No. 23-3655

United States Court of Appeals for the Eighth Circuit

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, SPIRIT LAKE TRIBE, WESLEY DAVIS, ZACHERY S. KING, COLLETTE BROWN,

Plaintiffs-Appellees,

v.

MICHAEL HOWE, in his official capacity as Secretary of State of North Dakota,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA
(No. 3:22-cv-00022)

REPLY BRIEF OF DEFENDANT-APPELLANT

David H. Thompson
Peter A. Patterson
Athanasia O. Livas
Special Assistant Attorneys General
dthompson@cooperkirk.com
ppatterson@cooperkirk.com
alivas@cooperkirk.com
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036

Philip Axt
Solicitor General
pjaxt@nd.gov
600 E. Boulevard Ave., Dept. 125
Bismarck, ND 58505

David R. Phillips
Special Assistant Attorney General
dphillips@bgwattorneys.com
300 West Century Ave., P.O. Box 4247
Bismarck, ND 58502

Counsel for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Appellate Case: 23-3655 Page: 3 Date Filed: 04/08/2024 Entry ID: 5381370

Statutes

Other Authorities

INTRODUCTION

While Plaintiffs criticize the Secretary's position as "audacious and unprecedented," it is Plaintiffs' theory that is more deserving of that descriptor. Rather than following the Supreme Court's well-established *Gonzaga* test for Section 1983 claims, Plaintiffs ask this Court to employ an entirely new framework they candidly admit they have invented. The Court should decline the invitation to craft a new categorical exception to the *Gonzaga* test for any statutes enacted under Congress's Reconstruction Amendment authorities.

In urging the Court to adopt an entirely novel framework, Plaintiffs disregard Supreme Court precedent that establishes *Gonzaga* as the test for whether Section 1983 applies to *any* federal law. No Supreme Court opinion—whether from a single Justice or for a majority of the Court—says the *Gonzaga* test only applies to Spending or Commerce Clause statutes. To the contrary, the Supreme Court has stated the *Gonzaga* test in broadly applicable terms, and courts have applied it to determine whether other sections of the VRA are enforceable through Section 1983. Reconstruction Amendment authority statutes that actually do protect *individual* rights—the kind of statutes Plaintiffs haphazardly try to group with Section 2 vote dilution claims—should generally satisfy *Gonzaga*'s test.

Applying the right test to the vote dilution claim at issue, Plaintiffs cannot meet their demanding burden to establish that Section 2 of the VRA unambiguously

Appellate Case: 23-3655 Page: 5 Date Filed: 04/08/2024 Entry ID: 5381370

creates an individual right enforceable through Section 1983. Moreover, the VRA's comprehensive remedial scheme for Section 2 vote dilution claims evidences Congressional intent to preclude lawsuits by private plaintiffs for such claims. Consequently, the most straightforward reading of the statutes is also the correct one: Section 2 of the VRA, which created, at most, a *collective* protection against "vote dilution," is not privately enforceable through Section 1983.

But even if Plaintiffs can use Section 1983 to circumvent this Court's recent holding that Section 2 lacks a private right of action, the district court's decision to invalidate North Dakota's election map should be reversed. The district court's assumption that it is irrelevant whether Plaintiffs' alternate maps are blatant racial gerrymanders was a substantial error that sharply departs from Supreme Court precedent. Additionally, the district court based one of its findings on data that it acknowledged was insufficient to support the conclusion reached. More is required before a federal court strikes down a state's election map.

ARGUMENT

I. Plaintiffs' Novel Theory for a Private Cause of Action Fails.

A. Plaintiffs' Claims Are Subject to the *Gonzaga* Test.

Private plaintiffs may invoke Section 1983 to assert individual rights created by other federal statutes only if they satisfy the two-part test of *Gonzaga University v. Doe*, 536 U.S. 273 (2002). "Although federal statutes have the *potential* to create

§ 1983-enforceable rights, they do not do so as a matter of course." *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 183 (2023). The *Gonzaga* test "sets a demanding bar: Statutory provisions must *unambiguously* confer individual federal rights." *Id.* at 180 (emphasis original). The district court correctly recognized the *Gonzaga* test is applicable here.

Perhaps recognizing their inability to satisfy the Supreme Court's test, Plaintiffs ask the Court to adopt a new test of their own creation. Plaintiffs propose a carve-out from the Supreme Court's *Gonzaga* test for any statutes enacted under Congress's Reconstruction Amendment authorities. Resp. Br. 23-35. But the Supreme Court has stated the *Gonzaga* test in broad terms derived from the text of Section 1983 itself, and Plaintiffs cannot escape it.

Plaintiffs also mischaracterize the Secretary's position, suggesting the Secretary contends Section 1983 "does not apply to the primary category of statutes Congress enacted it to cover." *Id.* at 31. That is not correct. The Secretary does not argue for *any* categorical exemption to *Gonzaga*, and Reconstruction Amendment authority statutes that do create individual rights should easily satisfy *Gonzaga*'s test for private enforcement. Plaintiffs admit as much. *See* Resp. Br. 30 ("Only the atypical Reconstruction Amendment enforcement statute will fail to protect individual rights."). But Section 2's prohibition on vote dilution is not a typical individual rights-creating statute.

