid.* Instead, "§ 2 is implicated only where

Democrats lose because they are [Latinos], not where [Latinos] lose because they are Democrats." *Clements*, 999 F.2d at 854. Section 2 certainly is not implicated where a Latina wins because non-Hispanic whites and Latinos voted for her.

II. The decision below conflicts with this Court's and circuit precedents.

The decision below adopted Justice Brennan's view about the third *Gingles* factors rather than the controlling approach of Justices White and O'Connor. Invoking a "fight" to "ferret[] out" "facially neutral electoral practices that have the effect of keeping minority voters[']" "preferred candidates from office," App. 11 n.6, the district court declared that "partisan preferences" "do[] not inform the political cohesiveness or bloc voting analyses." App. 15.

Expressly disagreeing with the Fifth Circuit's en banc decision holding otherwise, the district court tried to find support in a citation to Justice O'Connor's discussion of statistical evidence in *Gingles*. App. 15. But Justice O'Connor said merely that when "statistical evidence of divergent racial voting patterns is admitted *solely* to establish that the minority group is politically cohesive and to assess its prospects for electoral success," "defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race." 478 U.S. at 100 (emphasis added). But, she continued in a passage ignored by the district court, "Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate

the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates." *Ibid.* That is the third *Gingles* factor. And that white voters *supported* a minority candidate is surely even more probative. Yet the district court said that this type of evidence—described by Justice O'Connor as "clearly relevant"—"does not inform" the "bloc voting analyses" at all. App. 15. This departure from the Court's precedent requires review.

The district court's legal misstep meant that its bloc voting discussion does not mention—once—the results of the only election held under the new district lines, in which a Latina Republican won by 35 points with substantial Latino support. This election well "illustrates Justice White's observation that losses by the candidates [Latino] voters prefer may have more to do with politics than with race." *Baird*, 976 F.2d at 361.

Even as it ignored the 2022 election, the district court fixated on "expert" reconstructions of old elections that purported to find "that white voters in the Yakima Valley region vote cohesively to block the Latino-preferred candidates in" "approximately 70%" of elections. App. 14 (as corrected). Again, these were not actual election results, but statistical mirages that obscured the reality of the 2022 election with unsupported assumptions—including that voters behave the same in statewide or federal elections as they do in state legislative district elections.

Yet doubling down on these mirages, the district court treated them as hard facts, proclaiming that the

"quite small" computerized margins of victory in the hypothetical elections were irrelevant because "[a] defeat is a defeat." *Ibid.* But apparently a victory in a *real* election of an *actual* Latina woman in an *already-majority* Latino district with *actual* Latinos voting substantially in her favor is *not* a victory. Contra *Allen* v. *Milligan*, 599 U.S. 1, 36 n.8 (2023) ("[C]ourts should exercise caution before treating results produced by algorithms as all but dispositive of a § 2 claim.").

The district court's approach contradicts this Court's precedents, breaks with the en banc Fifth Circuit, and belittles real racial discrimination. "In holding that the failure of minority-preferred candidates to receive support from a majority of whites on a regular basis, without more, sufficed to prove legally significant racial bloc voting, the district court loosed § 2 from its racial tether and fused illegal vote dilution and political defeat." *Clements*, 999 F.2d at 850. This Court's review is needed.

III. The decision below calls into doubt § 2's constitutionality.

If the district court properly applied § 2 and the VRA requires that districts be drawn to elect white Democrats rather than provide equal opportunity to minorities, the time has passed for the kind of extreme racial remedy imposed by the VRA.

Congress's authority to enact § 2 comes from the Fourteenth and Fifteenth Amendments, which permit Congress to "enforce" those amendments' substantive provisions "by appropriate legislation." U.S. Const. amend. XIV, § 5; *id.* amend. XV, § 2. But the Court has time and again recognized that "[u]nder the Equal

Protection Clause, districting maps that sort voters on the basis of race 'are by their very nature odious.'" *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 595 U.S. 398, 401 (2022) (quoting *Shaw* v. *Reno*, 509 U.S. 630, 643 (1993)). An "underlying principle of fundamental importance" requires courts to "be most cautious before" requiring "inquiries based on racial classifications and race-based predictions"—for that would "raise[] serious constitutional questions." *Bartlett* v. *Strickland*, 556 U.S. 1, 18 (2009) (plurality opinion). When racial lines are mandated, "the multiracial . . . communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race . . . rather than to political issues are generated; communities seek not the best representative but the best racial . . . partisan." *Reno*, 509 U.S. at 648 (quoting *Wright* v. *Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting)).

