No. 25A62

In the Supreme Court of the United States

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, ET AL.,
Applicants,

v.

MICHAEL HOWE, SECRETARY OF STATE OF NORTH DAKOTA,
Respondent.

To the Honorable Brett Kavanaugh, Associate Justice of the United States Supreme Court and Circuit Justice for the Eighth Circuit

On Emergency Application to Stay Pending Appeal Injunction Entered by the United States District Court for the District of Idaho

BRIEF OF ALABAMA AND 14 OTHER STATES AS *AMICI CURIAE* OPPOSING EMERGENCY APPLICATION TO STAY MANDATE

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INTEREST OF *AMICI CURIAE*

The States of Alabama, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, South Carolina, South Dakota, Texas, and West Virginia respectfully submit this brief as *amici curiae* in opposition to private plaintiffs' emergency application.

"Redistricting is primarily the duty and responsibility of the State, and federal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Abbott v. Perez*, 585 U.S. 579, 603 (2018) (cleaned up). When Congress created "stringent new remedies" through the Voting Rights Act, *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 315 (1966), it gave to the Attorney General alone the authority to enforce §2 so as not to "subject to judicial oversight" the shape of every redistricting map "at the behest of a single citizen," *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 645 (1979) (Powell, J., concurring). The contrary approach has led to increasingly inevitable, seemingly interminable, and often inherently conflicting claims against districting plans. While "[r]edistricting is never easy," *Abbott*, 585 U.S. at 585, litigation-free redistricting shouldn't be impossible.

The States also have an interest in opposing Plaintiffs' equitable arguments. They dismiss (at 36) the harm a stay would inflict on North Dakota as "merely … a delay in the adoption of the State's preferred legislative map if a stay is granted." But North Dakota's law is not just its "preferred" map. It is the only map with democratic legitimacy. And plaintiffs have not even tried to prove to this Court that the district court's unreviewed §2 merits determination was right. In fact, the decision is fundamentally flawed. Equity favors North Dakota law governing North Dakota elections.

SUMMARY OF ARGUMENT

While many emergency applications ask this Court "to resolve significant and difficult questions of law on a highly expedited basis and without full briefing," *Trump v. CASA, Inc.*, No. 24A884, 2025 WL 1773631, at *12 (U.S. June 27, 2025), Plaintiffs' request stands out. Plaintiffs not only ask this Court to determine whether Congress empowered tens of millions of private attorneys general to insist on new districts anywhere they see "dilution." They ask this Court to enjoin a State from using its democratically enacted districts, even though the lawfulness of those districts was not reviewed by the Eighth Circuit and was not presented to this Court. In short, they ask this Court to use its equitable powers to impose "a form of irreparable injury" on North Dakota. *Id.* at *15. There are several reasons to reject that extraordinary request.

First, federal law is typically enforced by the Executive Branch, and it is the rare statute that creates individual rights for private plaintiffs to enforce. Section 2 of the Voting Rights Act is not one of those laws. The VRA was enacted not to create new statutory rights—the Fifteenth Amendment already enshrined the right to vote—but instead to create "new remedies" to enforce preexisting constitutional rights. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). Like other federal laws that created new civil or criminal enforcement powers for the Attorney General to protect preexisting rights, §2 mentions "rights" only in service of a general proscription on discriminatory conduct. And §12 shows how the VRA enforces these preexisting rights—by giving the Attorney General authority to bring criminal and civil actions. In light of the text, structure, and history of the VRA, §2 did not create

"new individual rights" "in clear and unambiguous terms." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286, 290 (2002).

Federalism concerns bolster this conclusion. Under Plaintiffs' reading, a single voter in any State can move millions of her fellow citizens from one district to another, based on their race. Meanwhile, even when it is "evident" that a State "carefully examine[d] the VRA and believed" it had complied with §2's mandates, App.84, just one voter can scrap it all (even if she personally ends up with no greater chance to elect her preferred candidate). Thus, while "*amici* supporting" the private plaintiffs in *Allen v. Milligan* told this Court that "§ 2 litigation in recent years has rarely been successful," 599 U.S. 1, 29 (2023), that is obviously no longer the case. Instead, the post-2020 redistricting cycle has seen at least *twelve* state legislative or congressional plans enjoined, *see infra* n.3, with more challenges still pending. Congress did not clearly intend to hand millions of plaintiffs these weapons of political warfare.

