Nos. 24-109, 24-110

IN THE

Supreme Court of the United States

LOUISIANA,
Appellant,
v.
PHILLIP CALLAIS, *ET AL.*,
Appellees.
PRESS ROBINSON, *ET AL.*,
Appellants,
v.
PHILLIP CALLAIS, *ET AL.*,
Appellees.

On Appeals from the United States District Court for the Western District of Louisiana

BRIEF OF MHA NATION, LISA FINLEY-DEVILLE, AND CESAR ALVAREZ AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae, the Mandan, Hidatsa, and Arikara Nation, a federally recognized Indian Tribe, and individuals Cesar Alvarez and Lisa Finley-Deville (collectively "MHA Nation") are Defendants-Intervenors in *Walen v. Burgum*, 700 F. Supp. 3d 759 (D.N.D. 2023), *appeal docketed*, No. 23-969 (U.S. Mar. 6, 2024), which is currently before this Court. *Amici* were granted summary judgment in *Walen*, which challenges as a racial gerrymander a district MHA Nation requested during the legislative process as required by Section 2 of the Voting Rights Act. *Amici* have an interest in the correct application of racial gerrymandering and Section 2 jurisprudence. Moreover, the *Walen* case is referenced—and mischaracterized—in the brief filed by *Amici* "Alabama and 12 Other States" ("*Amici* States") at the Jurisdictional Statement stage in this case. *Amici* thus have an interest in correcting those mischaracterizations as well as other flawed arguments presented by Appellees and the *Amici* States.

SUMMARY OF ARGUMENT

The Court should reverse the district court's decision concluding that Louisiana's congressional map is an unconstitutional racial gerrymander. *Amici*

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[1] No counsel for a party authored this brief in whole or in part and no person or entity other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

MHA Nation submit this brief to raise three issues to aid in the Court's consideration of this case.

First, the Court should reject the invitation of *Amici* States to radically rewrite its Section 2 jurisprudence. In advancing their arguments—which the Court expressly rejected just last year in *Allen v. Milligan*—the *Amici* States cite to the filing of both Section 2 and racial gerrymandering litigation in Louisiana and North Dakota as purported evidence that state legislatures suffer from a lack of clarity in redistricting law. Not so. The racial gerrymandering claim arising from North Dakota, which failed below and is pending before this Court in *Walen v. Burgum*, No. 23-969, and to which *Amici* MHA Nation is an Appellee, is meritless. A meritless racial gerrymandering claim in which the applicability of Section 2 was not even contested in the district court hardly reveals any confusion in the law warranting an abrupt reversal and effective evisceration of Section 2's protection against racial vote dilution.

Second, the Appellees in this case and the Appellants in *Walen* wrongly contend that they met their demanding burden to prove racial predominance merely because the legislatures in both states had Section 2 compliance as a goal when they embarked on redistricting. But merely aiming to comply with federal law is not evidence of racial predominance. A racial gerrymandering plaintiff's heavy burden is to overcome a presumption of legislative good faith and show that the particular district lines as a whole were drawn predominantly on the basis of race. The record in this case reveals that politics drove the

configuration of the particular district lines challenged here, not race. And in *Walen*, traditional redistricting criteria predominated, not race. Appellees would have this Court subvert the legislature's intent because it aimed to comply with federal law regardless of whether other valid criteria animated the ultimate configuration of the district.

Third, even if race had predominated in this case (it did not), this Court's decision upholding Texas congressional district 35 ("CD35") in *Abbott v. Perez* compels the conclusion that the challenged district in this case would likewise satisfy strict scrutiny. In *Perez*, this Court reversed a racial gerrymandering finding regarding a narrow district connecting parts of San Antonio and Austin along I-35 on the basis that the Texas legislature had good reasons to believe that Section 2 required the district. Alabama—the author of the *Amici* States' brief in this case—joined an amicus brief asking this Court to summarily reverse the Texas district court's racial gerrymandering decision, characterized Section 2 jurisprudence as "clear," and contended that the irregularly-shaped CD35 was required by Section 2. If Texas satisfied strict scrutiny in *Perez* just six years ago, so too would Louisiana today even if the Court reached the strict scrutiny step (which it should not). And Alabama's about-face from *Perez* to this case undermines its professed confusion about the jurisprudence. The Court should reject *Amici* States' invitation to baselessly upend settled law.

