Nos. 24-109, 24-110

IN THE

Supreme Court of the United States

STATE OF LOUISIANA,
Appellant,

v.

PHILLIP CALLAIS, *et al.*,
Appellees.

PRESS ROBINSON, *et al.*,
Appellants,

v.

PHILLIP CALLAIS, *et al.*,
Appellees.

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

BRIEF ON BEHALF OF *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF APPELLANTS PRESS ROBINSON, ET AL.

GEOFFREY BLACKWELL
NATIONAL CONGRESS OF AMERICAN INDIANS
1516 P Street NW
Washington, DC 20005
(202) 466-7767

CHAD DUNN
LEGAL DIRECTOR
BERNADETTE REYES
Counsel of Record
SONNI WAKNIN
UCLA VOTING RIGHTS PROJECT
3250 Public Affairs Building
Los Angeles, CA 90095
(310) 400-6019
bernadette@uclavrp.org
chad@uclavrp.org
sonni@uclavrp.org

Counsel for Amici Curiae

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INTEREST OF AMICI[1]

Amicus curiae National Congress of American Indians ("NCAI") is the Nation's oldest and largest organization of American Indian and Alaska Native tribal governments and their members. Since 1944, NCAI has served to educate the public, and tribal, federal, and state governments, about tribal self-government, treaty rights, and policy issues affecting Indian tribes and their members. Amicus is a member of the Native American Voting Rights Coalition that produced a 2020 report, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters* [hereinafter *Obstacles*], documenting widespread, present-day discrimination and impediments to registration and voting.[2] Amicus has a substantial interest in ensuring that Section 2 of the Voting Rights Act, 52 U.S.C. § 10301 (formerly cited as 42 U.S.C. § 1973) ("VRA"), provides recourse to address racial discrimination that dilutes Native American votes and diminishes their political power.

SUMMARY OF ARGUMENT

The Voting Rights Act does important work protecting voting rights throughout the country. However, these protections ring hollow if the ability of jurisdictions to remedy violations under the Act are unduly limited. NCAI respectfully submits this brief to provide the Court with an account of the ongoing and critical need

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

[2] Dr. J. Thomas Tucker, et al., *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, Native American Rights Fund (2020), https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf.

for Section 2 of the VRA to provide real remedies to vote dilution in Native American communities caused by contemporary racial discrimination and voter suppression. This ongoing racial discrimination continues to impact Native Americans' ability to elect candidates of their choice, and robs them of representatives who understand and respect their unique political status and urgent infrastructure needs.

Once again,[3] this Court is faced with a request to undermine Section 2(b). *Allen v. Milligan*, 599 U.S. 1 (2023) (rejecting suggestion of a "race-neutral" benchmark requirement for cases brought under Section 2 of the VRA). Like Petitioners in *Allen*, Appellees here utilize the idea of "race neutrality" to target maps meant to remedy proven violations of Section 2 under the guise of preventing racial gerrymandering. Appellees, unaccepting of the legal reality that the prior map adopted by the state of Louisiana violated the Voting Rights Act, mounted an attack not on the racial stereotypes and discriminatory practices perpetuated by the practice of racial gerrymandering, but on the implementation and adoption of maps remedying proven instances of the race-based vote dilution. Appellees' request, granted by the district court, challenges not only the constitutionality of the map adopted by the State of Louisiana, but now all maps, with the purpose and effect of rectifying the dilution of minority voters, including Native American voters, across the nation. *See* Appellee Motion To Dismiss or Affirm at 31 (No.24-109) ("Mot.").

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[3] Amicus NCAI submitted an Amicus brief in support of Appellees and Respondents in *Allen v. Milligan*, 599 U.S. 1 (2023) that, given the similarities of the challenge and their impact on Section 2 of the Voting Rights Act, substantially overlaps with contents of the instant brief.

The district court's holding runs contrary to Section 2's express purpose, and rather seeks to overturn longstanding case law, and undermine Section 2's effectiveness in Indian Country. A thorough examination of the racial discrimination occurring in South Dakota, New Mexico, and North Dakota demonstrates that vote dilution persists today and weakens Native Americans' political power.

Further, placing certain redistricting principles, such as those that respect existing district maps and political boundaries, over *any consideration of race at all*, would uniquely burden Native American voters. Throughout Indian Country, reservations (many of which predate the creation of counties, and some of which are larger than some states) are often split among numerous counties. States may not have considered reservation boundaries when forming counties. Or worse, states may have drawn these county lines with the express purpose of diluting Native American influence. A preference for respecting existing political boundaries, even when trying to remedy proven race-based vote dilution, ignores the intentional racial discrimination of the past that persists today. Mot. at 20-21. Placing crippling limits on how such dilution can be remedied ensures that such wrongs will continue.

The opinion below should be reversed.

BACKGROUND

Tribal Nations are distinct, inherent sovereigns whose existence predates the founding of the United States. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978). Tribes are recognized in the United States Constitution, art. I, § 8; art. VI, cl. 2, and in numerous treaties and laws. *See* N. Jessup Newton et

al., *Cohen's Handbook of Federal Indian Law* §1.03(e) (2012). Native Americans have, at varying points in United States history, been forcibly removed from their homelands, subjected to attempted assimilation, and deemed wards of the government. [4]

Native Americans are among the poorest citizens of the United States and often live on reservations that lack basic infrastructure. Some Native American homes lack running water, do not have addresses, and do not receive postal deliveries. Roads in and out are often unpaved or in poor condition.[5] 18% of people living on tribal lands cannot access broadband service, compared to 4% of people in non-tribal areas.[6]

Participating in American democracy provides Native Americans the opportunity to remedy these injustices by electing representatives who understand

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[4] *Id.* at §1.04; see also U.S. Dept. of Interior, *Federal Indian Boarding School Initiative Investigative Report* 25–63 (2022), https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf.