Appellate Case: 23-3655 Page: 7 Date Filed: 04/08/2024 Entry ID: 5381370

Plaintiffs have no answer to the Supreme Court repeatedly stating the *Gonzaga* test in broad terms applicable to *all* federal statutes. As the Court said: "[W]e have crafted a test for determining whether a particular *federal law* actually secures rights for § 1983 purposes." *Talevski*, 599 U.S. at 175 (emphasis added); *see also id.* at 183 (discussing the test for "federal statutes"). Moreover, Plaintiffs' contention there should be a new test for any statutes enacted under Congress's Reconstruction Amendment authorities disregards the many Circuits that have expressly recognized *Gonzaga*'s broad applicability—including for other sections of the VRA. *E.g., McCready v. White*, 417 F.3d 700, 703 (7th Cir. 2005) ("Any possibility that *Gonzaga* is limited to statutes that rest on the spending power … has been dispelled by *Rancho Palos Verdes v. Abrams*, 544 U.S. 113 [] (2005), which treats *Gonzaga* as establishing the effect of § 1983 itself."); *Vote.org v. Callanen*, 89 F.4th 459, 474-78 (5th Cir. 2023) (applying *Gonzaga* to determine whether the Materiality Provision of the Voting Rights Act is enforceable through Section 1983); *Schwier v. Cox*, 340 F.3d 1284, 1296-97 (11th Cir. 2003) (same).

Plaintiffs assert that in one Supreme Court decision applying the *Gonzaga* test, "the Supreme Court acknowledged [Section 1983's] central application was to Reconstruction Amendment enforcement statutes." Resp. Br. 32. But that is not a correct characterization of the decision. Plaintiffs misattribute to the Court a mere description of a party's argument, which the Court *disagreed with*. The Court stated:

> *As respondents argue*, the "prime focus" of § 1983 and related provisions was to ensure "a right of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted pursuant thereto" . . . *but the Court has never restricted the section's scope to the effectuation of that goal*.

Dennis v. Higgins, 498 U.S. 439, 444–45 (1991) (emphasis added).

Rather than offering precedential support for the presumptive-applicability framework they ask this Court to impose, Plaintiffs make broad pronouncements about Congress's supposed purposes and an alleged "universal[]" view "that statutes enacted to enforce the Fourteenth and Fifteenth Amendments are presumptively enforceable through § 1983." Resp. Br. 27. Universally accepted by whom, on what bases, and in what contexts, Plaintiffs do not say.[1]

[1] To the extent no one has yet challenged the application of Section 1983 to Section 2 of VRA, that can be explained by the fact that, until recently, parties may have assumed Section 2 of the VRA provided its own implied cause of action. This Court has since held otherwise. Any unstated background assumptions about private causes of action in those prior Section 2 actions are not instructive.

That also addresses the circular reasoning behind the alleged concerns of "under-enforcement" expressed by several amici. If the United States has previously been content to devote its attention elsewhere and play a minor role enforcing Section 2 because it believed it could rely on private plaintiffs to flood the space with recurrent and sometimes contradictory claims, *cf.* Amicus Br. of U.S. at 2, nothing is stopping the United States from taking a more active role enforcing the statute when the error of its prior assumption is made clear. *See About the Office*, U.S. DEP'T OF JUSTICE, https://bit.ly/3vLDRON (accessed Apr. 2, 2024) ("The Department of Justice is the world's largest law office, employing more than 10,000 attorneys nationwide."); *Remarks of Attorney General Merrick B. Garland*, U.S. DEP'T OF JUSTICE (Mar. 3, 2024), https://bit.ly/43LLJfP (the Department of Justice recently "double[d] the number of lawyers in the Voting Section of the Civil Rights Division").

As for acceptance by Courts, Plaintiffs largely rely on separate writings by Justices Barrett and Thomas in *Talevski*. But these separate writings offer Plaintiffs no help. Justice Barrett simply stated *Gonzaga* provides the applicable test for Spending Clause statutes. *Cf.* Resp. Br. 27 (quoting 599 U.S. at 193 (Barrett, J., concurring)). Contrary to Plaintiffs' suggestion, Justice Barrett did not suggest that the *Gonzaga* test does not apply to other statutes. Similarly, Plaintiffs misunderstand Justice Thomas's dissent, which considered whether Section 1983 has any relevance to statutes that do not enforce the Reconstruction Amendments. *Cf.* Resp. Br. 27 (quoting 599 U.S. at 225 & n.12 (Thomas, J., dissenting)). Nothing in Justice Thomas's dissent suggests that Section 1983 should apply *automatically* to any statutes enacted under Congress's Reconstruction Amendment authorities.

In short, *Gonzaga* provides the framework to assess whether Section 1983 provides a private cause of action for Section 2 vote dilution claims, and the Court should reject Plaintiffs' invitation to create a new test out of thin air.