The district court's decision should be reversed.

ARGUMENT

I. The existence of racial gerrymandering lawsuits in Louisiana and in North Dakota do not demonstrate any contradiction in this Court's Section 2 jurisprudence.

The existence of racial gerrymandering lawsuits in Louisiana and North Dakota do not indicate that the law is unclear or that Section 2 jurisprudence should be radically upended to relieve legislatures from the obligation to avoid discriminatory districting. *Amici* States invite this Court to use this case as a vehicle to announce a sweeping sea-change in redistricting jurisprudence. They ask this Court to hold one of three things: (1) that Section 2 does not apply to vote dilution claims, (2) that such claims are nonjusticiable, or (3) that such claims render the statute unconstitutional. In support of this abrupt jurisprudential change, *Amici* States cite simultaneously filed racial gerrymandering and Section 2 litigation in Louisiana and North Dakota following the 2020 Census, which they contend illustrates that "legislators lack a clear rule." *Amici* States' Br. at 18. Not so.

To begin, this Court rejected these same arguments just last year in *Allen v. Milligan*, 599 U.S. 1 (2023), and should not revisit them now.[2] *Amici*

[2] Appellant Louisiana likewise invites the Court to hold that both racial gerrymandering and Section 2 vote dilution claims should be held nonjusticiable. J.S. at 32-33. This Court has announced and applied judicially manageable standards for these claims for decades and should not depart from them now simply because Louisiana was subjected to a racial gerrymandering lawsuit after it sought to remedy its Section 2 violation.

States offer no explanation for why the Court should suddenly reverse course just one year later and upend decades of precedent merely because litigation—some meritorious and some meritless—has been filed in certain states.

In any event, the mere filing of racial gerrymandering lawsuits is no reason to radically rewrite Section 2 jurisprudence as *Amici* States suggest. This is especially so given the meritless nature of the North Dakota racial gerrymandering litigation cited by *Amici* States.

Consider North Dakota's litigation, to which *Amici* MHA Nation is a party and which is *Amici* State's lead example of the supposed confusion beguiling state legislatures and warranting an erasure of vote dilution claims from the jurisprudence. *See Amici* States' Br. at 18.

During North Dakota's legislative redistricting process, MHA Nation advocated for the configuration of a single-member state house district, District 4A, to align with its Reservation boundary. *Walen v. Burgum*, 700 F. Supp. 3d 759, 765, 772 (D.N.D. 2023). In doing so, MHA Nation provided testimony and data to illustrate that adhering to its Reservation boundary followed the traditional redistricting principle of keeping a community of interest together, and that the presence of the three *Gingles* preconditions for Section 2 applicability were met. *Id.* at 772. As MHA Nation requested, the legislature enacted District 4A.

On the opposite side of the state, the Turtle Mountain Band of Chippewa Indians ("Turtle

Mountain") and Spirit Lake Tribe ("Spirit Lake") jointly advocated for a configuration of District 9 that would retain the pre-existing ability of Native Americans in northeastern North Dakota to elect their candidates of choice to one state senate seat and two state house seats. *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 3:22-cv-22, 2023 WL 8004576, at *2 (D.N.D. Nov. 17, 2023). In support, the Tribes provided testimony and data to illustrate the presence of the three *Gingles* preconditions and shared communities of interest. *Id.* at *3. The legislature declined their request, however, and instead enacted a configuration that reduced from three to one the number of legislators the region's Native American voters had the opportunity to elect. *Id.* at *4.

As *Amici* States correctly observe, North Dakota's redistricting resulted in two lawsuits: one alleging that Districts 4A and 9A were unconstitutional racial gerrymanders and one alleging that the failure to enact a configuration of District 9 similar to that suggested by Turtle Mountain and Spirit Lake violated Section 2. The racial gerrymandering suit failed and the Section 2 suit succeeded. *See Walen*, 700 F. Supp. 3d at 775; *Turtle Mountain*, 2023 WL 8004576 at *17.