Equities also favor denying the application. The Court would impose irreparable harm on North Dakota by effectively enjoining its law. And North Dakota's right to use its lawfully enacted plan certainly should not be denied based on an unreviewed finding of §2 "vote dilution." Moreover, Plaintiffs never prove that the district court's ruling was correct on the merits, which means they can't show that it would be inequitable to use North Dakota's law. Nor could they make that showing because the district court held that race-predominate maps could prove §2 liability when *Allen v. Milligan* made abundantly clear that they cannot. It would be plainly inequitable for this Court to force North Dakota to use Plaintiffs' race-predominant map in 2026.

ARGUMENT

I. Section 2 Does Not Unambiguously Confer New Individual Rights.

Congress has not expressly authorized private persons to sue under §2 of the Voting Rights Act of 1965, as it did one year earlier in the Civil Rights Act of 1964, 42 U.S.C. §2000a-3(a). And the question whether §2 contains an implied private right of action has never been presented to this Court. *See Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 690 (2021) (Gorsuch, J., concurring). "Lower courts have treated this as an open question." *Id.* And courts are divided on the answer. Plaintiffs now want that question decided in this emergency posture solely to thwart the use of North Dakota's democratically enacted redistricting plan. While Plaintiffs (at 24) are correct that the private enforceability of §2 is an "exceptionally important issue," the Court should deny their stay application because they are unlikely to prevail on the merits.

1. "[F]ederal statutes do not confer 'rights' enforceable under § 1983 'as a matter of course.'" *Medina v. Planned Parenthood S. Atl.*, 145 S. Ct. 2219, 2227 (2025) (quoting *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 183 (2023)). "The Constitution charges the Executive Branch with enforcing federal law." *Id.* at 2229. Congress has, at times, "allow[ed] private parties to enforce the law through civil litigation," including when it enacted §1983. *Id.* But for much of its history, §1983 was relied on only to enforce constitutional rights; "purely statutory claims remained virtually unrecognized." *Maine v. Thiboutot*, 448 U.S. 1, 28 (1980) (Powell, J., dissenting). It was not until 1980 that this Court recognized that "§ 1983 encompasses claims based on purely statutory violations of federal law." *Id.* at 3. Since then, the "Court

has emphasized" that "statutes create individual rights only in 'atypical case[s].'" *Medina*, 145 S. Ct. at 2229 (quoting *Talevski*, 599 U.S. at 183).

"To prove that a statute secures an enforceable right, privilege, or immunity, and does not just provide a benefit or protect an interest," plaintiffs "must" meet a "'stringent' and 'demanding' test." *Id.* They must show that the statute's text "'clearly and unambiguously' gives them individual federal rights." *Id.* at 2234 (quoting *Gonzaga*, 536 U.S. at 290). And the statute must "display 'an unmistakable focus' on individuals like the plaintiff." *Id.* at 2229 (quoting *Gonzaga*, 536 U.S. at 284). In sum, the inquiry requires courts to look to the "text and structure of a statute" to determine whether Congress intended to create "an *enforceable* right." *Gonzaga*, 536 U.S. at 286 (emphasis added). Ultimately, "very few statutes are held to confer rights enforceable under § 1983." *Johnson v. Hous. Auth. of Jefferson Par.*, 442 F.3d 356, 360 (5th Cir. 2006).