At first, perhaps race-based VRA remedies "could be justified by 'exceptional conditions.'" *Shelby County* v. *Holder*, 570 U.S. 529, 545 (2013) (quoting *South Carolina* v. *Katzenbach*, 383 U.S. 301, 334 (1966)). But the Court has always imposed strict limits on these remedies, recognizing the tension between "the twin demands of the Fourteenth Amendment and the VRA." *Bush* v. *Vera*, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring). These "exacting requirements" "limit judicial intervention to those instances of intensive racial politics where the excessive role of race in the electoral process denies minority voters equal opportunity to participate." *Allen*, 599 U.S. at 30 (cleaned up). All three conditions

must be "rigorously appl[ied]" "[t]o ensure that *Gingles* does not improperly morph into a proportionality mandate" in contravention of the Equal Protection Clause. *Id.* at 44 n.2 (Kavanaugh, J., concurring in part); accord *Merrill* v. *Milligan*, 142 S. Ct. 879, 884 (2022) (Kagan, J., dissenting) ("The Court's longstanding precedent imposes strict requirements for proving a vote-dilution claim.").

The district court's approach below was anything but rigorous. The court tucked away all the evidence that differential voting was based on party—most notably the actual 2022 election—into the malleable "totality of the circumstances" analysis. But that analysis inevitably "morph[s] into a proportionality mandate" without proper analysis of the *Gingles* preconditions. *Allen*, 599 U.S. at 44 n.2 (Kavanaugh, J., concurring in part); see *id.* at 69–72 (Thomas, J., dissenting) ("[P]roportionality generally explains the results of § 2 cases after the *Gingles* preconditions are satisfied.").

Sure enough, the district court's totality-of-the-circumstance analysis mentioned the 2022 election results in the challenged district in a passing sentence before finding that the "Success of Latino Candidates" factor *still* "support[ed] the conclusion that the bare majority of Latino voters in LD 15 fails to afford them equal opportunity to elect their preferred candidates." App. 24, 31. No matter that non-Hispanic white voters overwhelmingly joined with Latino voters to elect a Latina representative by 35 points. For good measure, the court said that "the Democratic platform is apparently better aligned with the economic and social preferences of Latinos in the Yakima Valley region"—

notwithstanding the district's own Latina Republican representative. App. 33. The court dismissed arguments based on past Latino partisan voting as "essentially arguing that Latino voters should change the things they care about and embrace Republican policies (at least some of the time) if they hope to enjoy electoral success." App. 33–34.

The issue, however, is not changing voters' beliefs. It is that the federal government via the VRA cannot constitutionally impose racially-segregated districts to advantage Democratic voters or candidates. The VRA is supposed to be about racial polarization, not political polarization. Every voter is entitled to their political beliefs, but no voter is entitled to have the courts draw race-based districts to maximize the chance of their political beliefs being reflected by their representative. Cf. *Uno*, 72 F.3d at 982 ("[T]he results test protects racial minorities against a stacked deck but does not guarantee that they will be dealt a winning hand.").

The result below undermines § 2's constitutionality. The statute's "current burdens . . . must be justified by current needs." *Shelby County*, 570 U.S. at 542. "[E]ven if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future." *Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring in part).

If direct Latina representation in a majority Latino district with overwhelming support across races is just an inconvenient fact to be balanced away to draw districts that favor Democrats—including a losing

white Democrat candidate—§ 2 has lost its constitutional footing. "[T]he Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life." *Gregory* v. *Ashcroft*, 539 U.S. 461, 490–91 (2003). Even assuming that there can be a compelling government interest in statutory compliance sufficient to justify racial discrimination, there can be no compelling interest in treating Republican minority legislators as a negative while treating Democrat minority legislators as a positive. This treatment penalizes progress and integration by requiring stereotype-based redistricting. This mandate for segregation will never end, requiring an "indefinite use of racial classifications, employed first to obtain the appropriate mixture" to ensure partisan outcomes "and then to ensure that the [map] continues to reflect that mixture." *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731 (2007) (plurality opinion).

The Plaintiffs' proposed remedies below underscore the point. To remedy a supposed dilution of Latino votes, the Plaintiffs propose maps that would—all of them—*reduce* the Latino citizen voting age population in the district. See D. Ct. Dkt. 251, at 67. Evidently in the Plaintiffs' view, the district has too *many* Latinos—or at least too many Latinos who vote the "wrong" way. The Plaintiffs' lines are drawn not to help Latinos, but to help Democrats.

In sum, the decision below hinges on "the very stereotypical assumptions the Equal Protection

Clause forbids," namely, that "that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens." *Miller*, 515 U.S. at 914. This is "the precise use of race as a proxy the Constitution prohibits." *Ibid.* If § 2 requires that proxy even in the face of election results showing non-Hispanic whites and Latinos uniting behind a Latina Republican representative, its mandate for racial segregation should no longer be tolerated.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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