[5] U.S. Census Bureau, *Poverty Status in the Past 12 Months by Sex by Age*, 2013-2017 American Community Survey 5-Year Estimates, Table B17001C and B17001 (2017); *see also* National Congress of American Indians, *Tribal Infrastructure: Investing in Indian Country for a Stronger America* (2017), https://archive.ncai.org/attachments/PolicyPaper_RslnCGsUDiatRYTpPXKwThNYoACnjDoBOrdDlBSRcheKxwJZDCx_NCAI-InfrastructureReport-FINAL.pdf

[6] United States Government Accountability Office, Report to Congressional Requesters, *TRIBAL BROADBAND: National Strategy and Coordination Framework Needed to Increase Access*, GAO-22-1-4421 (June 2022), https://www.gao.gov/assets/d22104421.pdf; (executive summary available at: https://www.gao.gov/products/gao-22-104421#:~:text=Despite%20federal%20efforts%2C%20broadband%20access,broadband%20access%20on%20tribal%20lands).

and honor Tribal Nations' political status within American federalism, who will advance treaty rights, advocate for basic resources, and respect and value Native Americans' contribution to this country.

A. History of Denial of Native American Voting Rights

When the Fourteenth Amendment was ratified in 1868, U.S. Const. amend. XIV, Native Americans were not considered American citizens, and they did not have the right to vote, nor the right to equal protection. *See Elk v. Wilkins*, 112 U.S. 94 (1884). Following the naturalization of select Native Americans, all Native Americans were unilaterally conferred citizenship through the 1924 Indian Citizenship Act. 43 Stat. 253, enacted June 2, 1924. This unilateral conferral of the rights of citizenship also created obligations for states, which they consistently sought to avoid. States categorically continued to deny Native Americans the right to vote. *See*, *e.g.*, *Porter v. Hall*, 271 P. 411, 417 (Ariz. 1928), *overruled in part by Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948) (Indians, despite being U.S. citizens could not register because they were wards of the federal government); *Trujillo v. Garley*, Civ. No. 1353 (D.N.M. August 11, 1948) (finally rejecting New Mexico's argument that Indians were not state residents and therefore could not vote); *Allen v. Merrell*, 305 P.2d 490 (Utah 1956), *vacated as moot*, 353 U.S. 932 (1957) (upholding Utah's prohibition on Indian's right to vote but vacated following legislative action); 1957 Utah Laws ch. 38, 89–90.

As outright bans on Native Americans' right to vote subsided, some states moved to more insidious forms of vote denial. As with African Americans, literacy tests and poll taxes were utilized to disenfranchise Native Americans based on race. *See*, *e.g.*, Ariz. Rev.

Stat. Ann.§ 16-101(A)(4)-(5) (West 1956) (requiring reading the U.S. Constitution in English to vote); Alaska Const., art. V, § 1 (1959) (stating a voter "shall be able to read or speak the English language as prescribed by law"). The 1965 VRA provided critical protections to Native Americans from discrimination.

But states continued to defy the VRA by devising qualifications that led to the outright denial of Native American voting rights through 2000. For example, until 1975, a South Dakota law prohibited members of "unorganized" counties to vote for the county officials that ran local government affairs including county clerks, judges, clerks of the court, etc. There were only three "unorganized" counties in South Dakota—all of which were overwhelmingly Native American and were comprised entirely of Native American lands. *Little Thunder v. South Dakota*, 518 F.2d 1253, 1254-55 (8th Cir. 1975). State law also prohibited members of unorganized counties from running for county office until 1980. *United States v. South Dakota*, 636 F.2d 241 (8th Cir. 1980). In 1999, South Dakota *again* defined eligible voters to exclude Native Americans and brazenly allowed only residents of "noncontiguous pieces of land" to vote in sanitary district elections. 87% of the land and 200 tribal members serviced by the district were excluded. *United States v. Day County*, No. 99-1024 (D.S.D. June 16, 2000).

This is not ancient history.

B. Present Day Denial of Native American Voting Rights

The Native American Voting Rights Coalition (amicus is a member) completed a series of nine field hearings in seven states examining voting rights in Indian Country. One hundred twenty-five witnesses

from dozens of tribes generated thousands of pages of transcripts detailing the progress and ongoing barriers to voting. Witnesses included tribal leaders, community organizers, academics, politicians, and Native American voters. They shared their experiences with voter registration and voting in federal, state, and local (non-tribal) elections. The resulting 2020 report concluded that "[a]lthough many other American voters share some of the same obstacles [to voting], no other racial or ethnic group faces the combined weight of these barriers to the same degree as Native voters in Indian Country." *Obstacles*, at 3.

The report determined that structural factors (the result of federal failure to honor treaty rights and other trust obligations) such as poor roads, long distances to substandard postal services, lack of residential addresses, lack of broadband internet, lack of vehicles, and poverty, all contributed to low voter turnout. These structural barriers were compounded by hostile election officials who leveraged these barriers to make it even more difficult for Native Americans to vote. *See*, *e.g.*, *Blackfeet Nation v. Stapleton et al.*, No. 4:20-cv-00095-DLC (D. Mont. Oct. 14, 2020), ECF No. 9-1 (refusing to establish on-reservation polling site when reservation had no mail delivery and in-person voting required 120 miles of travel).

