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

MEMORANDUM IN RESPONSE TO JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether a state legislature's attempted compliance with Section 2 of the VRA can justify the enactment of election maps that predominately consider race in contravention of the Fourteenth Amendment's Equal Protection Clause.

2. Whether the district court applied the correct legal standard in determining whether the state legislature in this case had good reasons and a strong basis to believe that the challenged election map was required by Section 2 of the VRA.

3. Whether the district court clearly erred in finding that the state legislature in this case had good reasons and a strong basis to believe the challenged election map was required by Section 2 of the VRA.

PARTIES TO THE PROCEEDING

Because this brief could be construed as drawing into question the constitutionality of a potential application of an Act of Congress, 28 U.S.C. § 2403(a) may apply, and Appellees have served a copy of the brief on the Solicitor General of the United States.

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Appellees Doug Burgum, in his official capacity as Governor of North Dakota, and Michael Howe, in his official capacity as North Dakota Secretary of State (the "State"), respectfully submit the following memorandum in response to the Appellants' Jurisdictional Statement.

INTRODUCTION

"Under 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. Miller*, 509 U.S. 630, 643 (1993) ("*Shaw I*")). But "race consciousness does not lead inevitably to impermissible race discrimination," *Allen v. Milligan*, 599 U.S. 1, 30 (2023) (quoting *Shaw I*, 509 U.S. at 646), as redistricting legislatures "will almost always be aware of racial demographics." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Instead, the line this Court has "long drawn is between [race] consciousness and [race] predominance." *Id*. at 33. And when race is the *predominate* reason for a map's design, it runs into the Fourteenth Amendment's prohibition on racial discrimination. *Id*. at 30–31.

Yet in a series of decisions over the last three decades, the Court has repeatedly "assumed," without deciding, that a state's attempt to comply with the Voting Rights Act (VRA) could be a "compelling interest" capable of justifying a state's decision to make race the *predominate* consideration when drawing an election map. *E.g.*, *Wisconsin Legislature*, 595 U.S. at 401; *Abbott v. Perez*, 585 U.S. 579, 587 (2018); *Cooper v. Harris*, 581 U.S. 285, 292 (2017); *Bethune-Hill v. Virginia State Bd. of Elections*, 580

U.S. 178, 193 (2017); *Shaw v. Hunt,* 517 U.S. 899, 915 (1996) ("*Shaw II*"); *Miller*, 515 U.S. at 921.

Before the three-judge court in this case, the State's primary response to Appellants' allegation of racial gerrymandering was that race was not the predominate factor in the design of the challenged map. D. Ct. Doc. 102, 22-30 (02/28/23). But in the alternative, relying upon this Court's "assumption," the State also argued that even if race had been the predominate consideration it would have been justified by the State's attempt to comply with Section 2 of the VRA. *Id.* at 30–38. The three-judge court granted summary judgment to the State on that alternate basis, holding that even if race was the State's predominate reason for drawing the challenged subdistricts, "the State had good reasons and strong evidence to believe the subdistricts were required by the VRA." J.S.App.A27. On direct appeal to this Court, Appellants question the validity of that "assumption." *See* J.S.35–37.

As a matter of first principles, the State is unable to defend the basis upon which it was granted summary judgment. The State cannot defend this Court's "assumption" that attempted compliance with the VRA (or any statute) would justify racial discrimination in violation of the Fourteenth Amendment. Simply stated: "if complying with a federal statute would require a State to engage in unconstitutional racial discrimination, the proper conclusion is not that the statute excuses the State's discrimination, but that the statute is invalid." *Milligan*, 599 U.S. at 79 (Thomas, J., dissenting).

For the reasons that follow, the State requests that the Court reexamine the foundation for its

"assumption" (either summarily or after briefing and argument limited to the issue), vacate the decision below, make clear that a state's attempted compliance with Section 2 of the VRA cannot provide a compelling justification for making race the predominate consideration in the design of an election map, and remand for further proceedings where the State intends to prove race was not the predominate consideration in drawing the challenged election map.

