IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Civil No: 1:22-CV-00031

Charles Walen, an individual; and Paul Henderson, an individual, Plaintiffs vs. Doug Burgum, in his official capacity as Governor of the State of North Dakota; Michael Howe, in his official capacity as Secretary of the State of North Dakota, Defendants and The Mandan, Hidatsa and Arikara Nation; Lisa DeVille, an individual; and Cesareo Alvarez, Jr., an individual. Defendants-Intervenors	**DEFENDANTS DOUG BURGUM AND MICHAEL HOWE'S MEMORANDUM IN OPPOSITION TO PLAINITFFS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

The Court should deny Plaintiffs' *Motion for Summary Judgment*[1] because the undisputed facts demonstrate Plaintiffs lack the necessary Article III standing to challenge the legislative subdistricting in one of the two Subdistricts they challenge, Subdistrict 9A. Additionally, the undisputed evidence material to the challenged redistricting in both Districts 4 and 9 confirms such redistricting was conducted using traditional race-neutral redistricting principles *or* so as to comply

[1] Defendants Doug Burgum, in his official capacity as Governor of the State of North Dakota and Michael Howe, in his official capacity as Secretary of State of North Dakota ("Defendants") submit this memorandum in opposition to *Plaintiffs' Motion for Summary Judgment* (Doc. 98). This memorandum also responds to the arguments raised in the *Memorandum in Support of Plaintiffs' Motion for Summary Judgment* (Doc. 99).

with the Voting Rights Act, which is a complete defense to Plaintiffs' Equal Protection claims. Lastly, Defendants are entitled to summary judgment because Plaintiffs' requested remedy – the removal of the Challenged Subdistricts – would itself violate the Voting Rights Act.

The evidence and controlling law confirm Defendants are entitled to judgment as a matter of law, and thus the Court should deny Plaintiffs' summary judgment motion and should grant summary judgment to Defendants.

DISCUSSION

A. Plaintiffs Lack Article III Standing to Challenge Subdistrict 9A.[2]

The plaintiff "bears the burden of establishing standing as of the time" of the lawsuit and "maintaining it thereafter." Carney v. Adams, 208 L. Ed. 2d 305, 141 S. Ct. 493, 499 (2020).

> It is well established that standing is a jurisdictional prerequisite that must be resolved before reaching the merits of a suit. *See, e.g., McCarney v. Ford Motor Co.,* 657 F.2d 230, 233 (8th Cir.1981). We have stated numerous times that "standing is a 'threshold inquiry' that 'eschews evaluation on the merits.' " *Id.* (quoting *Coal. for the Env't v. Volpe,* 504 F.2d 156, 168 (8th Cir.1974)).

City of Clarkson Valley v. Mineta, 495 F.3d 567, 569 (8th Cir. 2007) (citations and quotations in original). In *Hays* the U.S. Supreme Court dismissed an Equal Protection lawsuit because plaintiffs lacked standing due to not residing in the district they contended was racially gerrymandered:

> Where a plaintiff resides in a racially gerrymandered district, however, the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action, *cf. Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993). Voters in such districts may suffer the special representational harms racial classifications can cause in the voting context. On the other hand, where a plaintiff does not live in such a district, he or she does not suffer those special harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference. Unless such

[2] Defendants incorporate by reference herein the undisputed material facts, law and analysis contained in their *Memorandum in Support of Defendants' Motion for Summary Judgment* (Doc. 102), as well as the *affidavit* (Docs. 103-106) and supporting papers filed therewith.

> evidence is present, that plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve.

United States v. Hays, 515 U.S. 737, 744–745 (1995). *Hays* and similar holdings from the U.S. Supreme Court have application here.

In their *Complaint*, Plaintiffs allege District 9 was subdivided to encompass the boundaries of the Turtle Mountain Indian Reservation, and allege that race was the predominant factor in the formation of Subdistrict 9A's boundaries. *Complaint* at ¶¶ 29-30. In other words, Plaintiffs allege that Subdistrict 9A – where neither Plaintiff lives or votes – was racially gerrymandered based upon the race of the majority of its voting age residents being Native Americans. Plaintiffs do not allege and have not provided any other evidence that they either live or vote in the challenged, allegedly racially gerrymandered Subdistrict 9A, or that they were personally subjected to any racial classification related to the subdistricting of District 9. Walen Depo. (Wiederholt Aff., ***Exhibit 37*** [Doc. 105-3]) at 14, l. 24 – 15, l. 23; 25, ll. 12 – 14; 26: ll. 1 – 3; Henderson Depo. (Wiederholt Aff., ***Exhibit 38*** [Doc. 105-4]) at 27:24-28:2, 36:21-24.[3]

Based on these facts, Plaintiffs have stated at most a generalized grievance concerning Subdistrict 9A that is insufficient to confer Article III standing. Neither Plaintiff has suffered personal harm such as being "represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group."[4] Because there is no personal harm to

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[3] Henderson concedes his wife is the State House Representative of Subdistrict 9B where he lives. Henderson Depo. (Wiederholt Aff., ***Exhibit 38***) at 39, l. 5 – 40, l. 3. The ND Legislature's website reflects Rep. Donna Henderson is the elected House Member from Subdistrict 9B, has been in the "House since 2023", and is married to "Paul". https://www.ndlegis.gov/districts/2023-2032/district-9; https://www.ndlegis.gov/biography/donna-henderson (Wiederholt Aff., ***Exhibit 39*** [Doc. 106]).