Unfortunately, racism was also found to be a factor. In the weekend before the general election in 2020, a man in Glasgow, Montana, bordering the Fort Peck Indian Reservation, won the Halloween costume contest in full Ku Klux Klan ("KKK") attire.[7] Though

[7] N. Mabie, *Man Reportedly Dressed as KKK Won Costume Contest in Glasgow Bar*, Great Falls Tribune (Nov. 2, 2020), https://www.greatfallstribune.com/story/news/2020/11/02/montana-

mostly associated with the Deep South, the KKK has been prominent since at least the 1920s in locations that border the Fort Peck Reservation. A primary goal of the KKK was to undermine Native American voting rights.[8] The general counsel to the Fort Peck Assiniboine and Sioux Tribes relayed following the incident, "[t]his is why satellite voting sites are so important for our tribal members. Not everyone is comfortable going into places in Glasgow, and not everyone in Glasgow is going to make our tribal members feel welcome."[9] Racism in the area has only continued, with Senator-elect Tim Sheehy using racial stereotypes to mock Native Americans, joking falsely that they were "drunk at 8:00 AM" at a 2023 fundraising event prior to his eventual election.[10]

Election officials still engage in racial discrimination that echoes the overt discrimination thought to be of the past. In Utah, in 2018, the San Juan County clerk backdated a false complaint against a Native American candidate. The clerk's fraud occurred after decades of court battles over the single-member districts in the county, and resulted in Native Americans having a chance

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r-man-kkk-costume-reportedly-wins-glasgow-bar-contest/6130962002/.

[8] *See* Anne Sturdevant, *The Ku Klux Klan in Montana During the 1920s*, 43, 60 (Carroll College, Apr. 1991), https://scholars.carroll.edu/handle/20.500.12647/2542?show=full.

[9] Written Statement of Jacqueline De León, *Hearings before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 18 (Oct. 20, 2021), https://www.judiciary.senate.gov/imo/media/doc/De%20Leon%20Testimony1.pdf.

[10] K. Browning, *Tim Sheehy Was Recorded Using Racist Stereotypes about Native Americans*, N.Y. Times (Sept. 3, 2024), https://www.nytimes.com/2024/09/03/us/politics/tim-sheehy-native-americans-montana.html.

to elect two candidates of choice for county commissioners. *Navajo Nation v. San Juan County*, 929 F.3d 1270, 1274 (10th Cir. 2019). The District Court reinstated the Native American candidate to the ballot and found the clerk likely violated the Native American candidate's constitutional rights. *Grayeyes v. Cox*, No. 4:18-CV-00041, 2018 WL 3830073, at *9 (D. Utah Aug. 9, 2018). This deception echoes a 1972 case in the very same county where a clerk misled two Navajo candidates about filing deadlines. The Federal Courts ordered those candidates back on the ballot as well. *Yanito v. Barber*, 348 F. Supp. 587, 593 (D. Utah 1972).

In 2018, a Native American community activist from Montana testified that when she returned voter registration cards the clerk hassled her over the number of voter registration cards returned. There was no legal limitation, but the clerk arbitrarily limited the number of registration cards she could return. She had collected them from impoverished Native Americans living miles from the clerk's office. *Obstacles*, at 45. This hearkens back to a VRA case regarding an unfair at-large voting system in Montana, where the Court recounted how "[an] Indian testified that he was given only a few voter registration cards and when he asked for more was told that the county was running low. Having driven a long way to get the cards, he asked his wife, who is white, to go into the county building and request some cards. She did and was given about 50 more cards than he was." *Windy Boy v. County of Big Horn*, 647 F. Supp. 1002, 1008 (D. Mont. 1986).

Native American plaintiffs have won or settled to their satisfaction 70 of 74 voting rights cases brought between 2008 and the publication of *Obstacles* in June 2020. *Obstacles,* at 18. Since then, at least another six

Native American vote dilution cases have been won or settled. *See* Final Judgment, *Navajo Nation v. San Juan County*, No. 1:22-cv-00095 (D.N.M. March 22, 2024); *Winnebago Tribe of Neb. v. Thurston Cty.*, No. 8:23CV20, 2023 U.S. Dist. LEXIS 221529 (D. Neb. Dec. 13, 2023); *Turtle Mt. Band of Chippewa Indians v. Jaeger*, No. 3:22-CV-22, 2023 WL 8004576 (D.N.D. Nov. 17, 2023); *Brule v. Lyman County*, 625 F. Supp. 3d 891 (2022); Complaint, *Spirit Lake Tribe v. Benson County,* No. 3:22-CV-00161 (D.N.D. Oct. 7, 2022), *United States v. Chamberlain Sch. Dist.,* No. 4:20-CV-4084, 2020 WL 6866809 (D.S.D. June 18, 2020). Another case successfully defended the drawing of a Native American majority district against claims of racial gerrymandering.[11]

Given the high burden the *Gingles* standard places on plaintiffs,[12] this recent record of success is, unfortunately, indicative of not only the pervasive discrimination

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[11] *See Walen v. Burgum*, 700 F. Supp. 3d 759 (D.N.D. 2023), *appeal docketed*, No. 23-969 (U.S. Mar. 6, 2024). Interestingly, the *Walen* lawsuit was the second to come about following North Dakota's redistricting, with the aforementioned *Turtle Mt. Band of Chippewa Indians v. Jaeger* suit challenging the map pursuant to Section 2 of the VRA succeeding and the *Walen* suit failing. Both suits affirmed tribal interests, demonstrating the ongoing need for Section 2.

[12] For example, plaintiffs have shown racially discriminatory harm in their Section 2 challenges but fail to meet the rest of the *Gingles* framework and therefore are denied relief. *See, e.g.*, *Rodriguez v. Harris Cnty.*, 964 F. Supp. 2d 686, 804 (S.D. Tex. 2013), *aff'd sub nom. Gonzalez v. Harris Cnty.*, 601 Fed. App'x 255 (5th Cir. 2015) (while Plaintiff's failed to meet the first *Gingles* prong, the "Court is troubled by evidence of the range and prevalence of voter suppression tactics employed against members of the Latino community."); *Cisneros v. Pasadena Indep. Sch. Dist.*, No. 4:12-CV-2579, 2014 U.S. Dist. LEXIS 58278, at *6365 (S.D. Tex. 2014).

faced by Native American voters but the continued failure of states to ensure equal voting opportunities for those same voters. This is exactly why the recourse Congress created in Section 2 is indispensable to the fight for Native Americans to participate fairly in American democracy and effectuate change in their communities.