"[T]he line between racial predominance and racial consciousness can be difficult to discern." *Milligan*, 599 U.S. at 31. But at least the effort to draw that line has a defensible constitutional foundation. The "assumption" that race cannot be the predominant reason for drawing an election map *except* for when a state has "good reasons" to think the VRA requires making race predominate is a jurisprudential edifice lacking a first-principles foundation, and it has added significant confusion to an already unpredictable area of the law. That "assumption" also "threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody." *Miller*, 515 U.S. at 912. The Court should use this case to make clear that attempting to comply with a statute, even a statute as important as the VRA, cannot be a compelling justification to engage in racial gerrymandering prohibited by the Fourteenth Amendment.

In the alternative, if the Court does not revisit the "assumption" that a State's attempted compliance with the VRA can justify an Equal Protection violation, the Court should summarily affirm.

The three-judge court faithfully applied decisions from this Court holding that, when implementing the "assumption," courts need not undertake the same full-fledged analysis that would be necessary to strike down a state's election map under Section 2 of the VRA. Instead, those cases apply a "strong basis" (or "good reasons" or "breathing room") standard that is satisfied when "a State has good reason to think that all the '*Gingles* preconditions' are met." *Cooper*, 581 U.S. at 293, 302. "The standard does not require the State to show that its action was 'actually necessary' to avoid a statutory violation." *Bethune-Hill*, 580 U.S. 194 (quoting *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015)). And here, the district court did not err—let alone clearly err—in its finding that the State would have had "good reasons and strong evidence to believe the [challenged] subdistricts were required by the VRA." J.S.App.A27. Nor did Appellants proffer any evidence below creating a genuine dispute of material fact that would have made summary judgment improper.

ARGUMENT

I. Attempting to Comply with the Voting Rights Act Cannot Be a Compelling Interest Justifying Racial Discrimination in Violation of the Fourteenth Amendment

Since *Marbury* and before, our system of government has operated under a basic structural premise "essential to all written constitutions": "a law repugnant to the constitution is void." *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 180 (1803). Where the application of a statute conflicts with the Constitution, the "act must of course, in that instance, stand as abrogated and without any effect." *Bayard v.*

Singleton, 1 N.C. 5, 3 (1787). The contrary conclusion—that "an act of the legislature, repugnant to the constitution, . . . though it be not law, does . . . constitute a rule as operative as if it was a law"—has long been recognized as "an absurdity too gross to be insisted on." *Marbury*, 1 Cranch (5. U.S.) at 176.

Stated in more modern terms: "[I]f complying with a federal statute would require a State to engage in unconstitutional racial discrimination, the proper conclusion is not that the statute excuses the State's discrimination, but that the statute is invalid." *Milligan*, 599 U.S. at 79 (Thomas, J., dissenting).

Yet for nearly three decades, this Court has entertained an "assumption" that relies upon that very absurdity: the idea that a state's effort to comply with the VRA could somehow excuse racial gerrymandering in the drawing of election maps, which would otherwise violate the Constitution.

The Court has been clear that drawing election maps in a way that "explicitly distinguish[es] between individuals on racial grounds fall[s] within the core . . . prohibition" of the Fourteenth Amendment's Equal Protection Clause. *Shaw I*, 509 U.S. at 642. And the Court has also been clear that the constitutional dividing line is between a state being aware of racial considerations and a state being predominately motived by them; "[t]he former is permissible; the latter is usually not." *Milligan*, 599 U.S. at 30. But despite drawing a line that is clear (in concept, if not always in practice), the Court has blurred that line by repeatedly "assum[ing], without deciding," *Bethune-Hill,* 580 U.S. at 193, that a state could have a "compelling interest" to make the consideration of race predominate if it had "good reasons" to believe

doing so was necessary to comply with the VRA. *Cooper*, 581 U.S. at 285.

That assumption cannot be defended for the simple but fundamental reason that "[t]he Constitution is supreme over statutes, not vice versa." *Milligan*, 599 U.S. at 79 (Thomas, J., dissenting) (citing *Marbury*, 1 Cranch at 178).

Moreover, even if attempted compliance with a statute could be a "compelling interest" for violating the Equal Protection Clause, the "assumption" that the VRA authorizes states to predominately consider race when drawing election maps is neither congruent nor proportional to the requirements of the Fourteenth Amendment. To the contrary, redistricting based predominately on racial goals is "*radically inconsistent* with the [Reconstruction] Amendments' command that government treat citizens as individuals and their goal of a political system in which race no longer matters." *Milligan,* 599 U.S. at 82 (Thomas, J., dissenting) (cleaned up). Moreover, "all governmental use of race must have a logical end point." *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003). Yet, the Court's "assumption" appears premised on the idea that the states' "authority to conduct race-based redistricting" under the VRA "extend[s] indefinitely into the future." *Milligan*, 599 U.S. at 45 (Kavanaugh, J., concurring).