2. Section 2 is not one of those statutes for several related reasons. First, unless a federal statute creates "substantive private rights," *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001), it does not secure "rights enforceable under § 1983." *Gonzaga*, 536 U.S. at 285. But Congress typically does not create substantive rights when enforcing the provisions of the Fourteenth and Fifteenth Amendments. *City of Boerne v. Flores*, 521 U.S. 507, 527 (1997) ("Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case

law.").[1] The VRA is an exercise of Congress's power to enforce the "constitutional prohibition against racial discrimination in voting" guaranteed by the Fifteenth Amendment. *Katzenbach*, 383 U.S. at 308. But the history of the VRA supports the position that §2 created only "new remedies," not new privately enforceable rights. *Id.* at 308, 315, 329-31.[2] As the Eighth Circuit recognized, one of those new remedies was "§ 2 paired with § 12." App.15. "[T]ogether, the provisions granted the Attorney General the power to bring civil suits for injunctive and other relief against State and local officials who violated § 2." App.15; *see also Katzenbach*, 383 U.S. at 316. Section 12 also gave the Attorney General the power to impose criminal penalties—fines of up to $5,000 and prison terms of up to five years—for violations of §2. *Katzenbach*, 383 U.S. at 350.

Section 2 thus stands alongside other statutes enacted to enforce preexisting rights. The Violent Crime Control and Law Enforcement Act of 1994, for example, declared it "unlawful for any governmental authority" or agent "to engage in a pattern or practice of conduct by law enforcement officers … that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the

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[1] *See also* Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1770 (2006) (recognizing that "Congress may not use its Section 5 powers to expand the scope of rights or to create new rights"); Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 189 (1997) (Congress "cannot create new rights" when enforcing the Fourteenth Amendment.).

[2] "Constitutional remedies, unlike statutory remedies, cannot be authorized as a derivative power based on the legislature's power over the substantive law because Congress has no power over the substance of constitutional rights." Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 701 (2001); *see also N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-84 (1982) (plurality) (contrasting Congress's broad power to define and prescribe remedies for statutory rights with Congress's limited power to enforce constitutional rights, *i.e.*, rights "not of congressional creation").

United States." 34 U.S.C. §12601(a). That provision references "rights," but the statute as a whole makes clear that it creates no new or enforceable right. Critically, the following subsection empowers the Attorney General to bring civil actions when he has "has reasonable cause to believe that a violation of" §12601(a) has occurred. §12601(b). Numerous courts interpreting this statute thus have concluded that it "confers no such express right upon a benefitted class. Instead, the statute only prohibits certain governmental conduct without conferring an unambiguous private right of action to a particular class." *Malecki v. Christopher*, No. 4:07-CV-1829, 2008 WL 11497819, at *3 n.6 (M.D. Pa. May 27, 2008); *see also Gumber v. Fagundes*, 2021 WL 4311904, at *5 (N.D. Cal. July 3, 2021). Despite the statute's clear reference to government actors "depriv[ing] persons of rights," "the statute only provides for civil actions brought by the United States Attorney General," which shows it did not intend to create new, privately enforceable rights. *Gustafson v. City of W. Richland*, 559 F. App'x 644, 645 (9th Cir. 2014).

Similarly, "[c]riminal statutes, which express prohibitions rather than personal entitlements and specify a particular remedy other than civil litigation, are … poor candidates for the imputation of private rights of action." *Chapa v. Adams*, 168 F.3d 1036, 1038 (7th Cir. 1999) (Easterbrook, J.). And that principle holds true even for federal criminal statutes that "explicitly refer[] to a citizen's 'right.'" Stay Appl. 27. For example, 18 U.S.C. §241 addresses when "two or more persons conspire to injure, oppress, threaten, or intimidate any person … in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United

States," and 18 U.S.C. §242 likewise addresses the "deprivation of any rights … secured or protected by the Constitution or laws of the United States." But "[t]hese statutes do not give rise to a civil action for damages." *Cok v. Cosentino*, 876 F.2d 1, 2 (1st Cir. 1989). "Because the statutes confer no right" to private plaintiffs, they "cannot base a § 1983 claim on defendants allegedly violating either." *Andrew Corpus v. Depass*, No. 218-CV-665-FTM-29NPM, 2020 WL 4260980, at *2 (M.D. Fla. July 24, 2020); *cf. California v. Sierra Club*, 451 U.S. 287, 294 (1981) (rejecting the view that "a victim of any crime would be deemed an especial beneficiary of the criminal statute's proscription").