ARGUMENT

I. Subjecting Section 2 Remedial Maps to Strict Scrutiny Merely Because Race is Considered Would Make Section 2 Unworkable and Would Result in Discriminatory Outcomes in Indian County.

Congress passed the VRA to "banish the blight of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). Congress amended the VRA in 1982 to clarify that the law does not require intentional discrimination. It aims to eliminate all "discriminatory election systems or practices which operate, designedly or otherwise to minimize or cancel out the voting strength and political effectiveness of minority groups." S. Rep. No. 97–417, at 28 (1982). The 1982 amendment specified that a violation was established if "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens [protected by subsection (a)] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). The purpose of these amendments was to provide "the broadest possible scope in combating racial discrimination." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (citations omitted). Key to rectifying the effects of this racial discrimination is the implementation of a map

providing equal opportunity for racial minorities to elect their candidates of choice. As any such map must rectify racial discrimination, it is nonsensical to require such maps be subject to strict scrutiny simply because race was considered in their formulation.

Here, the district court's decision disturbs long-standing precedent and upends Congress's intent by making most Section 2 remedies unconstitutional. Adopting the district court's interpretation of the Equal Protection Clause of the Fourteenth Amendment as well as the Fifteenth Amendment of the United States Constitution would automatically make intentionally trying to remedy a VRA violation constitutionally suspect and subject to strict scrutiny. Although Appellees argue that any consideration of race when drawing a map to remedy a VRA violation violates "our colorblind constitution" (Mot. at 33-34), this not only distorts the true history of the Fourteenth and Fifteenth Amendments,[13] but betrays the true consequence of the district court's decision: to render Section 2 practically useless by prohibiting any real consideration of race when formulating a remedial map. Achievement of such goal would prove disastrous in Indian Country where Native Americans face

[13] Transcript of Oral Argument at 58, *Allen v. Milligan*, 599 U.S. 1 (2023) (No-21-1086) ("…because I understood that we looked at the history and traditions of the Constitution at what the Framers and the Founders thought about and when I drilled down to that level of analysis, it became clear to me that the Framers themselves adopted the Equal Protection Clause, the Fourteenth Amendment, the Fifteenth Amendment, in a race-conscious way. That they were, in fact, trying to ensure that people who had been discriminated against, the freedmen in -- during the reconstructive -- Reconstruction period were actually brought equal to everyone else in the society").

frequent and egregious racial discrimination and vote dilution. The district court's decision should be reversed.

A. Discrimination Based on Race is Still Prevalent Throughout Indian Country.

Section 2 provides a coherent way for often impoverished Native American plaintiffs to seek redress from intentional discrimination through circumstantial evidence. Rendering any attempt to intentionally resolve these instances of discrimination constitutionally suspect would significantly impede the ability to provide meaningful relief to address Section 2 violations; violations which owe their existence to ongoing racial discrimination.

Native Americans face racial discrimination in their everyday interactions, including when they exercise their voting rights.

What follows is a narrative of vote dilution in South Dakota, New Mexico, and North Dakota. These present-day instances of racial discrimination are illustrative, and demonstrate the real-life impact should this Court uphold the lower court's decision to make any map intentionally setting out to rectify such discrimination constitutionally suspect. Section 2 must continue *as is* to ensure that Native Americans have a fair chance to elect candidates who represent their interests.

(1) Section 2 Must Be Allowed to Protect and Remedy Vote Dilution in South Dakota.

In 2022—forty years after Congress amended the Voting Rights Act —two Native American women were turned away from a hotel whose owner had posted a notice that no Indians were allowed to stay at her

property since she was unable to tell "who is a bad Native or a good Native." *NDN Collective v. Restel Corp.*, No. 5:22-cv-05027-RAL (D.S.D. Mar. 24, 2022). The same owner then placed a man with an assault rifle in the hotel lobby. *Id.* Given persistent racial tensions within South Dakota communities, it is not surprising that in a survey examining barriers faced by Native American voters, only 5% of Native American respondents in South Dakota expressed trust in their local, non-tribal governments.[14]

For the entirety of South Dakota's history through the present day, election officials have thwarted Native Americans' political power through racial discrimination. The resulting lack of representation has led to gross neglect of places like the Pine Ridge Reservation, which has poor road infrastructure, inadequate housing, and poverty. Indeed, more than half of Pine Ridge Reservation's residents have incomes of less than $10,000 a year.[15]

Securing rights through suffrage is difficult when, for example, only ten years ago, in 2014, a sheriff was posted at the satellite polling location for the Pine Ridge Reservation. He stood with his hand on his gun, intimidating potential voters.

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[14] *See Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada and South Dakota*, The Native American Voting Rights Coalition (Jan. 2018), https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-summary.pdf.

[15] *Tribal Infrastructure: Roads, Bridges, and Buildings, Oversight Hearing Before Subcomm. for Indigenous Peoples of the United States* (July 11, 2019), (testimony of President Julian Bear Runner) https://www.congress.gov/116/meeting/house/109756/documents/HHRG-116-II24-20190711-SD004.pdf.

A law enforcement officer inside the entry of a polling place on the Pine Ridge satellite voting office during the 2014 election. Photo by Donna Semans, Four Directions. Obstacles, at 46.