B. Plaintiffs' Claims Fail the *Gonzaga* Test.

1. Section 2's prohibition on collective vote dilution does not unambiguously confer new individual rights.

Plaintiffs cannot satisfy the "significant hurdle" of demonstrating that Section 2's prohibition on collective vote dilution "unambiguously" creates an "individual" right enforceable under Section 1983. *Talevski*, 599 U.S. at 180, 184.

For one, Section 2 prohibits states and local governments from engaging in collective vote dilution. It creates a *prohibition*—not a right. "Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights." *Gonzaga*, 536 U.S. at 287 (cleaned up).

Plaintiffs attempt to undermine this Court's recent precedent on the very question at issue—where this Court stated "[i]t is unclear whether § 2 creates an individual right"—by labeling that statement as dicta. Resp. Br. 38 (quoting *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1209 (8th Cir. 2023)). But the Court's conclusion that Section 2 does not clearly create an individual right was not "[un]necessary" to the Court's analysis, *contra* Resp. Br. 38 n.5; it was the first step in the Court's analysis whether Section 2 contains a private right of action. That this Court went on to find "[g]reater clarity exists on the private-remedy question[,]" *Ark. State Conf.*, 86 F.4th at 1210, does not undermine the Court's first holding on the lack of clarity for the individual-rights question.

But even if Plaintiffs are correct that this Court's statement was dicta, that does not change the fact that the analysis is correct. Section 2 of the VRA directs States and localities not to engage in prohibited conduct. The subject of the statute is any "State or political subdivision." 52 U.S.C. § 10301(a).

Plaintiffs largely rest their response on Section 2's use of the word "right." *See* Resp. Br. 36. But the Supreme Court has already rejected a "presumption of

enforceability merely because a statute speaks in terms of rights." *Gonzaga*, 536 U.S. at 289 n.7 (cleaned up) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 18–20 (1981)). It was the *dissent* in *Gonzaga* that adopted Plaintiffs' position, suggesting "any reference to 'rights,' even as a shorthand … should give rise to a statute's enforceability under § 1983." 536 U.S. at 289 n.7.[2]

Nor does *Talevski* stand for the proposition that a statute's mention of "rights" alongside a focus on regulated parties unambiguously confers an individual right. *Contra* Resp. Br. 38-39. Rather, *Talevski* provides that a secondary focus on regulated parties does not undermine a primary focus on individual rights where the mention of regulated parties does not cause a "material diversion." 599 U.S. at 185. Here, by contrast, Section 2's focus on what States cannot do is not a "diversion"—it is the statute's primary focus. *See* 52 U.S.C. § 10301(a) ("No voting qualification

[2] Plaintiffs' amici also argue extensively about Section 2's legislative history. There are "many reasons to doubt legislative history as an interpretive tool." *Ark. State Conf.*, 86 F.4th at 1213. But that is especially the case here, where the Court has already rejected relying upon the very documents amici invoke. *See id.* at 1214. The 1982 Senate Committee Report which amici invoke "does not point to a single word or phrase in the Voting Rights Act in support of the conclusion that a private right of action has existed from the beginning." *Id.* (citing S. Rep. No. 97-417, at 30; H.R. Rep. No. 97-227, at 32). "Nor is it clear how the 1982 Congress could possibly have known what a different set of legislators thought 17 years earlier." *Id.* Where this Court already found that such documents do not support an implied private right of action—an issue they purported to address—they certainly cannot be read to support a Section 1983 right of action—an issue they did not purport to address. "To the extent that legislative history can be helpful in any case, this one is not it." *Id*.

or prerequisite to voting or standard, practice, or procedure shall be *imposed* or *applied by any State or political subdivision* …") (emphasis added); *id.* 10301(b) ("A violation" exists when "the political processes leading to nomination or election in the *State or political subdivision* are not equally open …") (emphasis added).

Secondly, even if Section 1983 could be read to create a right, that right would be *collective*, not individualized. In arguing to the contrary, Resp. Br. 40-42, Plaintiffs place substantial weight on the fact that *Gonzaga* refers to groups of individuals—that is, a benefited class. But that confuses the issues. To be sure, a statute can protect multiple individuals, and it can address those individuals as a class. But that is not the question. The question is not whether multiple individuals can each exercise a right; the question is whether the *nature of the right* itself is individual or collective. And Courts analyzing Section 2 vote dilution claims are simply not "concerned with 'whether the needs of any particular person have been satisfied.'" *Gonzaga*, 536 U.S. at 288 (cleaned up).

In this way, vote dilution claims stand in stark contrast to vote denial claims, which do have an individual focus. Plaintiffs say it "makes no sense to contend that Section 2 creates an individual right in the vote denial context but not in the vote dilution context." Resp. Br. 42 n.8. But the distinction makes perfect sense. The right not to be denied the ability to vote on account of race is an individual one, conferred directly by the Fifteenth Amendment. Thus, an individual claiming denial

of their ability to vote can assert that an individual right has been violated—bringing the claim does not depend on anyone else. Conversely, the prohibition against vote dilution is collective—bringing the claim requires pointing to a group that is unable to elect the candidates preferred by a majority of that group. A vote dilution claim turns on the inability of political majorities in racial minority groups within geographic regions to elect their preferred candidates; the candidate preference of any individual is irrelevant.