Thus, although §2(a) references "a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," there is no presumption of §1983 enforceability just because a statute "speaks in terms of 'rights.'" *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 18-20 (1981) (holding that the "bill of rights" provision of the Developmentally Disabled Assistance and Bill of Rights Act was not enforceable under §1983). Rather, courts must take "pains to analyze the statutory provisions in detail, in light of the entire legislative enactment, to determine whether the language in question created enforceable rights, privileges, or immunities within the meaning of § 1983." *Suter v. Artist M*, 503 U.S. 347, 357 (1992) (internal quotation marks omitted).

And when the Eighth Circuit conducted that painstaking analysis, the court correctly found it "unclear whether § 2 creates an individual right." *Ark. NAACP v. Ark. State Legislature*, 86 F.4th 1204, 1209 (2023). The court first compared §2 to

Title VI, noticing some important dissimilarities. *Id.* at 1209-10. Section 601 of Title VI begins, "[n]o person … shall … be subjected to discrimination." 42 U.S.C. §2000d. The "unmistakable focus" is "on the benefited class," not the regulated party. *Gonzaga*, 536 U.S. 286. But §2 begins, "No voting qualification … shall be imposed … by any State." 52 U.S.C. §10301. The focus here, like in 34 U.S.C. §12601, is on the conduct prohibited and the party regulated. "It is a 'general proscription' of 'discriminatory conduct, not a grant of a right 'to any identifiable class.'" *Ark. NAACP*, 86 F.4th at 1209 (quoting *Sierra Club*, 451 U.S. at 294, and *Gonzaga*, 536 U.S. at 284). While the statute also mentions "any citizen," 52 U.S.C. §10301(a), at a minimum, Congress did not "speak[] with a clear voice," *Medina*, 145 S. Ct. at 2233 (quoting *Gonzaga*, 536 U.S. at 280).

Section 2(b) makes things even less clear by focusing on racial groups rather than "individual rights." *Id.* at 2229. Consider the oddity that "a § 2 plaintiff" doesn't even have "the right to be placed in a majority-minority district once a violation of the statute is shown." *Shaw v. Hunt*, 517 U.S. 899, 917 n.9 (1996). That means that a plaintiff who proves her vote is being submerged because too many voters in her district vote Republican can receive the "remedy" of a court-drawn plan that places her in a district with *more* Republicans. Only "a case about group political interests, not individual legal rights," could allow for such a strange result. *Gill v. Whitford*, 585 U.S. 48, 72 (2018). Thus the "expressly group-based inquiry under the Voting Rights Act," Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1859 (1992),

and the group-based relief it provides are another reason why §2 did not "clearly and unambiguously … confer individual federal rights." *Medina*, 145 S. Ct. at 2234 (cleaned up).

Rather, Congress provided a different "federal review mechanism"—enforcement actions by the Attorney General—which is further evidence still that §2 created no "individually enforceable private rights." *Gonzaga*, 536 U.S. at 289-90. In *Gonzaga*, the Court held that the Family Educational Rights and Privacy Act's nondisclosure provisions created no rights enforceable under §1983. *Id.* at 290-91. The Court's conclusion was "buttressed by the mechanism that Congress chose to provide for enforcing those provisions. Congress expressly authorized the Secretary of Education to '*deal with violations*' of the Act …." *Id.* at 289.

The Court contrasted FERPA's authorization of federal enforcement with provisions in the Public Housing Act and the Medicaid Act that lacked a "federal review mechanism." *Id.* at 280, 290. In *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), the Court held that the rent-ceiling provision of the Public Housing Act was enforceable under §1983 in "significant" part because "the federal agency charged with administering the Public Housing Act had never provided a procedure by which tenants could complain to it about the alleged failures of state welfare agencies to abide by the Act's rent-ceiling provision." *Gonzaga*, 536 U.S. at 280 (internal quotation marks omitted and alterations adopted). And in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), the Court also held that a reimbursement provision of the Medicaid Act was privately enforceable in part because there was "no

sufficient administrative means of enforcing the requirement against States that failed to comply." *Gonzaga*, 536 U.S. at 280-81.