Redress is also difficult because South Dakota remains hostile to the VRA. In 1975, the same year the 8th Circuit stopped South Dakota from overtly banning Native Americans from voting for their county officials, Congress reauthorized the VRA and expanded its geographic coverage formula. *See Little Thunder v.*

South Dakota, 518 F.2d at 1253. The next year, the DOJ used its updated trigger formula under Section 4(b) to subject two of those offending counties to preclearance. In response, South Dakota Attorney General William Janklow said the VRA was "garbage" and instructed noncompliance, alleging the VRA unconstitutionally infringes on states' rights. *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1036 (D.S.D. 2004). Subsequently, the covered counties passed more than 600 election actions but submitted fewer than 10 for preclearance until challenged in 2002. *Quick Bear Quiver v. Nelson*, 387 F. Supp. 2d 1027 (D.S.D. 2005); L. McDonald, et al., *Voting Rights in South Dakota: 1982- 2006*, 175 Cal. Rev. L. Soc. Just. 195 (2007).

Lack of attention and resources allocated to Indian Country likely attributed to this unchecked defiance. *Id.* at 206. Nevertheless, the VRA has proved instrumental to securing voting rights in South Dakota in the face of ongoing racial discrimination. *See Poor Bear v. Jackson County*, No. 5:14-CV-5059-KES (D.S.D. June 17, 2016) (closer polling places); *Janis v. Nelson,* No. 09-cv-05019 (D.S.D. Dec. 30, 2009) (non-imprisoned Native Americans convicted of felonies can vote consistent with South Dakota law); *Fiddler v. Sieker*, No. 86-3050 (D.S.D. Oct. 24, 1986) (remedying rejection of voter registrations); *American Horse v. Kundert*, No. 84-5159 (D.S.D. Nov. 5, 1984) (closer polling places).

Despite these efforts to stamp out discrimination, Native Americans continue to encounter racism when they attempt to vote. In 2012, election administrators humiliated Native American voters by making them vote in a chicken coop with feathers on the floor and no bathroom facilities. *Obstacles*, at 87.

(a) Section 3 of the VRA's Pocket Trigger Preclearance Coverage Has Twice Been Invoked in South Dakota Following Discriminatorily Drawn Districts.

Even within this shameful context, South Dakota's most persistent form of discrimination has been through vote dilution. Indeed, a Native American County commissioner protested the usage of the chicken coop in Buffalo County. *Id*. Her election followed a 2003 lawsuit that required the county to redraw its commissioner districts and hold a special election for two out of its three single-member districts.

At that time, Buffalo County the population was 85% Native American, but Native Americans were unable to gain control of the three-member county commission for decades because officials malapportioned the districts: 1,550 people in one district, 350 in a second, and 100 in the third, with nearly all Native Americans in the largest district. The board of county commissioners only agreed to redraw the districts after litigation. *See* Def.'s Answer, *Kirkie v. Buffalo County*, No. 03-5025, 10 (D.S.D. Apr. 28, 2003).

Eventually, the county acknowledged that its plan had been discriminatory and agreed to federal observers and preclearance under the VRA's Section 3(c) pocket trigger through 2013. Consent Decree, *Kirkie v. Buffalo County*, No. 03-5024 (D.S.D. Feb. 12, 2004); *see also Hearing on Legislative Proposals to Strengthen the Voting Rights Act Before Subcomm. on the Const., Civ. Rts., and Civ. Liberties of the H. Comm. on the Judiciary* (Oct. 17, 2019) (Testimony of Bryan L. Sells), https://docs.house.gov/meetings/JU/JU10/20191017/110084/HHRG-116-JU10-Wstate-SellsB-20191017.pdf [hereinafter *Sells Testimony*].

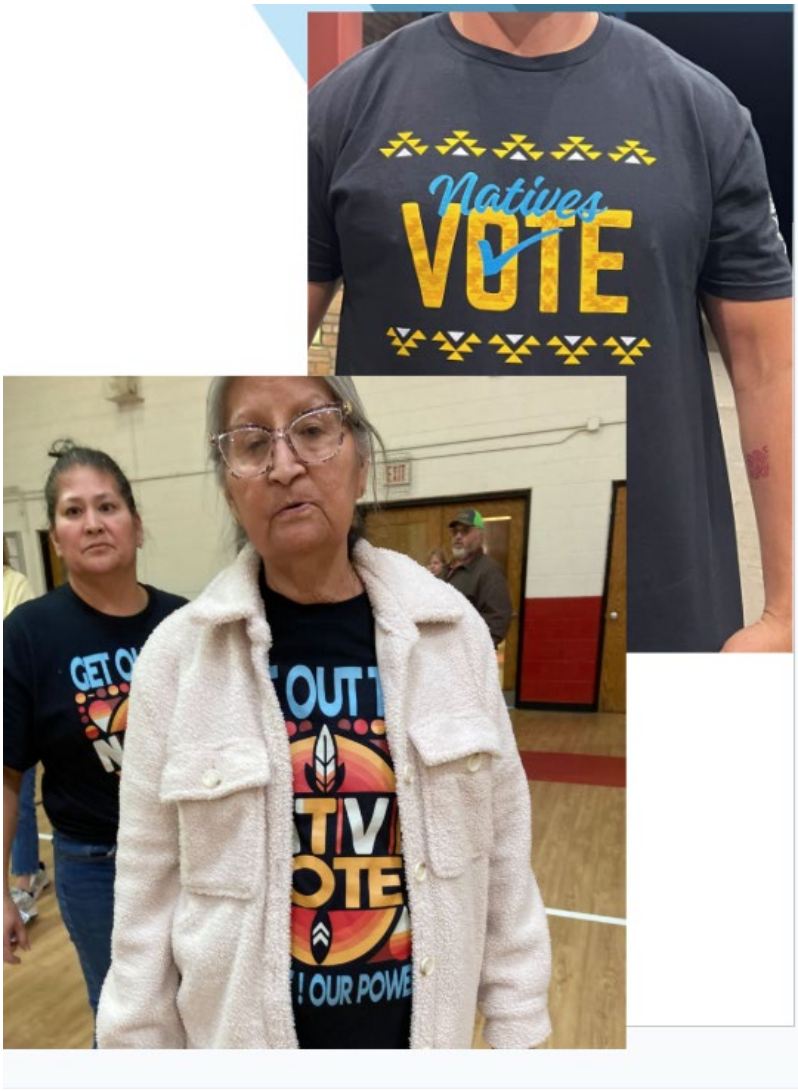
Yet, racial hostilities persist. The year after preclearance expired, in 2014, the Buffalo County Auditor refused to provide on-reservation early voting access for more than 1,200 Crow Creek tribal members, but provided full voting services at Gann Valley - population 12. This was despite funding being secured to cover an additional site. *Obstacles*, at n.270.