In a single paragraph in their brief, *Amici* States contend that the North Dakota legislature's compliance with Section 2 in western North Dakota and its violation of Section 2 in northeastern North Dakota illustrates that the legislature "lack[ed] a

clear rule" to guide its districting. *Amici* States' Br. at 18.

But this distorts the reality that North Dakota's legislature disregarded evidence that its proposed map would dilute Native American voting power in northeastern North Dakota, even as it simultaneously complied with Section 2 in western North Dakota. That these two realities exist in "the same districting law," *id.* at 18—regarding districts that are hundreds of miles apart—is not for lack of clarity in this Court's Section 2 jurisprudence. To the contrary, it demonstrates the continued need for Section 2 in states with historic and present-day discrimination.[3] Section 2 remains vital in places like North Dakota where a "backdrop of substantial racial discrimination," combined with racial bloc voting, can "render[] a minority vote unequal to a vote by a nonminority voter." *Milligan*, 599 U.S. at 25.

Nor does the fact that North Dakota was subject to a meritless racial gerrymandering lawsuit counsel in favor of overturning this Court's Section 2 jurisprudence as *Amici* States suggest. Consider the circumstances of the *Walen* racial gerrymandering lawsuit. Only one of the two plaintiffs even resides in a challenged district. And at their depositions, both plaintiffs testified that their sole purported injury was

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[3] With respect to Senate Factor 1, the *Turtle Mountain* court credited expert witness testimony detailing a "long history of mistreatment of Native Americans in North Dakota and . . . evidence of contemporary discrimination against Native Americans, including many successful voting discrimination claims affecting Native Americans." *Turtle Mountain*, 2023 WL 8004576, at *16.

being placed in *any* single-member district (regardless of what motivated its configuration)—not that they were subjected to any racial classification. Motion to Dismiss or Affirm of Intervenors-Appellees at 7-8, *Walen v. Burgum*, No. 23-969 (U.S. May 6, 2024). While this objection was packaged as a racial gerrymandering claim, their sworn testimony belies that branding effort. The *Walen* lawsuit is a policy objection to the legislature's use of single-member districting masquerading as a racial gerrymandering claim. The *Walen* Appellants thus lack standing because they have not suffered a racial gerrymandering injury.

The meritless nature of the *Walen* case is further illustrated by the posture in which it has reached this Court. The State and MHA Nation defended the suit by disclosing expert reports establishing that Section 2 required the configuration of District 4A that the legislature adopted. Motion to Dismiss or Affirm of Intervenors-Appellees at 7-8, *Walen v. Burgum*, No. 23-969 (U.S. May 6, 2024). Plaintiffs did not depose those experts, offered no experts of their own, and disclosed no witnesses. And when the parties cross-moved for summary judgment, Plaintiffs offered no contrary evidence to rebut the showing by the State and MHA Nation that Section 2 in fact required the configuration of District 4A that the legislature had adopted. *Id.* at 8-11. They thus conceded that Section 2 requires the configuration of District 4A adopted by the legislature.

In *Walen*, the district court properly applied this Court's precedent and the Rules of Civil Procedure in

granting the State and MHA summary judgment. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 916-17 (1995) (directing federal courts adjudicating racial gerrymandering claims to test the "adequacy of a plaintiff's showing at the various stages of litigation" to "determin[e] *whether to permit discovery or trial to proceed*." (quoting Fed. R. Civ. P. 12(b) and (e), 26(b)(2), and 56) (emphasis added)). This Court should likewise dismiss or summarily affirm the *Walen* appeal. Motion to Dismiss or Affirm of Intervenors-Appellees*, Walen v. Burgum*, No. 23-969 (U.S. May 6, 2024).