But here, like in FERPA, Congress expressly provided for federal enforcement of the VRA's provisions. Pursuant to his powers granted under §12 of the VRA, the Attorney General can and does enforce §2 against the States. *See* 52 U.S.C. §10308; *see also* Voting Section Litigation, *Cases Raising Claims Under Section 2 of the Voting Rights Act*, https://www.justice.gov/crt/voting-section-litigation#sec2cases (last visited July 17, 2025). "If the text and structure of § 2 and § 12 show anything, it is that Congress intended to place enforcement in the hands of the Attorney General, rather than private parties." *Ark. NAACP*, 86 F.4th at 1211.

3. "Basic federalism principles confirm" this conclusion. *Carey v. Throwe*, 957 F.3d 468, 483 (4th Cir. 2020). "To the extent [the *Gonzaga*] standard permits a gradation," courts should "apply its most exacting lens when inferring a private remedy [that] would upset the usual balance of state and federal power." *Id.* "Redistricting is primarily the duty and responsibility of the State, and federal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Abbott*, 585 U.S. at 603. To scrutinize §2 with anything less than the "most exacting lens," *Carey*, 957 F.3d at 483, would "subject to judicial oversight" every state redistricting map "at the behest of a single citizen," *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 645 (1979) (Powell, J., concurring). The text does not make unmistakably clear Congress's intent to "upset the usual constitutional balance of federal and state powers" in that way. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

The federalism harms of allowing any voter to shift hundreds of thousands of her fellow citizens from one district to another are now undeniable, particularly in light of the "considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim." *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring) (quoting *id.* at 883 (Roberts, C.J., dissenting)). Indeed, in this most recent redistricting cycle, vote-dilution jurisprudence has become increasingly "unclear and confusing," *id.*, with increasing instances of liability.

In *Allen v. Milligan*, "*amici* supporting the" plaintiffs assured this Court that recent §2 litigation "has rarely been successful," noting that since 2010, "'the *only* state legislative or congressional districts that were redrawn because of successful Section 2 challenges were a handful of state house districts near Milwaukee and Houston.'" 599 U.S. 1, 29 (2023) (quoting Br. for Chen et al. at 7-8). But the post-2010 redistricting cycle was the calm before the storm. For the post-2020 cycle, at least *twelve*[3] state legislative and congressional plans have been enjoined so far[4] under §2.[5]

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[3] *See Nairne v. Ardoin*, 715 F. Supp. 3d 808 (M.D. La. 2024) (Louisiana's 2022 House and Senate plans); *Robinson v. Ardoin*, 605 F. Supp. 3d 759 (M.D. La. 2022) (Louisiana's 2022 congressional plan); *Miss. NAACP v. State Bd. of Election Comm'rs*, 2024 WL 3275965 (S.D. Miss. July 2, 2024) (Mississippi's 2022 House and Senate plans); *Turtle Mtn. Band of* Chippewa *Indians v. Howe*, 2023 WL 8004576 (D.N.D. Nov. 17, 2023) (North Dakota's 2021 state legislative plan); *Soto Palmer v. Hobbs*, 686 F. Supp. 3d 1213 (W.D. Wash. 2023) (Washington's 2022 legislative plan); *Alpha Phi Alpha Fraternity v. Raffensperger*, 700 F. Supp. 3d 1136 (N.D. Ga. 2023) (Georgia's 2021 House, Senate, and congressional plans); *Singleton v. Allen*, No. 2:21-CV-1291-AMM, 2025 WL 1342947 (N.D. Ala. May 8, 2025), *appeal filed*, (Alabama's 2023 congressional plan); *Singleton v. Merrill*, 582 F. Supp. 3d 924 (N.D. Ala. 2022) (Alabama's 2021 congressional plan).

[4] *See, e.g.*, *Pierce v. N.C. State Bd. of Elections*, No. 4:23-cv-193 (E.D.N.C.) (pending trial verdict); *LULAC v. Abbott*, No. 3:21-cv-259 (W.D. Tex.) (pending trial verdict).