In 1963, South Dakota's attorney general advised that Native Americans in Charles Mix County could not vote because their names did not appear on the county's tax rolls. S.D. Atty. Gen., Report of the Atty. Gen. 106 (1963-1964). And in 2000, Charles Mix County failed to redistrict its commissioner district lines that had been in place since 1968. Complaint, *Blackmoon v. Charles Mix County*, No. 05-4017 (D.S.D. Jan. 27, 2005).

The map the county refused to change resulted in a 19.02% deviation from population equality. Despite the Native American population constituting one third of the county, no Native American had ever been elected to the three-person commission. After mediation, the county entered into a consent decree authorizing Section 3 preclearance for any changes to voting standards, practices, procedures, prerequisites, or qualifications to be enacted by the county through 2024, and changes to voting to be enacted by South Dakota through 2014. *Blackmoon v. Charles Mix County.*, No. 05-4017, slip op. (D.S.D. Dec. 4, 2007) (consent decree); *see also Sells Testimony* at 14–16. Yet, racial hostilities persist.

This past November, according to calls for assistance made to 1-800 OUR VOTE, and verified by on the ground field observers, Native American voters in Charles Mix County were denied the right to vote while wearing their "Natives Vote" t-shirts unless they

covered up or reversed their shirts. At least one voter refused to do so and was denied their right to vote.



Native voters forced to cover up or reverse their shirts displaying "Natives Vote" in the 2024 election.

(b) Section 2 and its Remedy Has Recently Provided Relief for Dilutive Election Systems.

South Dakota remains hostile toward Native American voting rights. Section 2's protections against vote dilution continue to provide an important check. In the most recent redistricting session, a state senator had to push back on arguments that "somehow the VRA is merely a guideline" since "that simply isn't true."[16]

Interpreting racial gerrymandering as the district court in this case did, would allow jurisdictions yet another an excuse for not complying with the VRA or choosing to remedy known and proven vote dilution. As the history above outlines, the consequences of this would be devastating.

(2) Section 2 Must Be Allowed to Protect and Remedy Vote Dilution in New Mexico.

In recent years, New Mexico has tried to increase Native American voting rights. For example, New Mexico gives tribes authority to request early voting sites. N.M. Stat. Ann. § 1-6-5.8 (West 2021). Yet, these recent strides sit atop a long legacy of voter disenfranchisement. By 2007, nineteen cases had been brought to vindicate Native American voting rights in New Mexico. Daniel. McCool et al., *Native Vote: American Indians, The Voting Rights Act, And The Right To Vote*, 46 (Cambridge Univ. Press 2007).

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[16] S. Leg. Redistricting Comm. & H. Leg. Redistricting Comm., at 1:06:30 (S.D., Oct. 12, 2021) (response of Representative Spencer Gosch, House Committee Chair), https://sdpb.sd.gov/sdpbpodcast/2021/interim/ hlr10122021a.mp3.

Even when changes at a statewide level are implemented, racism and hostility persist at a local level. In 1975, San Juan County sought to exclude Navajo and other reservation residents from a school district bond election by limiting eligible voters to real estate owners. *Prince v. Board of Educ. of Cent. Consolid. Indep. Sch. Dist. No. 22*, 543 P.2d 1176, 1178 (N.M. 1975). And in 1980, the DOJ sued to eliminate the use of at-large districts when the demographics favored non-Hispanic whites. *United States v. San Juan County*, No. 79-5007-JB (D.N.M. settled Apr. 8, 1980). Racial prejudice continues to this day. Nearly two-thirds of San Juan County is comprised of Navajo Nation tribal lands, and the town bordering the tribal lands, Farmington, has been a hotbed of racial tension.

Following the 1974 kidnap and murder of three Navajo men as part of a local practice known as "Indian rolling," the New Mexico Advisory Committee on Civil Rights conducted an investigation and issued a 174-page report detailing racial discrimination in the administration of justice, delivery of health services, employment, and economic environment in various respects.[17] In 2005, the committee followed up and found conditions had improved, but there were still concerns of ongoing racial discrimination.[18] The Navajo Nation Human Rights Commission issued its own investigation and documented continued

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[17] *See* N.M. Advisory Comm. To The U.S. Comm'n On Civ. Rts., *The Farmington Report: A Conflict Of Cultures* (July 1975), https://babel.hathitrust.org/cgi/pt?id=uiug.30112045537286&view=1up&seq=2.