Plaintiffs try to counter this point by pointing to language from *Shaw v. Hunt*, 517 U.S. 899 (1996). *See* Resp. Br. 40. But *Shaw* did not address the issues in this case. *Shaw* was an Equal Protection racial gerrymandering case, and it addressed whether the state's attempt to comply with Section 2 would justify making race the predominate consideration in map design (it did not). 517 U.S. at 907-08. In *Shaw*, the Court seems to have assumed that a private right of action existed under the VRA. *Id.* at 914-17. *Shaw* does not mention Section 1983. To the extent some of the Court's language refers to Section 2 claims in individual terms, that would appear to follow from the unexamined assumption that Section 2 provided an implied private right of action—an assumption since considered and repudiated by this Court. *Ark. State Conf.*, 86 F.4th at 1204.

In any event, *Shaw* only spoke to a hypothetical remedy for a hypothetically proven Section 2 claim (in the context of whether those hypotheticals would allow

the state's predominate consideration of race to survive an Equal Protection challenge). And what the Court rejected was the idea that if "a § 2 violation exists," a state "may draw a majority-minority district *anywhere*, even if the district is in no way coincident with the compact *Gingles* district[.]" *Id.* at 916-17 (emphasis added). The Court rejected such statewide interchangeability. Within a "particular area," however, the nature of the right is aggregate and can only be understood as so. Notably, *Shaw* also emphasized that an individual plaintiff does not have the "right to be placed in a majority-minority district once a violation of the statute is shown." *Id.* at 917 n.9. Thus, *Shaw* still analyzes the question at the district level, addressing the injury to a collective group of voters in a "particular area." *Id.* at 917.

In short, Section 2 prohibits States and localities from engaging in racial vote dilution. It creates a prohibition, not a right—and certainly not an *unambiguous* right. But to the extent it could be read as creating any right at all, it would be a collective one, not an individual one. Consequently, Section 2 of the VRA is not privately enforceable through Section 1983.

2. Section 2's comprehensive enforcement scheme independently precludes lawsuits by private plaintiffs.

Even if Plaintiffs could demonstrate that Section 2 unambiguously created an individual right, the second step of *Gonzaga* independently precludes a private right of action under Section 1983 for vote dilution claims.

The VRA expressly authorizes the Attorney General to seek broad relief for Section 2 vote dilution claims, including "an application for a temporary or permanent injunction, restraining order, or other order … directed to [] State and State or local election officials[.]" 52 U.S.C. § 10308(d). As this Court has already held, "[i]f 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. State Conf.*, 86 F.4th at 1211 (quoting *Freeman v. Fahey*, 374 F.3d 663, 665 (8th Cir. 2004)).

Here again, Plaintiffs seek to avoid the Supreme Court's test. Plaintiffs argue that private enforcement for Section 2 claims can coexist with Attorney General enforcement. Resp. Br. 45. But "[t]he critical question" is "whether Congress meant the statute's remedial scheme to coexist with a § 1983 action." *Talevski*, 599 U.S. at 187 (cleaned up). The question is thus not whether it is *impossible* for the statute's enforcement scheme and private enforcement through Section 1983 to coexist. Rather, the question goes to likely congressional intent.

With that framework in mind, Plaintiffs make much of the fact that Section 2 does not provide its own private right of action. Resp. Br. 46-47. But an express private right of action is only *one* of the many ways in which Congress can indicate intent not to permit enforcement of a statute through Section 1983, and "an actual clash—one private judicial remedy against another …—is *not required* to find that

a statute forecloses recourse to § 1983." *Talevski*, 599 U.S. at 195 (Barrett, J., concurring) (emphasis added).

Gonzaga requires more than a surface-level inquiry of whether a statute provides an express private right of action, and several indicators of congressional intent to the contrary are present here. As the Secretary addressed, Opening Br. 32-34, the VRA provides a "comprehensive" remedy for Section 2 claims, *Talevski*, 599 U.S. at 189, and it expressly authorizes a government actor to "deal with violations." *Gonzaga*, 536 U.S. at 289–90.[3]

Additionally, as the Secretary also explained, Opening Br. 34-35, enforcement by the Attorney General is more consonant with the structure of the statute and the federalism and separation of powers issues at play. Of course, the Secretary does not dispute that "a federal court's enforcement of Section 2 is a *legal* exercise, not a political one." *Contra* Resp. Br. 49. But the decision *whether* to bring suit, and *when*, is fraught with political consequences, as the recent history of Section 2 litigation has proven. *Cf. McConchie v. Scholz*, 567 F. Supp. 3d 861, 892 (N.D. Ill. 2021) (noting that around the country "[c]hallenges to redistricting maps are routine"

[3] Plaintiffs criticize the Secretary for "relying" on Justice Barrett's *Talevski* concurrence. Resp. Br. 45-46. But the Secretary only "relied" on the concurrence as additional support for its summary of the Court's precedential cases. *See* Opening Br. 32 (citing *Talevski*, 599 U.S. at 195) (Barrett, J., concurring) ("Our cases have looked to a wide range of contextual clues, like 'enforcement provisions' that 'confe[r] authority to sue … on government officials'").