In short, attempted compliance with the VRA cannot justify violating the Equal Protection Clause when drawing an election map, and, even if it could, there would need to be a temporal limitation on the predominant consideration of race.

A. Attempting to Comply with a Statute Cannot Justify Violating the Constitution's Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment represents "a foundational principle": that "[t]he Constitution . . . 'should not permit any distinctions of law based on race or color.' " *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 202 (2023) ("*SFFA*") (quoting Supp. Brief for United States on Reargument in *Brown* v. *Board of Education*, O. T. 1953, No. 1 etc., p. 41). This mandate of racial nondiscrimination "is universal in its application," *id.* at 206 (cleaned up), and it bars any "effort to separate voters into different districts on the basis of race," *Shaw I*, 509 U.S. at 649. Under this Court's precedent, "[a]ny exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as 'strict scrutiny,' "—a test the state can meet only if it shows, first, that "the racial classification is used to further compelling governmental interests," and second, that its "use of race is 'narrowly tailored'—meaning 'necessary'—to achieve that interest." *SFFA*, 600 U.S. at 206–07 (cleaned up).

Outside of affirmative action in higher education, this Court has "identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute. The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot." *Id.* at 207 (citations omitted).

Yet while the Court has never affirmatively *held* that a state's attempted compliance with the VRA would constitute a compelling interest capable of justifying redistricting decisions made predominately based on race, it has repeatedly "assumed"—without deciding—that it could. *E.g., Wisconsin Legislature*, 595 U.S. at 401; *Cooper*, 581 U.S. at 292; *Bethune-Hill*, 580 U.S. at 193; *Shaw II*, 517 U.S. at 915. But "the slightest reflection on first principles should make clear" that assumption is untenable. *Milligan*, 599 U.S. at 79 (Thomas, J., dissenting).

That conclusion necessarily follows from the basic logic of our constitutional structure. "The Constitution is supreme over statutes, not vice versa. Therefore, if complying with a federal statute would require a State to engage in unconstitutional racial discrimination, the proper conclusion is not that the statute excuses the State's discrimination, but that the statute is invalid." *Id.* at 79 (Thomas, J., dissenting) (citation omitted).

The constitutional prohibition on race discrimination applies at every level. Congress is barred by the Fifth Amendment from engaging in race discrimination. The States are barred from engaging in such conduct by the Fourteenth Amendment. And "Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation." *Saenz v. Roe*, 526 U.S. 489, 508 (1999).

Thus, when *Califano v. Westcott* struck down Massachusetts's denial of unemployment benefits to families of unemployed mothers as unconstitutional sex-based discrimination, it did not find that

discrimination justified because the State was attempting to comply with the federal Aid to Families with Defendant Children statute, which mandated sex-based denial of benefits. 443 U.S. 76, 78–79 (1979). Instead, it found *the federal statute itself* unconstitutional. *Id.* at 89.

Similarly, in a series of cases dealing with residency requirements for state-administered federal grant programs, the Court "ha[s] consistently held that Congress may not authorize the States to violate the Fourteenth Amendment." *Saenz*, 526 U.S. at 507. In *Saenz*, it struck down California's one-year residency requirement as contrary to the right to travel, and it rejected the state's defense relying on the "1996 amendment to the Social Security Act" by explaining that "neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment." *Id.* at 507, 508 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732–733 (1982)). Likewise, in *Shapiro v. Thompson*, the Court held that various state residency requirements were unconstitutional even if "Congress expressly approved the imposition of the requirement," because such a "provision . . . would be unconstitutional." 394 U.S. 618, 638, 641 (1969), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974). And in *Graham v. Richardson*, the Court held that state denials of various federally-funded welfare benefits to certain immigrants violated the Equal Protection Clause, rejecting the argument that the denial was "authorized by federal law," because "Congress does not have the power to authorize the individual States

to violate the Equal Protection Clause." 403 U.S. 365, 380, 382 (1971).