[18] *See* N.M. Advisory Comm. To The U.S. Comm'n On Civ. Rts., *The Farmington Report: Civil Rights For Native Americans 30 Years Later* (Nov. 2005), https://www.usccr.gov/pubs/docs/122705_FarmingtonReport.pdf.

discrimination and barriers to Navajo civic engagement in a series of field hearings in border communities including Farmington in 2008 and 2009.[19] The report outlined how witnesses testified that while there was some improvement "racism will . . . always be here." *Id.* Another witness described overheard racial slurs and remarks about an elder's dress, and another person testified how "[n]on-Indian personnel with no experience are making $13.00 an hour, whereas Native American personnel with experience are earning $8.00 an hour." *Id.* Yet another described allegations of discrimination at the San Juan Regional Medical Center concerning patient safety and quality of patient care. *Id.* at 33–36. In 2011, two San Juan County men pleaded guilty to racially motivated hate crimes for branding a Navajo man with a swastika.[20]

Despite this disturbing context, non-white Hispanics, who constituted less than 40 percent of the County's residents, controlled four of the five Board of Commissioner seats in San Juan County until just last year. Navajo residents were packed in one district. It was not until Navajo plaintiffs brought suit did the County finally agree to change their map, agreeing to settle the case and adopt a map providing the Navajo residents of San Juan County an opportunity to gain representation on the Commission. Final Judgment,

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[19] *See* Navajo Hum. Relations Comm'n, *Assessing Race Relations Between Navajos And Non-Navajos 2008-2009: A Review Of Border Town Race Relations* (July 2010), https://nnhrc.navajo-nsn.gov/docs/NewsRptResolution/071810_Assessing_Race_Relations_Between_Navajos_and_Non-Navajos.pdf.

[20] See D. Carroll, *Two plead guilty to branding of disabled Navajo man*, Reuters U.S. News (August 18, 2011) https://www.reuters.com/article/us-hate-crime-newmexico/two-plead-guilty-to-branding-of-disabled-navajo-man-idUSTRE77H70420110818.

Navajo Nation et.al., v. San Juan County, et al., Civ. No. 1:22-cv-00095 (D.N.M. March 22, 2024). However, even then the transition was not a smooth one, with the suit being actively litigated for over a year and a half, and the County making several attempts to undermine Plaintiffs' assertions of a Section 2 violation prior to reaching the settlement agreement. Def.'s Mot. for Summ. J. on *Gingles* 1, *Navajo Nation v. San Juan County*, No. 1:22-cv-00095 (D.N.M. July 11, 2023); Def.'s Mot. for Summ. J. on *Gingles* 2 and 3, *Navajo Nation v. San Juan County*, No. 1:22-cv-00095 (D.N.M. July 11, 2023); Def.'s Mot. to Limit Test. of Dr. Daniel McCool, *Navajo Nation v. San Juan County*, No. 1:22-cv-00095 (D.N.M. July 11, 2023); Def.'s Mot. to Strike Ops. of Dr. Matt Barreto, *Navajo Nation v. San Juan County*, No. 1:22-cv-00095 (D.N.M. July 11, 2023); Def.'s Mot. to Dismiss, *Navajo Nation v. San Juan County*, No. 1:22-cv-00095 (D.N.M. July 10, 2023).

If maps intending to remedy Section 2 violations are automatically deemed constitutionally suspect, Native Americans in places like San Juan County, who have faced a long and continuing history of racial discrimination, would find no reprieve even after proving violations of the Voting Rights Act.

(3) Section 2 Must Be Allowed to Protect and Remedy Vote Dilution in North Dakota.

There is an expansive history of Native American voter suppression in North Dakota. Compare *State ex rel. Tompton v. Denoyer*, 72 N.W. 1014 (N.D. 1897) (Spirit Lake Tribe challenging denial of voting precinct on the Spirit Lake Reservation in 1897), with *Spirit Lake Tribe v. Benson Cnty., North Dakota*, No. 2:10-

CV-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010) (2010 finding that the County's removal of the polling place likely violated Section 2). As recently as 1920, North Dakota courts required Bureau of Indian Affairs Superintendents as well as other witnesses to testify that Native Americans attempting to exercise their right to vote "live[d] just the same as white people" and were "civilized." *Swift v. Leach*, 178 N.W. 437, 438-40 (N.D. 1920).

When Native Americans were credited with the surprise election of Heidi Heitkamp in 2012 by fewer than 3,000 votes, the state legislature immediately began suppressing the Native American vote. Following Senator Heitkamp's election—just two years after the bipartisan rejection of voter ID reform where state legislators learned some Native Americans did not have residential addresses on their homes—the legislature eliminated all failsafe mechanisms for voters whose IDs did not have residential address. *Id.* In 2014, there were reports of widespread disenfranchisement of Native Americans. Eventually, following four years of litigation, the case was settled, and the settlement included provisions for voters without a residential address to vote. *Brakebill v. Jaeger* ("Jaeger I"), No. 1:16-CV008, 2016 WL 7118548, at *1 (D.N.D. Aug. 1, 2016).

In 2021 the North Dakota Redistricting Committee (and afterwards the full Senate) approved a house districting proposal that the Turtle Mountain Chippewa Indians and the Spirit Lake Tribe later challenged. See *Turtle Mt. Band of Chippewa Indians v. Jaeger*, No. 3:22-CV-22, 2022 WL 2528256, at *3 (D.N.D. July 7, 2022). Chairmen of the Turtle Mountain and Spirit Lake Nation submitted a letter to the Governor of North Dakota pointing out that calls for redistricting hearings near reservations were ignored. This was

especially troubling because many Native Americans lacked the means to travel to Bismarck to participate in the hearings. Instead, the tribes were given an email notice of the hearing in Bismarck with one day's notice. The letter also called attention to the 2016 election for the United States House of Representatives that demonstrated extreme racial polarization. A Native American candidate was preferred by 98% of Native American voters, but only received 21% of the vote from white voters. *Cf. Allen v. Milligan*, 599 U.S. 1 (2023) (upholding a finding that the second and third *Gingles* preconditions were met where Black candidates were preferred by Black voters at a rate of 92.3% but by white voters at a rate of 15.4%). The letter proposed a redistricting plan that would allow the members of Spirit Lake and Turtle Mountain to vote as a cohesive unit given the racially polarized voting in North Dakota.