Appellate Case: 23-3655 Page: 17 Date Filed: 04/08/2024 Entry ID: 5381370

and "occur every ten years, like clockwork"); Elmendorf & Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2157-58 (2015) (noting "litigating section 2 cases [has become] expensive and unpredictable[,]" and "well-funded actors" may "finance section 2 cases when the political stakes are high").

When Congress created a disparate-impact-theory of liability for "vote dilution" claims, it matched enforcement to the harm. Congress paired a centralized enforcement remedy consonant with the VRA's collective prohibition. Section 2 lawsuits by private plaintiffs—perennial, unpredictable, and sometimes contradictory—are incompatible with that framework.

II. Even If Section 1983 Provides a Private Right of Action for Claims Brought Under Section 2 of the VRA, the District Court Erred in Striking Down North Dakota's Redistricting Plan.

The Supreme Court has held time and again that a federal court's decision to strike down a state's duly enacted election map "represents a serious intrusion on the most vital of local functions." *Abbott v. Perez*, 585 U.S. 579, 603 (2018). The bar for doing so is supposed to be high, and "the *Gingles* factors help ensure that remains the case." *Allen v. Milligan*, 599 U.S. 1, 29-30 (2023). "Properly applied," the *Gingles* factors "limit judicial intervention" so that Section 2, with its "exacting requirements," is only used to invalidate election maps that are the product of "intensive racial politics." *Id.* (citation omitted).

As the Secretary explained, Opening Br. 38-47, the district court did not make the findings necessary to invalidate the State's duly enacted map. Had it done so, it should have concluded that Plaintiffs failed to meet their burden. Plaintiffs' response, Resp. Br. 52-67, is largely an attempt to re-write the district court's order to suggest that it made findings it did not.

A. The District Court's *Gingles* Precondition 1 Analysis Was Insufficient to Strike Down the State's Election Map.

"Each *Gingles* precondition serves a different purpose." *Milligan*, 599 U.S. at 18. "[T]he ultimate end of the first *Gingles* precondition is to prove that a solution is possible[.]" *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006) (citation omitted). The Secretary addressed why an alternate map proffered by a plaintiff that is predominantly based upon racial considerations cannot be a possible "solution," and identified multiple ways in which the district court's *Gingles* 1 analysis was insufficient to strike down the State's election map. Opening Br. 38–44. Plaintiffs' response attempts to evade or excuse those deficiencies several different ways, all of which should be rejected.

First, contrary to Plaintiffs' insinuation, Resp. Br. 54-55, the purpose of *Gingles* precondition 1 is not remedial. *Bone Shirt*, 461 F.3d at 1019 ("the *Gingles* preconditions are designed to establish liability, and not a remedy"). And an examination of Plaintiffs' alternate maps was *absolutely* necessary for the *Gingles* 1 inquiry. *Contra* Resp. Br. 54-55. Supreme Court precedent is clear on the point.

Appellate Case: 23-3655 Page: 19 Date Filed: 04/08/2024 Entry ID: 5381370

E.g., Milligan, 599 U.S. at 25-26 ("our cases have consistently focused, for purposes of litigation, on the specific illustrative maps that a plaintiff adduces").[4] Plaintiffs' suggestion that examining their proffered alternate maps was "not even necessary for *Gingles* 1 to be established," Resp. Br. 55, should be rejected out of hand.[5]

Second, Plaintiffs complain that the Secretary's argument "rests entirely on a mischaracterization of a single footnote in the district court's decision." Resp. Br. 55. How the Secretary purportedly "mischaracterized" the district court on this point is not clear, and Plaintiffs offer no explanation. And more fundamentally, the fact that the district court dedicated only a single footnote to whether Plaintiffs' proposed

[4] Plaintiffs cite one case in support of this argument. *See* Resp. Br. 54 n.12 (citing *Missouri State Conf. of NAACP v. Ferguson-Florissant Sch. Dist*., 894 F.3d 924, 933 (8th Cir. 2018)). But nothing in *Ferguson-Florissant*—which rejected the argument that a polity's as-enacted map is *per se* immune to Section 2 challenge when it has a bare numerical minority-majority—suggests *Gingles* 1 does not require examination of the plaintiff's proposed alternate maps.

[5] The Court should also reject Plaintiffs' suggestion, Resp. Br. 54-55, that the Court ignore Supreme Court precedent on what *Gingles* precondition 1 requires because, they allege, the Secretary's expert "conceded" at trial the as-enacted version of District 9 could satisfy *Gingles* 1 without an examination of Plaintiffs' maps. For one, a review of the cited transcript pages reveals it is not clear what sort of response Plaintiffs' counsel was trying to elicit, and the transcript suggests the witness was similarly confused. *See* App.357. R.Doc.117 at 110-11 ("You lost me. Could you restate that, please?"). Secondly, even if the Secretary's expert "conceded" what Plaintiffs suggest (which the Secretary denies), an expert's mistaken interpretation of law would not trump Supreme Court precedent. And third, the district court's order does not rely on any such alleged "concession," but instead noted (correctly) "the first precondition considers the proposed district(s) …" Add.43, App.471, R.Doc.125 at 17 (emphasis original).

maps were predominantly based on considerations of race is part of the problem. Another big part of the problem is that, in that footnote, the district court failed to find that race was not the predominate basis for the design of Plaintiffs' maps. Add.46, App.474, R.Doc.125 at 20 n.3. Instead, the district court assumed that even if Plaintiffs' maps were blatant racial gerrymanders, "establishing (and then remedying) a Section 2 violation provides a compelling justification." *Id*.

