No. 23-969

In the
Supreme Court of the United States

CHARLES WALEN, *et al.*,
Appellants,
v.
DOUG BURGUM, Governor of North Dakota, *et al.*,
Appellees.

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

SUPPLEMENTAL BRIEF FOR APPELLEES

DAVID H. THOMPSON
BRIAN W. BARNES
JOHN D. OHLENDORF
Special Assistant Attorneys General
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

DAVID R. PHILLIPS
Special Assistant Attorney General
300 W. Century Ave., P.O. Box 4247
Bismark, ND 58502
dphillips@bgattorneys.com

DREW H. WRIGLEY
Attorney General
PHILIP AXT
Counsel of Record
Solicitor General
600 E. Boulevard Ave., Dept. 125
Bismarck, ND 58505
(701) 328-3625
pjaxt@nd.gov

Counsel for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Appellees Kelly Armstrong, in his official capacity as Governor of North Dakota,[1] and Michael Howe, in his official capacity as North Dakota Secretary of State (the "State"), respectfully submit the following Supplemental Brief in response to the Brief for the United States as *Amicus Curiae*.

ARGUMENT

The United States urges the Court to summarily affirm the decision of the lower court in principal part. And the State agrees that would be the appropriate course of action if the Court elects not to reexamine the "assumption" that attempted compliance with the VRA constitutes a compelling interest capable of justifying a state's predominate consideration of race when engaging in redistricting. However, the problems with that "assumption" are more serious than the United States is willing to acknowledge.

The State of course wishes—and, ultimately, expects—to see Appellants' Equal Protection challenge to its 2021 election map fail. As just one reason, the United States is entirely correct that the "legislature's decision to follow reservation boundaries … does not suggest that it subordinated traditional districting principles to race." U.S. Br. 15 (citing *McGirt v. Oklahoma*, 591 U.S. 894, 909 (2020)). However, to summarily affirm the lower court's judgment—which upheld the State's election map after assuming (incorrectly) that race *was* the State's predominant motivating factor in the map's design—will further entrench an unexamined aspect of this Court's voting rights

[1] Kelly Armstrong replaced Doug Burgum as the Governor of North Dakota on December 15, 2024.

jurisprudence, and one which defies some of our nation's most fundamental constitutional protections. The State believes it should win this case, but the reason why it wins is important.

The United States' main response on that score is to challenge this case as a vehicle, and to contend the arguments challenging that "assumption" are "not properly presented" because the State did not make those arguments below and "relied upon the opposite view." U.S. Br. 14 (cleaned up). But that is true in *every* case considered by this Court where the prevailing party declines to defend the basis for the decision. Yet the Court not infrequently hears such cases where the questions presented otherwise merit its review, *see, e.g.*, *Lange v. California*, 594 U.S. 295, 301 (2021), including many cases where the United States has changed its position, *see, e.g.*, *Smith v. Berryhill*, 587 U.S. 471, 477-78 (2019); *Pepper v. United States*, 562 U.S. 476, 487 (2011). As in those cases, the constitutional question is squarely presented *now*, and the fact the State did not make the argument below is not an ineluctable barrier to this Court's review.

"There is doubtless no jurisdictional bar to [this Court] reaching" a constitutional question that was not pressed below, *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987), and it is within the Court's discretion to take up such a question where it "is squarely presented and fully briefed" and concerns "an important, recurring issue," such that "the interests of judicial administration will be served by addressing the issue on its merits," *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980). Such is the case here. Whether attempted compliance with the VRA can justify making race the *predominant* consideration when drawing

electoral maps is a question of the highest import: it concerns our Constitution's promise "that all persons … shall stand equal before the laws of the States." *Strauder v. West Virginia*, 100 U.S. 303, 307 (1879). And it also implicates another important question of constitutional structure: whether the Constitution, which our founders proclaimed to "be the supreme Law of the Land," U.S. CONST. art. VI, § 2, may be violated based on a belief that such a violation is necessary to comply with a federal statute.

This important question is also a "recurring" one. *Green*, 446 U.S. at 17 n.2. Redistricting occurs in all 50 states at regular intervals, and the resulting electoral maps are routinely challenged under the Equal Protection Clause by partisans of whichever political party feels its ox has been gored. These challenges consume an immense quantity of state and judicial resources, and they can occupy multiple levels of the federal judiciary for years on end. *See, e.g.*, *Louisiana v. Callais*, No. 24-109 (U.S.); *Alexander v. South Carolina State Conf. of the NAACP*, 602 U.S. 1 (2024). The constitutional question presented in this case goes to the heart of this genre of redistricting litigation, and the State respectfully submits that judicial economy would be served by deciding it now rather than letting it continue to fester. Moreover, the issue turns on pure questions of law that this Court is well-suited to resolve; the failure of the lower court to consider that question has not deprived this Court of the benefit of any relevant factual development.

Finally, the United States fails to acknowledge that the procedural posture of this case differs importantly from the usual circumstance where this Court considers whether to take up review of an issue

not pressed below. That question usually arises on the Court's certiorari docket, where it is free to avoid the issue altogether by denying the petition and awaiting a case where the issue is better preserved or provides a more desirable vehicle. But this case arises under the Court's mandatory appellate jurisdiction, 28 U.S.C. § 1253, and so the Court cannot simply avoid review of the case altogether—it must either affirm or reverse. Consequently, the United States's qualms that this case may be an "inappropriate vehicle," U.S. Br. 14, are misplaced.

To be sure, the Court retains discretion to dispose of the case summarily without considering the important constitutional questions that are implicated. But the State respectfully submits that the same principles which compelled it to confess error in relying upon this Court's prior "assumption" should counsel against affirming a decision relying upon an application of that "assumption." As the State addressed at length in its prior brief, this Court's previous "assumption" reflects an interpretation of the Equal Protection Clause that is fundamentally inconsistent with the Constitution's text, history, and structure, and which has injected significant confusion into an already convoluted area of the law.

CONCLUSION

For the foregoing reasons, and as addressed in the State's prior brief, the Court should vacate the three-judge district court's decision, make clear that attempted compliance with the VRA cannot excuse otherwise unconstitutional race discrimination, and remand for further proceedings where the State intends

to prove that race was *not* the predominant consideration in the design of its election map.

In the alternative, if the Court does not reconsider its assumption that attempted compliance with the VRA can justify the predominate use of race when drawing election maps, it should summarily affirm.

December 23, 2024

Respectfully submitted,

DAVID H. THOMPSON
BRIAN W. BARNES
JOHN D. OHLENDORF
Special Assistant
Attorneys General
1523 New Hampshire
Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

DREW H. WRIGLEY
Attorney General
PHILIP AXT
Counsel of Record
Solicitor General
600 E. Boulevard Ave.,
Dept. 125
Bismarck, ND 58505
(701) 328-3625
pjaxt@nd.gov

DAVID R. PHILLIPS
Special Assistant
Attorney General
300 W. Century Ave.,
P.O. Box 4247
Bismark, ND 58502
dphillips@bgattorneys.com

Counsel for Appellees