To be sure, the Reconstruction Amendments altered our constitutional order in important respects: they decreed an end to "all official state sources of invidious racial discrimination," *Loving v. Virginia*, 388 U.S. 1, 10 (1967), they "expand[ed] federal power at the expense of state autonomy," *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996), and they "enlarged" Congress's ability to exercise "remedial powers to effectuate the constitutional prohibition against racial discrimination," *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966). But they did not change the fundamental premise of our constitutional system: that "[t]he Constitution is supreme over statutes, not vice versa." *Milligan*, 599 U.S. at 79 (Thomas, J., dissenting).

It ineluctably follows from that foundational principle that a state's attempt to comply with the VRA—an important statute, but a statute nonetheless—cannot provide a "compelling interest" capable of excusing what would otherwise amount to unconstitutional race discrimination.

If complying with Section 2 of the VRA authorizes the states to predominately consider race when drawing election maps, and if predominately considering race violates the Equal Protection Clause, then the necessary conclusion is that such an application of Section 2 is unconstitutional under both the Fifth Amendment's Equal Protection component and the Fourteenth Amendment's "implicit[ ] prohibit[ion]" of congressional "legislation that purports to validate [a state's Fourteenth Amendment] violation." *Saenz*, 526 U.S. at 508. To

avoid construing Section 2 of the VRA as unconstitutional, the Court should clarify that it does not authorize states to predominantly consider race during the redistricting process. *Cf. Boumediene v. Bush*, 553 U.S. 723, 787 (2008) ("[W]e are obligated to construe the statute to avoid constitutional problems if it is fairly possible to do so.") (cleaned up).

Moreover, rejecting the "assumption" would not place States "in the impossible position of having to choose between compliance with [the VRA] and compliance with the Equal Protection Clause." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 518 (2006) ("*LULAC*") (Scalia, J., concurring in part and dissenting in part). Under our constitutional structure, that choice is not impossible, it is easy: "a legislative act contrary to the constitution is not law," *Marbury*, 1 Cranch (5 U.S.) at 177, and so a state faced with the choice can only choose "compliance with the Equal Protection Clause," *LULAC*, 548 U.S. at 518 (Scalia, J., concurring in part and dissenting in part).

B. Even if Attempting to Comply with a Statute Could Justify Violating the Equal Protection Clause, Sorting Voters Predominately Based on Race Is Neither Congruent nor Proportional to the Fourteenth Amendment.

Even if it were possible for attempted compliance with a federal statute to justify state conduct that would otherwise violate the Constitution, applying Section 2 of the VRA to authorize or require the sorting of voters based predominately on race could only possibly be defended "under Congress' power to enact reasonably prophylactic legislation [under the Reconstruction Amendments] to deter constitutional

harm." *Milligan*, 599 U.S. at 80 (Thomas, J., dissenting) (cleaned up). It cannot be so defended.

"Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997). But Congress's enforcement power under the Reconstruction Amendments "is not unlimited." *Id.* Congress has no "power to decree the substance" of the underlying constitutional amendments via statute. *Id.* at 519; *see also Katzenbach*, 383 U.S. at 326 (Congress cannot use its enforcement power to "attack[ ] evils not comprehended by the Fifteenth Amendment"). And "[w]hile preventive rules are sometimes appropriate remedial measures," there "must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520, 530. If Section 2 of the VRA is applied to authorize or require States to draw district lines based predominately on considerations of race, it would not be "congruent and proportional to any provisions of the Reconstruction Amendments." *Milligan*, 599 U.S. at 81 (Thomas, J., dissenting).

Reading Section 2 of the VRA as authorizing or requiring states to draw district lines based predominately on the races of voters living therein is fundamentally at odds with the principles codified by the Reconstruction Amendments. "Under the Equal Protection Clause, districting maps that sort voters on the basis of race are by their very nature odious." *Wisconsin Legislature*, 595 U.S. at 401. The beating heart of the Reconstruction Amendments is that "[t]he

Constitution . . . should not permit any distinctions of law based on race or color," *SFFA*, 600 U.S. at 202 (cleaned up), and the "sordid business" of "divvying us up by race" must come to a close, *LULAC*, 548 U.S. at 511 (Roberts, C.J., concurring in part and dissenting in part). Reading Section 2 of the VRA to authorize States to segregate voters based predominately on their race is thus "not merely *foreign to* the Amendments. Rather, [it is] *radically inconsistent* with the Amendments' command that government treat citizens as individuals and their goal of a political system in which race no longer matters." *Milligan*, 599 U.S. at 82 (Thomas, J., dissenting).

