No. 23-969

In the Supreme Court of the United States

CHARLES WALEN *et al.*,

v.

DOUG BURGUM, *et al.*,

PLAINTIFF-APPELLANTS' SUPPLEMENTAL BRIEF

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Plaintiff-Appellants Walen and Henderson respectfully submit the following Supplemental Brief in response to the Brief of the United States as Amicus Curiae.

ARGUMENT

I. Appellants have Article III standing.

This case involves a racial-gerrymandering challenge to two subdistricts in the North Dakota legislative redistricting plan. By their nature, subdistricts in the state necessarily contain only two districts, because each district elects one state Senator and two state Representatives. The United States ignores this reality when it claims Appellants lack standing to challenge the configuration of the subdistricts in District 9.

The United States agrees that Subdistrict 9A was drawn to contain the Turtle Mountain Indian Reservation. SG Br. at 6. It also agreed that Appellant Henderson lived in Subdistrict 9B prior to the *Turtle Mountain* injunction. SG Br. at 11.

According to the United States, North Dakota argued that it created Subdistrict 9A for Native Americans to meet the *Gingles* threshold. SG Br. at 8. Configuring one district for a minority group would not usually mean that a voter residing in another district on the same plan has been "personally denied equal treatment," *Sinkfield v. Kelley*, 531 U.S. 28, 30 (2000) (quoting *United States v. Hays*, 515 U.S. 737, 744–46 (1995)), due to the innumerable number of configurations of multi-

district plans. But each of those cases involved far more districts than this one, which matters. *Hays*, 515 U.S. at 740 (seven districts); *Sinkfield*, 531 U.S. at 29 (seven challenged districts out of more than 100 districts).

Because there are only two subdistricts at issue in each district, if Subdistrict 9A is configured specifically to include Native Americans (to give Native American voters an ability to elect a candidate of choice), that necessarily means that other voters were excluded and placed into Subdistrict 9B because they are not Native American. There is a single boundary line between the two districts and a voter in District 9 must be in one subdistrict or the other.

In other words, the subdistrict "lines [are] obviously drawn for the purpose of separating voters by race" which "require[s] careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption." *Shaw v. Reno*, 509 U.S. 630, 645 (1993) (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)). And "a tortured [subdistrict] boundary line [that] was drawn to exclude [white] voters" is an effort to "'segregate[e] . . . voters' on the basis of race." *Id*. at 646–47 (citing *Gomillion*, 364 U.S. at 341).

So while a resident of a neighboring district in a multi-district plan can only show "their own district *might* have been different," *Sinkfield*, 531 U.S. at 30 (emphasis added), a resident of a North Dakota district that has only two subdistricts is able to show his district *necessarily* would have been

different but for the racial gerrymandering of both subdistricts—because Subdistrict 9B is the mirror image of the racial gerrymandering in Subdistrict 9A along their shared boundary. That means that each resident of each subdistrict has "personally been subjected to a racial classification," *Hays*, 515 U.S. at 745, because each improper racial decision about the boundary in one subdistrict always means that the bordering subdistrict boundary is also race-based. As a result, Henderson was excluded from the challenged subdistrict based on his race—because there was no other district in which he could be placed within District 9 and he can challenge Subdistrict 9B.

At root, a voter who is excluded from a district in a two-district plan because of his or her race—just like a voter who was included in the corresponding district because of his or her race—has been "personally . . . subjected to [a] racial classification" and thus has standing to challenge the racially gerrymandered subdistrict. *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015) (quoting *Bush v. Vera*, 517 U.S. 952, 957 (1996)). That is true regardless of the race of the plaintiff-voter. *See Johnson v. Miller*, 864 F. Supp. 1354, 1370 (S.D. Ga. 1994) (three judge court), *aff'd and remanded*, 515 U.S. 900 (1995).

There is no basis for this Court to dismiss the claim against the subdistrict configuration of District 9 because Henderson has standing to challenge the configuration of both subdistricts. The subdistrict he resides in was drawn "in a manner that . . . exclude[d] [non-Native-American] voters"

from Subdistrict 9B. *Shaw*, 509 U.S. at 640 (quoting *Gomillion*, 364 U.S. at 340).

II. There are still too many contingencies in this and related cases to summarily affirm.

As the briefing on this appeal has shown, the procedural posture of this appeal is highly unusual. There is still an appeal pending at the Eighth Circuit of an earlier Section 2 decision enjoining the use of the District 9 subdistricts. *Turtle Mt. Band of Chippewa Indians v. Howe*, No. 22-cv-22, 2023 WL 8004576, at *1 (D.N.D. Nov. 17, 2023). In that case, North Dakota took a position on Section 2 compliance contrary to the one in this case—which Appellants plan to explore on cross-examination at trial in this case.[1] *See* App. Resp. at 2 n.1.

Given the current state of Eighth Circuit precedent on a private right of action under Section 2, that decision seems likely to be overturned. *See Ark. State Conference NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1211 (8th Cir. 2023). While noting that Appellants have temporary relief from the *Turtle Mountain* injunction, SG Br. at 11, the United States completely ignores the almost-certain reversal of that decision under binding precedent.