As the Secretary explained, Opening Br. 41-42, the district court's cursory conclusion sharply departs from Supreme Court precedent. The Supreme Court has "assumed" in several cases that if a *State* had good reason to believe predominantly considering race was necessary to comply with the VRA, the *State* may have had a compelling reason for predominantly considering race that would permit the state's as-enacted map to survive strict scrutiny.[6]

To the Secretary's knowledge, the Supreme Court has never "assumed" that when a *plaintiff* proffers maps during a *Gingles* 1 analysis, the *plaintiff* can engage in racial gerrymandering if the *plaintiff* believes the VRA requires it. To the contrary, the Supreme Court recently reaffirmed plaintiffs satisfy their *Gingles* 1 burden when "race did not predominate in [their proposed] maps." *Milligan*, 599

[6] *But see Milligan*, 599 U.S. at 79 (Thomas, J., dissenting) (noting that "assumption" is "one of the more confused notions inhabiting our redistricting jurisprudence" and that the Court has "never applied this assumption to *uphold* a districting plan that would otherwise violate the Constitution, and the slightest reflection on first principles should make clear why it would be problematic to do so").

U.S. at 32; *see also id*. at 33 (for a *Gingles* 1 inquiry, "[t]he line that we have long drawn is between [race] consciousness and [race] predominance").

Conversely, what this district court held, without any critical analysis, is that private plaintiffs have free reign to inject race-based considerations into the very fabric of how our democracy is organized—elevating racial considerations over everything else—if they believe the VRA requires it. That holding, if not corrected, "threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody[.]" *Miller v. Johnson*, 515 U.S. 900, 912 (1995); *accord SFFA v. President & Fellows of Harvard Coll*., 600 U.S. 181, 208 (2023) ("acceptance of race-based state action [is] rare for a reason").

The district court's failure to meaningfully address whether Plaintiffs' maps were predominantly based on racial considerations—let alone make a finding they were not—is a sharp departure from how Supreme Court precedent addresses the specter of racial gerrymandering in the *Gingles* 1 context. *Cf. Milligan*, 599 U.S. at 32 ("The District Court did not err in finding that race did not predominate in [plaintiffs' proposed] maps."); *accord id*. at 98 (Alito, J., dissenting) ("Because [racial] non-predominance is a longstanding and vital feature of districting law, it must be honored in a *Gingles* plaintiff's illustrative district.").

Third, Plaintiffs contend there was not evidence that their alternate maps were

predominantly based on racial considerations, and they cite testimony from the Secretary's expert that he lacked "evidence" race was their predominate motivating factor. Resp. Br. 56 (quoting App.414-15; R.Doc.117 at 167-68).[7] But there are a couple problems with this argument.

For one, Plaintiffs created their alternate maps, and it is their burden to establish that race was not their predominate motivating factor. In a *Gingles* 1 analysis, "[t]he plaintiff bears both the burden of production and the burden of persuasion" to establish that an additional majority-minority district "can be created without making race the predominant factor." *Milligan*, 599 U.S. at 99 (Alito, J., dissenting) (citing *Voinovich v. Quilter*, 507 U.S. 146, 155-56 (1993)). Notably, Plaintiffs in this case did not proffer testimony from the drafter of their alternate maps to establish that race was not the predominate consideration. *Contra Milligan*, 599 U.S. at 31 (person who designed alternate maps testified race did not predominate and was merely given "equal weighting" with traditional factors).

Moreover, the contention there was not evidence of racial predominance runs headlong into another major problem of the district court's *Gingles* 1 analysis—its

[7] Relatedly, Plaintiffs suggest the Secretary's expert testified Plaintiffs alternate maps "did not subordinate traditional districting principles to racial considerations." Resp. Br. 56 (citing App.410-11, R.Doc.117 at 163-64). However, a closer read of the transcript indicates what the witness testified is he did not have "evidence" plaintiffs' maps subordinated other concerns to race. App.411, R.Doc.117 at 164.

Appellate Case: 23-3655 Page: 23 Date Filed: 04/08/2024 Entry ID: 5381370

failure to address the fact that Plaintiffs' alternate districts perform *worse* on traditional districting criteria than the districts they sought to invalidate.