Moreover, even in the limited situations where this Court has permitted race-based state actions, it has insisted that "at some point . . . they must end." *SFFA*, 600 U.S. at 213. Race-based distinctions designed to remedy specific past violations of equal treatment, for instance, must be accompanied by "findings [that] serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989). Likewise, while the Court in *Grutter* allowed the use of race in college admissions to continue temporarily, it insisted that "all governmental use of race must have a logical end point." 539 U.S. at 342. And in *SFFA,* the Court held that race-based college admissions were no longer constitutional, given that no end was in sight. 600 U.S. at 230–31. "The requirement of a time limit 'reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands.

Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle." *Id.* at 313–14 (Kavanaugh, J., concurring) (quoting *Grutter*, 539 U.S. at 342).

Whether or not the VRA could justify the sorting of voters based predominately on considerations of race in the "exceptional conditions" of 1965, *Katzenbach*, 383 U.S. at 309, or when Section 2 was amended in 1982, the continued use of such an extraordinary measure "must be justified by current needs," *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 536 (2013); *see also SFFA*, 600 U.S. at 260 (Thomas, J., concurring) (consideration of race to remedy past discrimination must have a "close remedial fit" that is "concrete and traceable to the *de jure* segregated system"). And given the requirement that "all governmental use of race must have a logical end point," *Grutter*, 539 U.S. at 342, any "authority to conduct race-based redistricting cannot extend indefinitely into the future," *Milligan*, 599 U.S. at 45 (Kavanaugh, J., concurring).

Yet, this Court's "assumption" that a state's attempted compliance with Section 2 of the VRA could justify making race the predominate consideration in the design of election maps has no logical end point, nor any other "salutary limiting principles; it is unbounded in time, place, and subject matter." *Id.* at 88 (Thomas, J., dissenting). That temporally unbounded mandate for states to engage in race discrimination "offend[s] th[e] fundamental equal protection principle" that "racial classifications, even when otherwise permissible, must be a temporary matter, and must be limited in time." *SFFA*, 600 U.S. at 313–14 (Kavanaugh, J., concurring). The lack of an

endpoint for state action that violates the Fourteenth Amendment's prohibition on racial discrimination means that this Court's "assumption" is therefore not "proportionate to ends legitimate." *City of Boerne*, 521 U.S. at 533.

Accordingly, even if a state's attempt to comply with a statute could be a "compelling interest" capable of justifying a state's violation of the Fourteenth Amendment, a state's belief that sorting voters based predominately on race is necessary under Section 2 of the VRA would still not justify such race discrimination, since applying Section 2 to require such conduct is not congruent and proportional to the purposes of the Reconstruction Amendments and is thus not "a constitutional reading and application of [the VRA]," *Miller*, 515 U.S. at 921.

C. This Court Should Vacate the District Court's Decision and Remand for Further Proceedings.

For the reasons above, the State cannot, as a matter of first principles, defend one of the underlying bases for the three-judge district court's decision to grant summary judgment to the State. The "assumption" that attempting to comply with Section 2 of the VRA could provide a "compelling interest" capable of justifying otherwise unconstitutional race discrimination lacks constitutional grounding and should be revisited by this Court. *Cf.* J.S.App.A27.

The State therefore asks this Court to vacate the decision in its favor. In doing so, the State asks the Court to make clear that *predominately* considering race in the creation of an election map violates the Fourteenth Amendment, and that the "assumption"

that a state may have a "compelling interest" for making race predominate when it has "good reasons" to believe doing so is necessary to comply with the VRA cannot withstand scrutiny. *Cf., e.g., Cooper*, 581 U.S. at 292. After rejecting that "assumption" and clarifying the governing law, the Court should remand for further proceedings, where the State intends to prove race was not the predominant factor in the creation of the challenged subdistricts.