[1] The State's differing positions also emphasizes the importance of having all redistricting challenges in federal court heard by a three-judge panel. *See* J.S. at 21 n.12; App. Resp. at 5.

Further, this Court has already granted briefing and argument in a case with direct bearing on the outcome of this case—*State of Louisiana v. Callais*, No. 24-109 (U.S.). Not only does that appeal involve the same tensions between a single-judge Voting Rights Act action and a three-judge constitutional action that are present in this case, it involves the question of whether a legislature's reliance on Section 2 compliance is or can be unconstitutional racial predominance. Thus, it makes far more sense for this Court to decide *Callais*, then return this case to the district court for consideration in light of that future ruling. That approach, rather than the United States' desire for summary affirmance, will be the best use of this Court's resources.

Finally, the State has changed its position from the trial court to this Court, now asking for this Court to vacate and reverse the decision below. And there is good reason to believe the United States may change its position as well. The Solicitor General submitted her brief near the end of a presidential term, and the President-elect intends to nominate a new Solicitor who may wish to review the issues in this case. *See, e.g.*, Brief of President Donald J. Trump as Amicus Curiae Supporting Neither Party, *TikTok, Inc. v. Garland*, 2024 WL 5264709, at *1 (Dec. 27, 2024) (brief filed by Solicitor-General Designee urging position different from the current position of the United States on a stay of deadline). If a new administration and new Solicitor wishes to provide additional perspective on a pending case, it would not be the first time that has occurred. *See, e.g.*, U.S. Department of Justice

Press Release, *Attorney General Jeff Sessions Announces Department of Justice has Settled with Plaintiff Groups Improperly Targeted by IRS*, https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-has-settled-plaintiff-groups (Oct. 26, 2017) (discussing *Linchpins of Liberty, et al., v. United States of America, et al.*, No. 1:13-cv-00777-RBW in the United States District Court for the District of Columbia and *NorCal Tea Party Patriots v. Internal Revenue Service, et al.*, No. 1:13-cv-00341 in the United States District Court for the Southern District of Ohio and acknowledging the "inappropriate criteria" used by its client that the Department previously defended in court).

Given the procedural challenges that would result from summary affirmance here, this Court should instead return this case to the trial court to establish a complete record in light of its future ruling in *Callais*. That enables a more appropriately timed review on a fully developed record in this case after this Court and the Eighth Circuit both rule on the pending appeals, after the evidence is tested at trial, and after all parties have had a chance to state their positions in lower courts rather than staking out new positions in this one.

III. This Court should not allow district courts to ignore evidence of what legislatures actually considered.

The United States, like the Intervenors, relies on its characterizations of the North Dakota legislature's decision-making process. SG Br. at 14–22. But it does so based on a record that required

deference to Appellants, not to the State or Intervenors, because it was decided at summary judgment.

The United States is correct that this case is not a proper vehicle for dealing with the questions at issue—but that is because of its current procedural posture, as discussed above. The United States then spends the remainder of its brief explaining its view of the evidence before the district court about the North Dakota legislature, engaging in a post-hoc Section 2 analysis that is not supported by the record at summary judgment.

Unlike *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 186 (2017), where the legislature engaged in an analysis of election results to determine the need for Voting Rights Act compliance, there is nothing in the legislative record to support any kind of analysis by the legislature here. Indeed, none of the evidence presented by the Intervenors to the district court was ever presented to the legislature while it was creating the plan. And an *ex post facto* creation of a record cannot provide a strong basis in evidence when the legislature never used any analytical process to determine whether Section 2 required the challenged subdistricts.[2] *See*

[2] While the United States references the North Dakota constitutional provision allowing subdistricts, SG Br. at 3, it ignores the state's traditional redistricting principle of not using subdistricts and the fact that only Districts 4 and 9 were subdistricted on the 2021 plan based on race. If politics figured into the creation of subdistricts, then one would expect an overwhelmingly Republican legislature to

J.S. at 22–27. These are exactly the types of issues that should be explored on cross-examination at trial.

Instead of recognizing the deference that should have been accorded to Appellants as non-movants, the United States charges ahead. It backfills a *Gingles* analysis that was never conducted by the legislature in the first place and that uses a standard of review that does not apply to a case at summary judgment. SG Br. at 19.

Regardless of whether Appellants submitted evidence at summary judgment, none of the evidence the United States cites was ever subject to cross-examination by Appellants because there was no trial. That means the district court reached its decision without considering the "intensely local appraisal," *Allen v. Milligan*, 599 U.S. 1, 19 (2023) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986)), that is required to find a Section 2 violation. A full record, which does not yet exist, will significantly benefit this Court's review and it should not decide this case on less.

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subdistrict the handful of districts electing Democrats to ensure that more Republicans could be elected. That has not occurred to this point, indicating that politics did not drive the decision to create subdistricts on the 2021 plan. Indeed, a political goal could easily form a basis for creating subdistricts, but the legislature has not yet chosen to do so. *See Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971).

CONCLUSION

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

Respectfully submitted this 9th day of January, 2025.

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