Despite the outcry for equal participation, Native Americans were packed into a single state house sub-district and cracked into two other districts dominated by white voters who bloc vote against Native Americans' preferred candidates. Even though Turtle Mountain Band of Chippewa and Spirit Lake Tribe would eventually succeed in demonstrating at trial that North Dakota's redistricting plan diluted the votes of Native Americans, the state continues to mount legal challenges to the decision, attempting to thwart its responsibilities to provide fair maps under the VRA, and challenging the very rights of private citizens to even bring suit against dilutive maps. *See Turtle Mt. Band of Chippewa Indians v. Jaeger*, No. 3:22-CV-22, 2023 WL 8004576 (D.N.D. Nov. 17, 2023); Appellant Brief, *Turtle Mt. Band of Chippewa Indians v. Howe* No. 23-3655, 2024 WL 478244 (8th Cir. Jan. 30, 2024).

Voting rights violations and prevalent discrimination in these three states illustrate the urgent need for the

protections that Section 2 provides, protections that are slowly being chipped away by the states, and protections that would be hollow if efforts to comply with Section 2 were automatically subject to the highest level of scrutiny simply for trying to rectify racial discrimination.

II. Barring Remedial Maps Seeking to Rectify Section 2 Vote Dilution Violations Uniquely Burdens Native American Communities.

Upholding the district court's decision would lead to a mandate that remedial maps to known VRA violations be "colorblind," (Mot. at 33-34) and they be invalid unless they give priority to other traditional redistricting principles such as honoring political boundaries and protecting prior district shapes ("core retention"). This scheme would be devastating to Tribal Nations and Native Americans.

Color blind maps are a farce. This Court has noted that map drawers are "always" aware of racial demographics. *Bethune-Hill v. Virginia State Bd. Of Elections*, 580 U.S. 178, 187 (2017) (quoting *Shaw v. Reno* (*Shaw I*), 509 U.S. 630, 646 (1993)). Legislators, who draw maps in most jurisdictions in which Native American voters live, are similarly aware of the existence of racially polarized voting in their community—knowledge that is key to knowing where one's supporters live. Banning racial considerations in the formulation of remedial maps would not result in race-neutral maps; it would provide a cover for racially discriminatory electoral systems to persist.

Placing consideration of traditional redistricting principles over any consideration of race, even when rectifying proven VRA violations ensures significant difficulty in remedying instances of racial discrimination

and allows for a perpetuation of racially discriminatory maps. Thus, while racial discrimination under the guise of "traditional redistricting criteria" would be allowed to thrive, proven racial discrimination could not be rectified by the more transparent consideration of race.

"Core retention" is not among the longstanding traditional redistricting criteria. *See Shaw I,* 509 U.S. at 646–47. It can perpetuate continued discrimination. *See*, *e.g.*, *North Carolina v. Covington,* 585 U.S. 969, 971-974 (2018) (*per curiam*) (policy of core preservation perpetuated a racial gerrymander). Similarly, respecting political boundaries, such as county lines, is particularly problematic in Indian Country. In states like South Dakota, North Dakota, Arizona, and New Mexico, Native American populations are often spread out across multiple counties. Respecting those political boundaries can devastate Native Americans' ability to vote as a cohesive unit.

For example, reservation lands of nine Tribal Nations are split amongst thirteen different counties in South Dakota—effectively diluting Native American voting power in county elections. In one instance, a majority of the members of the Oglala Sioux Tribe live on the Pine Ridge Indian Reservation. The reservation consists of lands in four separate counties—Oglala Lakota, Bennett, Jackson, and Sheridan. Similarly, the Cheyenne River Tribe is split amongst five different counties—Dewey, Haakon, Meade, Stanley, and Ziebach. The Rosebud Tribe, located in the Rosebud Sioux Indian Reservation, spans five different counties—Gregory, Lyman, Mellette, Todd, and Tripp.

Other states with large Native populations face similar issues of dispersal of tribal members across multiple counties. In North Dakota, the Fort Berthold

Indian Reservation is split amongst McLean, Mountrail, Dunn, McKenzie, Mercer, and Ward counties. Spirit Lake Nation, like the MHA Nation, is split amongst five different counties—Benson, Eddy, Ramsey, Wells, and Nelson. In Arizona, the Tohono O'odham Nation is split amongst Maricopa, Pima, and Pinal counties. In New Mexico, the Laguna Pueblo Reservation is split between Cibola, Sandoval, Valencia, and Bernalillo counties. Similarly, the Santa Clara Pueblo is split across Rio Arriba, Sandoval, and Santa Fe counties. These unique features of Tribal lands clash with modern political divisions—making it difficult for Native Americans to have adequate representation, and much needed political power, in state and local political bodies.

In Indian Country, there are places where some "traditional" redistricting principles, particularly those relating to political boundaries, *entrench* the political power of the majority and adherence to them is anything but race-neutral. And those principles must be balanced by an appreciation of racial issues when attempting to remedy discriminatory practices.

CONCLUSION

Tribal Nations and Native Americans continue to face racial discrimination that prevents the full exercise of their political power. Section 2 must be allowed to provide a *real* remedy to protect Native Americans from vote dilution that prevents them from electing candidates of choice. The decision of the district court should be reversed.

Respectfully submitted,

GEOFFREY BLACKWELL
NATIONAL CONGRESS OF AMERICAN INDIANS
1516 P Street NW
Washington, DC 20005
(202) 466-7767

CHAD DUNN
LEGAL DIRECTOR
BERNADETTE REYES
Counsel of Record
SONNI WAKNIN
UCLA VOTING RIGHTS PROJECT
3250 Public Affairs Building
Los Angeles, CA 90095
(310) 400-6019
bernadette@uclavrp.org
chad@uclavrp.org
sonni@uclavrp.org

Counsel for Amici Curiae

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