Given the clarity of the constitutional principles set forth above, this Court could summarily reverse and vacate the three-judge district court's decision through a brief opinion rejecting the "assumption" that attempted compliance with the VRA can justify predominantly considering race in violation of the Equal Protection Clause, and providing any necessary guidance to the district court concerning how to proceed on remand. *See* Supreme Court Rule 18.12. Alternatively, if the Court concludes that examining the basis for that "assumption" requires further consideration, it could note probable jurisdiction and set the case for briefing and argument limited to that issue. If no other party is prepared to defend the assumption that a state's attempted compliance with the VRA could justify otherwise unconstitutional racial gerrymandering, the Court could appoint an *amicus curiae* to defend that position.

II. If the Court Does Not Revisit the "Assumption" that Attempting to Comply with the VRA Could Be a Compelling Justification for Making Race Predominate in Districting, It Should Summarily Affirm.

As addressed *supra*, the Court should reconsider and reject its "assumption" that a state's attempt to

comply with Section 2 of the VRA could be a compelling reason to make race predominate in redistricting. It should either summarily reverse on that point or grant merits briefing limited to that point. However, if the Court does not reconsider that "assumption," the Court should summarily affirm.

Faithfully following precedent from this Court instructing how to implement the "assumption," the three-judge court correctly applied the "strong basis" (or "good reasons" or "breathing room") standard articulated by this Court to find that the State would have had good reasons to believe the creation of challenged subdistricts was required by Section 2 of the VRA. The district court's findings in that regard were well supported in the record and were not erroneous, let alone clearly erroneous. *See Cooper*, 581 U.S. at 285 ("A district court's factual findings made in the course of this two-step inquiry are reviewed only for clear error."). And Appellants did not proffer any evidence capable of creating a genuine dispute of fact that would have precluded summary judgment.

Consequently, if the Court does not revisit the underlying "assumption" addressed *supra*, the three-judge court correctly granted summary judgment to the State based on the undisputed record evidence and summary affirmance would be warranted.

A. The District Court Correctly Applied the "Good Reasons" Standard.

When States predominately consider race during redistricting in an attempt to comply with the VRA (assuming the Court does not revisit the assumption discussed above), they are left in a precarious position—"'trapped between the competing hazards of

liability' under the Voting Rights Act and the Equal Protection Clause." *Bethune-Hill*, 580 U.S. at 196 (quoting *Bush v. Vera*, 517 U.S. 952, 977 (1996)).

Recognizing that states need "breathing room" to navigate the tensions of the VRA and the Equal Protection Clause in this context, this Court has held that "[w]hen a State justifies the predominant use of race in redistricting on the basis of the need to comply with the Voting Rights Act," the State is not required "to show that its action was 'actually . . . necessary' to avoid a statutory violation, so that, but for its use of race, the State would have lost in court." *Id*. at 194–96 (quoting *Alabama Legislative Black Caucus*, 575 U.S. at 278).

Instead, the Court applies a lower standard, under which "the requisite strong basis in evidence exists when the legislature has '*good reasons* to believe' it must use race in order to satisfy the Voting Rights Act." *Id*. at 194 (quoting *Alabama Legislative Black Caucus*, 575 U.S. at 278). "Th[e] 'strong basis' (or 'good reasons') standard gives States 'breathing room' to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed." *Cooper*, 581 U.S. at 293 (quoting *Bethune-Hill*, 580 U.S. at 194).

Applying that standard, the district court in this case thoroughly reviewed the relevant legislative history and concluded the State performed "a contemplative and thorough pre-enactment analysis as to whether the subdistricts were required by the VRA." J.S.App.A26. That included " 'carefully examin[ing]' potential Section 2 claims" and "reviewing testimony and presentations as to the *Gingles* preconditions." *Id*. And based upon that

analysis, the three-judge court found that the State would have had "good reasons to believe the subdistricts were *required* by the VRA." *Id.* at A.25 (emphasis added). Under this Court's precedent, the court was not required to undertake an exhaustive analysis to find that the State would in fact have been subject to Section 2 liability if it did not enact the challenged map.

On direct appeal to this Court, Appellants argue that the three-judge court's analysis was "anemic" and failed to conduct a "searching inquiry or functional analysis" to establish the State would have been liable under Section 2 of the VRA if it did not enact the challenged map. *See* J.S.11–18.