Plaintiffs' argument, Resp. Br. 58-59, that the district court could ignore this fact because it did not need to engage in a "beauty contest" misses the purpose for comparing alternate maps against the state's map in the first place.[8] Section 2 claims can only prevail when the state's map dilutes minority voting strength "on account of race." 52 U.S.C. § 10301(a). And ordinarily, where (unlike here) plaintiffs offer alternate maps that perform better on traditional criteria and bolster minority voting strength without making race predominate, the state map's worse performance "shows it is *possible* that the State's map has a disparate effect *on account of race*." *Milligan*, 599 U.S. at 26 (emphasis added); *Cooper v. Harris,* 581 U.S. 285, 317 (2017) ("Such would-have, could-have … arguments are a familiar means of undermining a claim that an action was based on a permissible … ground.").

That same principle applies in reverse when, as here, Plaintiffs ask a federal court to strike down a state's election map and replace it with a map that accrues to one race's electoral benefit while performing *worse* on traditional criteria. That is

[8] Plaintiffs also miss the point of the "beauty contest" language in *Milligan*. Contrary to Plaintiffs' assertion, Resp. Br. 59, *Milligan* did not say that a plaintiffs' alternate maps can perform worse on traditional districting criteria than the as-enacted map it seeks to replace. Instead, *Milligan* affirmed a district court statement that no "beauty contest" was needed in that case because both the as-enacted map and the alternate map each split a community of interest. 599 U.S. at 21.

Appellate Case: 23-3655 Page: 24 Date Filed: 04/08/2024 Entry ID: 5381370

why, in *Milligan*, it mattered that the plaintiff proffered an alternate map that "perform[ed] generally better on average" than the state's map. 599 U.S. at 20. And that is why, in this case, the district court erred when it treated as irrelevant the fact that plaintiffs' alternate maps perform *worse* on traditional districting criteria. The fact that they perform worse is evidence they were created with unconstitutional racial goals. *Id.*; *Cooper,* 581 U.S. at 317.[9]

States desperately need clarity on when federal courts will strike down their election maps under Section 2, and the district court's order in this case is a testament to the current uncertainty. Despite noting the State "carefully examine[d] the VRA and believed … [the map] would comply," Add.64, App.492, R.Doc.125 at 38, the district court found the VRA *obligated* the State to enact districts that perform *worse* on traditional criteria in order to give one race an electoral benefit—all without undertaking any inquiry whether doing so violated the Constitution's prohibition on racial gerrymandering. *Contra Milligan*, 599 U.S. at 43 (Kavanaugh, J., concurring) (states are not required to create majority-minority districts "without concern for

[9] Plaintiffs try to sidestep this issue by pointing to one or two districts elsewhere in the State that had lower scores. Resp. Br. 58-59. But there is no allegation those other districts were drawn with predominantly racial motivations. Conversely, there is a significant concern race predominates plaintiffs' alternate districts, and it is therefore very relevant Plaintiffs sought to replace the States' as-enacted districts with ones that perform substantially *worse* on traditional criteria.

Appellate Case: 23-3655 Page: 25 Date Filed: 04/08/2024 Entry ID: 5381370

traditional districting criteria"). That was significant error.[10]

B. The District Court's *Gingles* Precondition 2 Analysis Was Insufficient to Strike Down the State's Election Map.

On *Gingles* precondition 2, the Secretary's argument is simply stated: before invalidating the State's election map, did Plaintiffs have to proffer evidence of political cohesion and racial polarization in the challenged subdistricts, countenanced by the district court, using a recognized method of statistical analysis or other objectively reliable data? *See Bone Shirt*, 461 F.3d at 1020 ("Proving this factor typically requires a statistical and non-statistical evaluation.").

Plaintiffs' primary response, Resp. Br. 60-61, 64-67, is that proffering evidence from a recognized method of statistical analysis is merely one way (albeit the "typical" way) of establishing racial cohesion and political polarization, but courts are free to simply rely on lay testimony. Plaintiffs cite several out-of-circuit cases for this proposition, but those cases undermine Plaintiffs' position more than they support it. *Cf. Brewer v. Ham*, 876 F.2d 448, 454 (5th Cir. 1989) (while statistical evidence may not be a "*sine qua non* to establishing cohesion," lay testimony from the plaintiffs failed to prove cohesion "*by some sort of reliable*

[10] Plaintiffs also passingly note that members of the different tribes have "shared representational interests, socioeconomic statuses, and cultural values" apart from race. Resp. Br. 56 (quoting Add.45, App.473, R.Doc.125 at 19). While that may go to the question of racial predominance, it does not change the fact that the district court in this case expressly did not make a finding whether race was predominate and assumed the question immaterial. Add.46, App.474, R.Doc.125 at 20 n.3.

Appellate Case: 23-3655 Page: 26 Date Filed: 04/08/2024 Entry ID: 5381370

evidence") (emphasis original) (citation omitted); *City of Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1558 (11th Cir. 1987) ("plaintiffs established their case … through the clearly acceptable means of a bivariate regression analysis *and* the testimony of lay witnesses … the Eleventh Circuit has approved the form of statistical analysis used") (emphasis added); *Sanchez v. Bond*, 875 F.2d 1488, 1493 (10th Cir. 1989) (while lay witness testimony may also be considered, "[c]learly, a statistical analysis of voting data is highly relevant to the issue of political cohesion"); *Pope v. Cnty. of Albany*, 94 F. Supp. 3d 302, 333-35 (N.D.N.Y. 2015) (citing anecdotal *and* statistical evidence of political cohesion).