Even a brief review of the *Walen* and *Turtle Mountain* lawsuits illustrates the paper-thin logic behind *Amici* States' contention that the racial gerrymandering and Section 2 lawsuits in North Dakota illustrate some hopeless contradiction in the law confusing legislators. Nothing about the *Walen* litigation illustrates a flaw in this Court's jurisprudence confusing legislators. And North Dakota's litigation choices following the *Turtle Mountain* Section 2 decision suggest that the State—which did not join *Amici* States' brief—does not find itself confused about its Section 2 obligations.[4]

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[4] After the *Turtle Mountain* district court entered judgment finding a Section 2 violation, the State moved for a stay in the Eighth Circuit only with respect to whether 42 U.S.C. § 1983 provides a cause of action for Section 2 claims and not based on any likelihood of success on the merits on appeal. Appellants' Motion for Stay of Judgment Pending Appeal and Motion to Expedite at 4, *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 23-3655 (8th Cir. filed Dec. 13, 2023). The Eighth

The examples cited by *Amici* States neither reveal some hopeless contradiction in the law nor warrant a radical departure from this Court's redistricting jurisprudence.

II. A legislature's aim to comply with Section 2 is not *per se* racial predominance.

Contrary to Appellees' and *Amici* States' contention, *see* Appellees' Mot. to Dismiss or Affirm at 18; *Amici* States' Br. at 22, a legislature's mere aim to comply with Section 2 when it embarks on redistricting does not itself establish that race predominated in the configuration of district lines.

This is so because the racial predominance inquiry looks not at one districting goal among many, but instead requires a searching analysis of what motivated the configuration of the particular district lines. "Racial gerrymandering claims proceed 'district-by-district.'" *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 191 (2017) (quoting *Ala. Legislative Black Caucus v. Ala.*, 575 U.S. 257, 262 (2015)). Courts must "scrutinize[] the legislature's motivation for placing 'a significant number of voters within or without a particular district.'" *Id.* (quoting *Miller*, 515 U.S. at 916). "The ultimate object of the inquiry . . . is the legislature's predominant motive for the design of the district as a whole." *Id.* at 192.

Because a racial gerrymandering claim requires analyzing what motivated the configuration of

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Circuit denied the requested stay. Order, *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 23-3655 (8th Cir. Dec. 15, 2023).

particular district lines, racial gerrymandering plaintiffs cannot meet their "demanding" burden to prove racial predominance in the line drawing by merely observing that the legislature sought to comply with Section 2 when it embarked on redistricting. *Cooper v. Harris*, 581 U.S. 285, 319 (2017). The contrary argument of the Appellees in this case and of Appellants in the *Walen* appeal is without support.

Indeed, this Court confirmed in *Milligan* that a legislature's consideration of Section 2 in redistricting "does not lead inevitably to impermissible race discrimination." 599 U.S. at 33 (quoting *Shaw v. Reno*, 509 U.S. 630, 646 (1993)). *Milligan* rejected Appellees' position that simply considering compliance with Section 2 is synonymous with racial predominance. "The contention that mapmakers must be entirely 'blind' to race has no footing in our § 2 case law. The line that we have long drawn is between consciousness and predominance." *Milligan*, 599 U.S. at 33. This is true regardless of whether the legislature is redistricting to avoid a violation of Section 2 in the first place or to remedy one found by a court. Appellees' logic is untenable and has already been rejected by this Court.

For these reasons, the fact that the Louisiana legislature "was motivated by VRA litigation in *Robinson*" is not "conclusive direct evidence" that "race predominated," as Appellees contend. Appellees' Mot. to Dismiss or Affirm at 17. Instead, it is merely evidence that Louisiana—as *every* state should—sought to comply with federal law as *a* purpose in

embarking on redistricting. As Appellants explain—and as was widely reported[5]—the particular configuration of the district at issue in this case was predominantly driven by the Republican Governor's political preferences. That compliance with Section 2 was also a goal cannot change the fact that politics motivated *how* the lines were drawn.

III. *Abbott v. Perez* mandates the conclusion that the Louisiana legislature had a compelling interest in complying with Section 2.

This Court's decision just six years ago in *Abbott v. Perez*, 585 U.S. 579 (2018), mandates the conclusion that the Louisiana legislature had a compelling interest in complying with Section 2. While the Court need not reach the question because race did not predominate in the drawing of the district challenged in this case, *Perez* would nevertheless compel the conclusion that strict scrutiny is satisfied here if race were found to have predominated.