But this case does not involve a Section 2 *challenge* to the State's election map. Rather, this case involves a Section 2 *defense* of the State's election map, where the question is whether the State would have had "good reasons" to believe that complying with the VRA required enacting the challenged map. The demands of Section 2 are thus being used to *defend* a state's map, rather than to *challenge* it. In this context, requiring the State to affirmatively *establish* that Section 2 required enacting the challenged map, as Appellants suggest, would *nullify* the "breathing room" expressly provided by this Court's precedents. *Cooper*, 581 U.S. at 293. This Court's case law adopts a "good reasons" standard; it does not require states to establish that "the VRA *actually requires*" the election map it adopts. *Contra* J.S.13 (emphasis added).

Appellants and *Amici* States similarly argue that the three-judge court erred because it focused its "good reasons" analysis on the *Gingles* preconditions

without additionally undertaking an exhaustive analysis of the totality of circumstances and whether Native Americans have an unequal opportunity to participate in the political process. *See* J.S.22–27; Brief of *Amici Curiae* Alabama *et al.* at 3–16 (Apr. 5, 2024) ("States' Amicus Br."). The State agrees that those additional Section 2 factors beyond the *Gingles* preconditions—totality of the circumstances and unequal opportunity to participate—would indeed be necessary elements if this case involved a *challenge* to a state's redistricting plan under Section 2 of the VRA. But again, this case does not involve such a challenge: it involves a State's Section 2 *defense* of its election map against a challenge under the Equal Protection Clause.

Under this Court's precedent, in cases where attempted compliance with Section 2 is used as a *defense* of the state's map, courts need not undertake the type of full-fledged Section 2 analysis that would be necessary if the statute was being used to challenge the state's map. Instead, this Court has directed lower courts assessing such a defense to focus on the *Gingles* factors. As the Court described the analysis in *Cooper*, "[i]f a State has good reason to think that all the '*Gingles* preconditions' are met, *then so too it has good reason to believe that § 2 requires drawing a majority-minority district*." 581 U.S. 302 (citing *Vera*, 517 U.S. at 978) (emphasis added). The Court is of course free to provide further guidance concerning the role of the unequal opportunity to participate inquiry in affirmative Section 2 claims in an appropriate case, *see* States' Amicus Br. at 14–16, 20–24, but the district court here cannot be faulted for adhering to this

Court's direction that such an inquiry is not necessary when assessing a state's Section 2 *defense*.

And if the Court's "assumption" that attempted compliance with Section 2 can provide a compelling interest to predominantly consider race remains intact, it makes sense to set a lower *defensive* bar for determining whether a state had "good reason" to believe its actions were necessary to comply with the VRA. As implementing that "assumption" makes it necessary to give the States "'breathing room' to make reasonable mistakes" and adopt "compliance measures [that] may prove, in perfect hindsight, not to have been needed." *Wisconsin Legislature*, 595 U.S. at 404 (quoting *Cooper*, 581 U.S. at 293).

In short, the three-judge district court faithfully followed this Court's "good reasons" standard for implementing the "assumption" that attempted compliance with the VRA can be a defense to unconstitutional racial gerrymandering. If that "assumption" is not revisited, Appellants' challenge on this basis should be summarily rejected.

B. The District Court's Findings Implementing the "Good Reasons" Standard Are Not Clearly Erroneous

A substantial part of Appellants' argument on direct appeal to this Court challenges the three-judge court's findings under the "Good Reasons" standard. *See* J.S.18–22, 29–30. The Court should also summarily reject these arguments.

A three-judge district court's assessment of a districting plan under the "good reasons" standard "warrants significant deference on appeal to this Court." *Cooper*, 581 U.S. at 293. And the three-judge

court's findings "are subject to review only for clear error." *Id*. (citing Fed. R. Civ. Proc. 52(a)(6); *Easley v. Cromartie,* 532 U.S. 234, 242 (2001)). "Under that standard, we may not reverse just because we 'would have decided the [matter] differently.' A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern." *Cooper*, 581 U.S. 285 at 293 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573–74 (1985)).