What these cases illustrate is that courts require something more than lay testimony from the plaintiffs themselves to support a *Gingles* precondition 2 finding; they also require some sort of objective, reliable evidence—typically a recognized statistical analysis. *See Thornburg v. Gingles*, 478 U.S. 30, 52-53 (1986) (relying on extreme case analysis and bivariate ecological regression analysis); *Bone Shirt*, 461 F.3d at 1020 (relying on regression analysis and homogeneous precinct analysis).

But in this case, the district court did not base its *Gingles* 2 finding for the challenged subdistricts on a recognized method of statistical analysis or any objectively reliable data. Instead, the district court based its finding on data that both sides agreed was insufficient "for a full statistical analysis," combined with "lay

witness testimony" from Plaintiff representatives. Add.47, App.475, R.Doc.125 at 21. *Gingles* precondition 2 requires more before striking down a state's election map. *Cf. Bone Shirt*, 461 F.3d at 1026 (Gruender, J., concurring in judgment) (finding it "difficult to rely upon a statistical method" that is "admittedly erroneous" as used in the case).[11]

Plaintiffs' secondary argument, Resp. Br. 62-64, is that they were not required to prove (and the district court was not required to find) political cohesion and racial polarization for the challenged subdistricts when there was statistical evidence of it at the district level. However, the *Gingles* factors require "'an intensely local appraisal' of the challenged district[,]" *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 406 (2022) (citation omitted), and where Plaintiffs challenge subdistricts there should also be an "intensely local appraisal" of those subdistricts. *Cf. id.* at 404 (reversing decision that relied on "generalizations" and failed to address "whether the preconditions would be satisfied as to each district"). Indeed, the district court made *Gingles* 2 findings for the challenged subdistricts,

[11] Plaintiffs suggest their expert also used homogenous precinct analysis as a recognized statistical method. Resp. Br. 64-65. But as Plaintiffs also acknowledge, their expert identified only *one* precinct—out of *seven* precincts in subdistricts 9A and 9B—that was racially homogeneous. Resp. Br. 64 (citing Pls.App.16). Rather than using a recognized statistical method to show cohesion in the remaining six precincts, Plaintiffs' expert merely assumed it. Regardless, the district court did not base its *Gingles* 2 finding on homogeneous precinct analysis, but noted there was insufficient data "for a full statistical analysis." Add.47, App.475, R.Doc.125 at 21.

Appellate Case: 23-3655 Page: 28 Date Filed: 04/08/2024 Entry ID: 5381370

notwithstanding Plaintiffs' argument on appeal that no such findings were required. *See* Add.47, App.475, R.Doc.125 at 21.[12]

Gingles precondition 2—like the other *Gingles* preconditions—sets a high bar that "limit[s] judicial intervention" so that Section 2's (unpredictable) vote dilution claims do not cause federal courts to usurp reapportionment roles that are "primarily the duty and responsibility of the State[s]." *Milligan*, 599 U.S. at 29-30. Had the district court properly conducted the *Gingles* analysis, it should have concluded that Plaintiffs had not met their burden.

CONCLUSION

The district court's judgment should be reversed and this action remanded to the district court for further proceedings.

[12] Plaintiffs, like the district court, place weight on an *assumption* of the Secretary's expert in different litigation that voting patterns in the subdistricts may mirror patterns in the overall district. Resp. Br. 61-62, 66; Add.47, App.475, R.Doc.125 at 21. But as the Secretary addressed, Opening Br. 46 n.6, the testimony in *this* litigation was that there is insufficient data for Plaintiffs' analytical methods for the subdistricts. It was Plaintiffs' burden to establish political cohesion in the challenged subdistricts, and they failed to do so with any recognized statistical method.

Dated: April 8, 2024

Respectfully submitted,

/s/ Philip Axt

Philip Axt (ND Bar No. 09585)
Solicitor General
pjaxt@nd.gov
600 E. Boulevard Ave., Dept. 125
Bismarck, ND 58505

David R. Phillips (ND Bar No. 06116)
Special Assistant Attorney General
dphillips@bgwattorneys.com
300 West Century Ave., P.O. Box 4247
Bismarck, ND 58502

David H. Thompson
Peter A. Patterson
Athanasia O. Livas
Special Assistant Attorneys General
dthompson@cooperkirk.com
ppatterson@cooperkirk.com
alivas@cooperkirk.com
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036

Counsel for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 6,467 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionately spaced typeface using the 2016 version of Microsoft Word in 14-point Times New Roman font.

As required by Eighth Cir. R. 28A(h), this brief has been scanned for viruses and is virus-free.

Date: April 8, 2024

/s/ *David Phillips*

Appellate Case: 23-3655 Page: 31 Date Filed: 04/08/2024 Entry ID: 5381370

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *David Phillips*

Appellate Case: 23-3655 Page: 32 Date Filed: 04/08/2024 Entry ID: 5381370