In *Perez*, this Court reversed a district court's determination that a Texas congressional district was a racial gerrymander, holding that the legislature had

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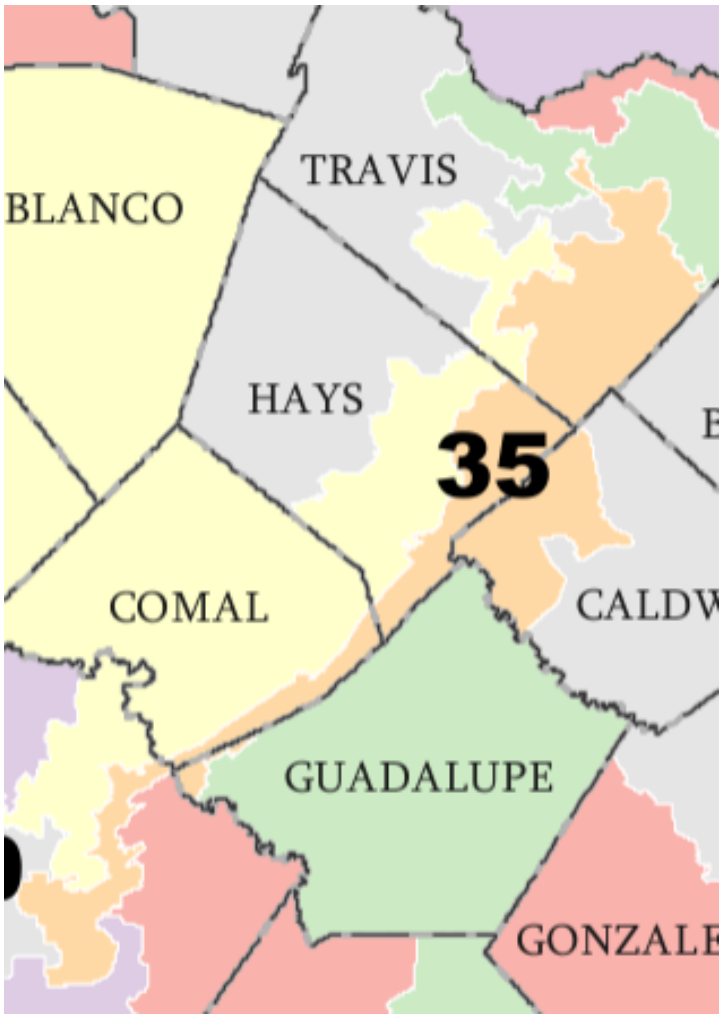
[5] The political motivation behind the line drawing was widely reported before and during the legislative process. *See, e.g.*, Tyler Bridges, *Special session to focus on redrawing congressional and Supreme Court lines, closed primaries*, Nola.com (Jan. 14, 2024), https://www.nola.com/news/politics/the-legislature-holds-special-session-called-by-jeff-landry/article_6cfec29e-b196-11ee-8acb-5fa225c76eeb.html ("Facing a court order, Gov. Jeff Landry is expected to push legislators to carve up the district of Graves, a Republican and political foe, to create one for Fields, a Democrat and political friend.")

good reasons to believe that the *Gingles* preconditions were satisfied. 585 U.S. 579, 616 (2018). Texas CD35 was drawn to be a Latino-majority district connecting Latino populations in San Antonio and Austin via a thin strip of land along I-35. The district is shown in orange below.



Tex. Legislative Council, Tex. Congressional Districts, 2013-2022, Plan C235 Map Statewide, https://perma.cc/MJ3A-WSJR.

The *Perez* district court reasoned that the legislature lacked good reasons to believe Section 2 required the race-based drawing of CD35 because "Travis County does not have Anglo bloc voting and thus does not meet the third *Gingles* precondition, which the mapdrawers knew . . . ." *Perez v. Abbott*, 274 F. Supp. 3d 624, 683 (W.D. Tex. 2017), *rev'd in part*, 585 U.S. 579 (2018).