The three-judge court cited extensive witness testimony, statements of legislators, and a legislative committee report in support of its finding that the State would have had good reasons and a strong basis to believe the challenged subdistricts were required by the VRA. J.S.App.A21-27. And the State's pre-enactment analysis was further bolstered by the experts disclosed in this case. The State disclosed an expert who performed a functionality analysis of Districts 4 and 9 and concluded that the *Gingles* preconditions were met, potentially subjecting the State to Section 2 claims if the challenged subdistricts were not created. D. Ct. Doc. 100-10 (02/28/23). The Intervenors also disclosed an expert who likewise opined that the *Gingles* preconditions would have been met had the State not created the challenged subdistrict in District 4. D. Ct. Doc. 106-3 (02/28/23). The expert reports submitted by the State and Intervenors in this case were entirely unrebutted, as Appellants did not disclose any experts of their own and chose not to take any expert depositions.

The district court's finding was consequently "'plausible' in light of the full record." *Cooper*, 581 U.S. at 293. And the fact that one of the districts containing a challenged subdistrict was subsequently

invalidated by the decision of a single judge, *see Turtle Mountain Band of Chippewa Indians v. Howe*, 2023 WL 8004576 (D. N.D. Nov. 17, 2023), *appeal filed* (8th Cir. No. 23-3655), has no bearing on the question presented here, *contra* J.S.22–23. Whether the State could have been liable under Section 2 for not subdividing one of its as-enacted districts is a separate question from whether the State could be liable for not drawing that as-enacted district with an entirely different shape to begin with. The answer to one question has little to do with the other.

In short, after reviewing the record evidence submitted in this case, the three-judge court more than plausibly found that the State "had good reasons to believe the [challenged] subdistricts were required by the VRA." J.S.App.A25. That Appellants would have attached different legal significance to certain parts of the record and arrived at different conclusions—*see* J.S.18–22, 28–30—does not make the court's findings implausible or clearly erroneous. *See Cooper*, 581 U.S. 285 at 293.

C. Summary Judgment Was Appropriate.

Finally, Appellants argue that the three-judge court improperly resolved this case at summary judgment "on the thin record before it," rather than after a bench trial. *See* J.S.28–29, 30–35. Appellants assert that they were "denied . . . the opportunity to cross-examine witnesses, probe their testimony, and further develop evidence for the finder of fact." *Id.* at 28. This argument should also be summarily rejected.

The relevant facts in this case were undisputed; indeed, Appellants *themselves* moved (unsuccessfully) for summary judgment based on the same record,

apparently also believing that the relevant record facts were not in dispute. D. Ct. Doc. 99 (02/28/23).

As the three-judge court explained, its "good reason" inquiry examined the "undisputed legislative record to assess the State's pre-enactment analysis." J.S.App.A21. The entire legislative record of the State's 2021 redistricting process (including all public legislative documents and transcripts of all legislative hearings) was produced by the State in discovery and thus was available to all parties during the summary-judgment briefing. Much of that legislative record was submitted to the court through the summary judgment cross-motions. D. Ct. Docs. 100-1 through 100-10 (02/28/23); D. Ct. Docs. 103-1 through 106-4 (02/28/23); D. Ct. Docs. 109-1 through 109-23 (02/28/23). Appellants did not dispute any of those materials, nor did they introduce any factual evidence in this case outside of the legislative record. By the close of discovery, Appellants had noticed no depositions, disclosed no expert witnesses, and produced no affidavits from fact witnesses in relation to the summary judgment motions. Appellants' belief that the three-judge court should have attributed different legal importance to particular facts in the undisputed record, *see* J.S.31–33, does not mean that summary judgment was inappropriate.

In short, the record was undisputed in this case, as were the opinions of the State's and Intervenors' experts. That undisputed record evidence supports the district court's conclusion that the State would have had good reasons to believe Section 2 required creation of the challenged subdistricts. As Appellants themselves stated when filing their own motion urging that the same undisputed facts be given

different legal effect, "[s]ummary judgment is appropriate." D. Ct. Doc. 99, 32 (02/28/23).

CONCLUSION

For the foregoing reasons, the Court should vacate the three-judge district court's decision, make clear that a state's attempted compliance with the VRA cannot excuse otherwise unconstitutional race discrimination, and remand for further proceedings.

In the alternative, if the Court declines to reconsider its assumption that a state's attempted compliance with the VRA could provide a compelling justification for a state using race as the predominate consideration in drawing election districts, it should summarily affirm.

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Respectfully submitted,

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