[5] The trend is not the product of States retrogressing following the end of §5 preclearance. To the contrary, during this cycle, "not only did minority representation in formerly covered states not decline in *absolute* terms, it also didn't drop in *relative* terms versus the benchmark of formerly uncovered states." Nicholas Stephanopoulos et. al., *Non-Retrogression Without Law*, 2023 U. CHI. LEGAL F. 267, 269-70 (2024).

And deputizing millions of §2 enforcers amplifies the "competing hazards of liability" States face in trying to comply with the colorblind Equal Protection Clause and §2's "demands [for] consideration of race." *Abbott v. Perez*, 585 U.S. 579, 587 (2018). States can even face competing challenges with regard to the *same* districting plan. In North Dakota, within nine days of each other, two sets of plaintiffs challenged the State's 2021 State Legislative Plan. One alleged that the State racially gerrymandered by subdividing two districts. The district court held that North Dakota could racially gerrymander in order to comply with §2. *Walen v. Burgum,* 700 F. Supp. 3d 759, 774 (D.N.D. 2023), *affirmed in part and dismissed in part by* 145 S.Ct. 1041 (2025). Even so, weeks later, the district court in this case determined that the same districting law *violated* §2 because the Legislative Assembly "did not go far enough." App.84. More racial line-drawing was needed. "How much is too much?" *Rucho v. Common Cause,* 588 U.S. 684, 707 (2019). States must wait for private plaintiffs to tell them.

Plaintiffs play both sides of the competing hazards in other ways. The South Carolina NAACP, for example, told this Court that South Carolina had violated the Equal Protection Clause by breaking up an "economically integrated coastal community" in a plan that would place residents of the "heavily Black" parts of that community in a congressional "district anchored more than 100 miles away in" another large city.[6] But the Alabama NAACP argues elsewhere that §2 demands that Alabama

[6] Br. of S.C. State Conf. NAACP at 16-17, *Alexander v. S.C. State Conf. of the NAACP*, No. 22-807 (U.S. filed Aug. 11, 2023).

break up an economically integrated coastal community to place residents of Mobile in a congressional district anchored more than 160 miles away in Montgomery. *See Singleton v. Allen*, No. 2:21-CV-01291-AMM, 2025 WL 1342947, at *46 (N.D. Ala. May 8, 2025) (3-judge court), *appeal filed*.

And then of course there is Louisiana's ongoing quest for a map that can satisfy federal courts. *See Louisiana v. Callais*, No. 24-109 (U.S. June 27, 2025) (ordering reargument). States would be far less likely to face such "lose-lose situation[s]"[7] if the ability to enforce "dilution" claims was vested solely with the politically accountable Attorney General, rather than countless plaintiffs who have every incentive to use §2 as a means of "transform[ing] federal courts into weapons of political warfare." *Alexander*, 602 U.S. at 11 (internal quotation marks omitted).

II. The Equities Favor Allowing North Dakota Law To Govern North Dakota Elections.

The equities strongly favor North Dakota. Plaintiffs' emergency application is a particularly poor vehicle for assessing §2's private enforceability. And the district court's underlying §2 merits determination is fatally flawed under *Allen v. Milligan*.

First, whenever "a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Trump v. CASA, Inc.*, No. 24A884, 2025 WL 1773631, at *15 (U.S. June 27, 2025) (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). As the district court recognized, it was "evident that, during the redistricting process, the

[7] *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 65 (2023) (Thomas, J., concurring in part).

Secretary and the Legislative Assembly sought input from the Tribes and other Native American representatives," and "did carefully examine the VRA and believed that" the enacted plan "would comply with the VRA." App.84. The district court thought North Dakota still came up short, but the Eighth Circuit reversed that decision, and the majority did not address the district court's merits ruling. It would be inequitable for that unreviewed merits ruling and the court-drawn map that followed from it to govern North Dakota's 2026 elections when it is undisputed that the State has ample time to implement its plan and avoid voter confusion.