This Court reversed, noting "two serious problems with the District Court's analysis." 585 U.S. at 616. First, the Court explained that the conclusion that the third *Gingles* precondition was unsatisfied was flawed because it "looked at only one, small part of the district, the portion that falls within Travis County." *Id.* But, "redistricting analysis must take place at the district level." *Id.* Second, this Court held that "the 2013 Legislature had 'good reasons' to believe that [CD35] was a viable Latino opportunity district that satisfied the *Gingles* factors." *Id.* This was so because

> CD35 was based on a concept proposed by [the Mexican American Legal Defense Fund], and the Latino Redistricting Task Force (a plaintiff group) argued that the district is mandated by § 2. The only *Gingles* factor disputed by the court was majority bloc voting, and there is ample evidence that this factor is met. Indeed, the court found that

> majority bloc voting exists throughout the State.

Id.

Ignoring *Perez*, *Amici* States contend that this Court has only assumed that Section 2 provides a compelling justification for race-predominant districting and that "the Court has 'never applied this assumption to uphold a districting plan what would otherwise violate the Constitution.'" *Amici* States' Br. at 7 n.3 (quoting *Milligan*, 599 U.S. at 79 (Thomas, J., dissenting)). Although *Amici* States rely upon the quoted assertion from Justice Thomas's *Milligan* dissent for the proposition, that assertion is, respectfully, incorrect. This Court reversed a racial gerrymandering finding in *Perez* precisely because it concluded that Section 2 compliance provided good reasons for the Texas legislature's predominant use of race in configuring CD35. If the Texas legislature had a compelling interest in configuring CD35 with race as the predominant motivation, then so too would the Louisiana legislature here even if race had predominated (it did not).

Indeed, Alabama—the lead author of the *Amici* States' brief in this case—joined an amicus brief authored by Louisiana in *Perez* asking this Court to summarily reverse the *Perez* district court's conclusion that CD35 was a racial gerrymander. *See* Br. of *Amici Curiae* States at 16-20, No. 17-586, *Abbott v. Perez* (Nov. 20, 2017). In doing so, Louisiana and Alabama cited the "clarity of the law" regarding the proper Section 2 analysis, *id.* at 16, and observed that "[t]his Court clearly laid out the 'three threshold

conditions' in determining improper vote dilution under § 2 of the VRA." *Id.* Louisiana and Alabama argued that the Texas legislature had good reasons to believe that the *Gingles* preconditions were satisfied in CD35, and asked this Court to *summarily reverse* the district court's conclusion that the district was an unconstitutional racial gerrymander.

Alabama's position in *Perez* cannot be reconciled with its position in authoring the *Amici* States' brief in this case. In both *Perez* and in this case the respective legislatures had prior judicial findings of Section 2 obligations that provided good reasons to justify their districting choices. Alabama does not explain its sudden confusion about Section 2's requirements—requirements it just six years ago characterized as "clear."[6]

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[6] It seems that willful disregard—not any genuine confusion—animates Alabama's current views of Section 2 jurisprudence. When this Court issued an opinion explaining Alabama's own Section 2 obligations in *Milligan*, the Alabama legislature responded by enacting a remedial map that willfully ignored this Court's holding. *See Singleton v. Allen*, 690 F. Supp. 3d 1226, 1239 (N.D. Ala. 2023) ("[W]e are deeply troubled that the State enacted a map that the State readily admits does not provide the remedy we said federal law requires."); *id.* ("We are disturbed by the evidence that the State delayed remedial proceedings but ultimately did not even nurture the ambition to provide the required remedy."); *id.* ("[W]e are struck by the extraordinary circumstance we face. We are not aware of any other case in which a state legislature—faced with a federal court order declaring that its electoral plan unlawfully dilutes minority votes and requiring a plan that provides an additional opportunity district—responded with a plan that the state concedes does not provide that district."). Alabama's contention that its legislature needs more clarity rings hollow.

Race did not predominate in the drawing of the Louisiana congressional district challenged in this case, but even if it did, *Perez* compels the conclusion that Louisiana's map would satisfy strict scrutiny.

CONCLUSION

The district court's judgment should be reversed.

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