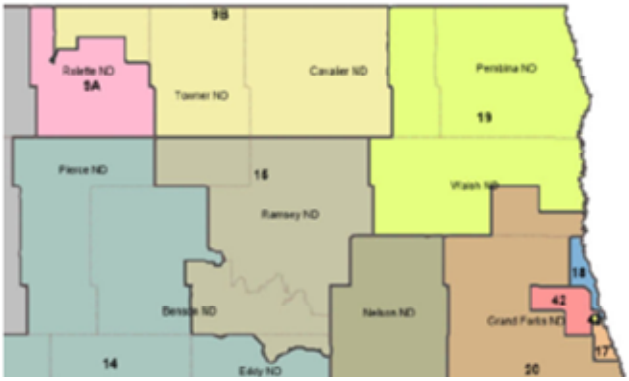
Second, Plaintiffs (at 34) claim irreparable harm based on their assertion that they proved a §2 violation. But that claim just underscores what a poor vehicle their application is for considering §2's private enforceability. For while many emergency applications ask this Court "to resolve" a "significant and difficult question[] of law on a highly expedited basis and without full briefing," *CASA*, 2025 WL 1773631, at *12, Plaintiffs' application would require this Court to assess not only whether §2 is privately enforceable, but whether §2 relief was properly granted in this case. Without deciding whether there is some underlying §2 problem, there is nothing inequitable about allowing North Dakota's democratically enacted map to govern and declining to freeze in place a court-drawn map that never should have been drawn in the first place. Thus, Plaintiffs cannot begin to prove their entitlement to a stay without also proving that their unreviewed win in the district court was correct on the merits. And, on that front, they offer precious little beyond the bare assertion that "the current remedial maps are likely to be upheld following this Court's review."

Stay.Appl.36. Based on what? Merely calling North Dakota's plan "unlawful" doesn't prove it, meaning Plaintiffs have not proven that any of the equities tilt in their favor.

Third, if the Court were to delve into those merits issues beneath the enforceability issue, it would find serious errors in the district court's ruling. Most glaringly, the district court completely ignored *Allen*'s teaching that plaintiffs cannot use race-predominate alternative maps to prove that an enacted plan violates §2. The *Allen* Court explained that to prove a §2 dilution claim, plaintiffs must establish, among other things, that the minority group is "sufficiently large and geographically compact to constitute a majority in a reasonably configured district." *Allen*, 599 U.S. at 18 (cleaned up). To do so they must come forward with an illustrative plan that includes the additional majority-minority district. And, critically here, eight Justices agreed that the plaintiff's map will fail this test if the map crosses "the line between racial predominance and racial consciousness." *Id.* at 31 (plurality); *see also id.* at 59 (Thomas, J., dissenting) ("[P]laintiffs could not prove the first precondition of their statewide vote-dilution claim … by drawing an illustrative map in which race was predominant."). If a plaintiff's illustrative map is race-predominant, it is obviously not true that "[d]eviation from that map shows it is *possible* that the State's map has a disparate effect on account of race," *id.* at 26, for it is not discriminatory to not discriminate.

But the Plaintiffs here came forward only with maps that pitted race against compactness and then gave the win to race. Below on the left is the enacted plan, in which District 9 is shown in its two parts—9A (in pink) and 9B (in tan). The district is close to rectangular. Contrast that with Plaintiffs' proposed District 9, on the right (in maroon). Starting at the State's northern border, it expands then contracts then expands and contracts again as it makes its way south before hooking east.

2021 Enacted Plan (App.54)



Plaintiffs' Plan 1 (App.55)

North Dakota argued that "the districts under the Tribes' proposed plans would be illegal racial gerrymanders." App.66 n.3. But the district court rejected the argument by ignoring *Allen* and holding that even if "race was the predominate motivating factor in drawing the districts," they could be used to "establish[] (and then remedy[]) a Section 2 violation …." *Id.* They can't. "The line that" this Court has "drawn is between consciousness and predominance." *Allen*, 599 U.S. at 33 (plurality). It appears that the Plaintiffs here "adduced" *no* "illustrative map that comported with [this Court's] precedents." *Id.* At best, no court has found as much. The district court's legally erroneous ruling offers Plaintiffs no support on the equities.

CONCLUSION

The Court should deny the stay application.

Respectfully submitted,

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