[4] Article III standing for a racial gerrymandering claim must meet the following standard:

> Our district-specific language makes sense in light of the nature of the harms that underlie a racial gerrymandering claim. Those harms are personal. They include being "personally ... subjected to [a] racial classification," *Vera,* [] (principal opinion), as well as being

either Plaintiff concerning Subdistrict 9A, the Court should determine Plaintiffs lack standing to assert, and the Court lacks jurisdiction to consider, their Equal Protection claims.

B. ***Plaintiffs Have Not Established Race Was A Predominant Factor***

Plaintiffs have failed in their "demanding" burden of proof to show the North Dakota Legislature "subordinated traditional race-neutral districting principles to racial considerations". The following standard applies:

> [A] plaintiff alleging racial gerrymandering bears the burden "to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." [] To satisfy this burden, the plaintiff "must prove that the legislature subordinated traditional race-neutral districting principles ... to racial considerations." []

Bethune-Hill v. Virginia State Bd. of Elections, 580 U.S. 178, 187 (2017) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)); *Cooper v. Harris*, 581 U.S. 285, 319 (2017) (stating, "[t]hat burden of proof, we have often held, is 'demanding'") (citing *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (Cromartie II)).

In their summary judgment briefing (Doc. 99), Plaintiffs have selectively gleaned from the entire legislative record, ignoring much of the committee level testimony and floor speeches that conflicts with their narrative that race predominated, and have focused in on statements of various legislators who were opposed to the subdistricting of Districts 4 and 9. The statements Plaintiffs

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> represented by a legislator who believes his "primary obligation is to represent only the members" of a particular racial group, *Shaw I* []. They directly threaten a voter who lives in the *district* attacked. But they do not so keenly threaten a voter who lives elsewhere in the State. Indeed, the latter voter normally lacks standing to pursue a racial gerrymandering claim. *Hays*[.]

Alabama Legislative Black Caucus v. Alabama, 575 U.S. 254, 263, 135 S. Ct. 1257, 1265, 191 L. Ed. 2d 314 (2015) (cleaned up) (quoting *Bush v. Vera*, 517 U.S. 952, 957 (1996); *Shaw v. Reno*, 509 U.S. 630, 648 (1993)).

have chosen to highlight include statements along the lines of: the Legislature should not subdivide Districts 4 and 9 because such subdistricting could be considered racial gerrymandering; the Legislature should not pass laws based on threats of litigation; refusing to draw subdistricts would not violate the Voting Rights Act (VRA), a proper *Gingles* analysis was never performed; and similar sentiments. Plaintiffs assert, falsely, that these types of "cherry-picked" statements evidence an indisputable intent to legislate based on race, and, that the Legislature did not and could not have had a compelling governmental interest.

There are problems with Plaintiffs arguments and with their selective citation to the record. For example, Plaintiffs have avoided discussing any of the evidence that indicates the Legislature adopted the 2021 map (including subdivided Districts 4 and 9) based on traditional redistricting principles. Because of briefing page limitations, only a portion of that traditional race-neutral redistricting evidence considered by the Legislature has been provided by Defendant and Intervenors in their respective summary judgment briefing. (Docs. 102 & 108), which is incorporated herein by reference.

A review of that overwhelming evidence indeed shows Plaintiffs have presented a one-sided and decidedly false view of what occurred at the legislative level as there is overwhelming evidence traditional race-neutral redistricting principles factored heavily in the map that was adopted, including in drawing the Challenged Subdistricts. Regarding the Challenged Subdistricts specifically, there was abundant evidence the Legislature considered (and the Subdistricts themselves reflect): compactness, contiguity, preservation of counties and political subdivisions, preservation of communities of interest, preservation of cores of prior districts, and protection of incumbents. *See* Defendants' Summary Judgment Memo. (Doc. 102) at 22 *et seq*. (citing to, quoting, and analyzing abundant record evidence the Legislature considered each of the traditional

race-neutral redistricting principles); *see* Challenged Subdistrict Maps (Wiederholt Aff., ***Exhibit 33*** [Doc. 104-17]); *see also* https://www.ndlegis.gov/assembly/67-2021/special/approved-legislative-redistricting-maps (last visited Mar. 10, 2023). A significant amount of oral and written testimony was provided to and considered by the Legislature at the committee level as well, which further illustrates the focus on traditional race-neutral redistricting factors. *See e.g.*, Legislative Redistricting – Background Memorandum (Wiederholt Aff., Exh. 7 [Doc. 103-7] at 10); August 26, 2021 Redistricting Committee Meeting Minutes (Wiederholt Aff., Exh. 5 [Doc. 103-5]); *see also*:

- *Exhibit C* (Doc. 20-3) – North Dakota Native Vote: advocating for Turtle Mountain Reservation and the tribes therein as compact, and contiguous, and being considered a community of interest;
- *Exhibit E* (Doc. 20-5) – Spirit Lake Tribe: advocating for tribes being considered communities of interest.
- *Exhibit F* (Doc. 20-6) – League of Women Voters of ND: advocating for open and transparent redistricting that includes abundant public comment, and keeping communities intact.
- *Exhibit G* (Doc. 20-7) – North Dakota Farmers Union: advocating for crossing "as few county lines as possible", retention of "communities of interest within district boundaries" and "give geographical balance to our legislature."
- *Exhibit H* (Doc. 20-8) – North Dakota Voters First – advocating for compactness and contiguity, equality of district populations, and respecting existing boundaries and communities of interest.

- *Exhibit M* (Doc. 20-13) – North Dakota Native Vote: advocating for subdistricting to protect communities of interest, and not splitting reservations.
- *Exhibits O & P* (Docs. 20-15 & 20-16) – Chairman and Councilman, Standing Rock Sioux Tribe: advocating for tribal communities of interest.
- *Exhibit R* (Doc. 20-18) – MHA Nation, Business Council: advocating for tribal communities of interest.
- *Exhibit T* (Doc. 20-20) – Chairman, Standing Rock Sioux Tribe: advocating "geographic representation", protection of incumbents, and communities of shared interest.
- *Exhibit U* (Doc. 20-21) – Chairman, MHA Nation: advocating for tribal communities of interest.
- *Exhibit V* (Doc. 20-22) – Chairman, Spirit Lake Nation: advocating "geographic representation and communities of shared interest.
- *Exhibit W* (Doc. 20-23) – Lisa DeVille: advocating for communities of interest.
- *Exhibit X* (Doc. 20-24) – Chairman, Spirit Lake Nation: advocating for communities of shared interest.
- *Exhibit Y* (Doc. 20-25) – Chairman, Turtle Mountain Band of Chippewa Indians: advocating for communities of shared interest.

Thompson Affidavit (Doc. 20). (Docs. 20-3, 20-5 through 20-8, 20-13 through 20-16, 20-18, 20-20 through 20-26).

Moreover, the U.S. Supreme Court has said: "[I]t must be kept in mind that references to race by those responsible for drawing or adopting a redistricting plan are not necessarily evidence that the plan was adopted for improper racial reasons." *Cooper*, 137 S. Ct. at 1497 (2017) (*Alito,*

S. concurring). While Defendants concede race may have been impliedly mentioned on a few occasions by allegations of "gerrymandering", the record shows race did not predominate. Plaintiffs cite to *Cooper v. Harris*, 581 U.S. 285, 293 (2017) as controlling here because in that case the North Carolina legislature appealed to compliance with the VRA to justify its "majority black districts" that were being challenged and were ultimately invalidated by *Cooper* on Equal Protection grounds. *Cooper* does not control here as its facts are clearly distinguishable from the instant case. For example, a brief review of the *Cooper* Appendix showing the shapes of the non-compact and non-contiguous challenged districts *(id.* at Appendix[5]) proves *Cooper* does not assist the Plaintiffs contention in this case that traditional redistricting principles were subordinated to racial considerations. Those *Cooper* districts as compared with the Subdistricts challenged here (*e.g.*, Wiederholt Aff., ***Exhibit 33*** [Doc. 104-17]) show that *Cooper* is an "apples to oranges" comparison.

Plaintiffs have *not* met their heavy burden of establishing racial predominance as the undisputed evidence shows traditional race-neutral redistricting principles factored heavily in the challenged subdistricting. And as set forth *infra*, assuming *arguendo* the Court agrees Plaintiffs

[5] *Cooper's* narrative description of one of the challenged districts in that case confirms *Cooper* has nothing in common factually with the challenged Subdistricts in this case:

> Begin with some facts and figures, showing how the redistricting of District 12 affected its racial composition. As explained above, District 12 (unlike District 1) was approximately the right size as it was: North Carolina did not—indeed, could not—much change its total population. But by further slimming the district and adding a couple of knobs to its snakelike body (including in Guilford County), the General Assembly incorporated tens of thousands of new voters and pushed out tens of thousands of old ones. And those changes followed racial lines: To be specific, the new District 12 had 35,000 more African–Americans of voting age and 50,000 fewer whites of that age. (The difference was made up of voters from other racial categories.)

Cooper, 581 U.S. at 310 (cleaned up, citations omitted).

have succeeded "in establishing racial predominance," the undisputed evidence nevertheless confirms the Challenged Subdistricts were adopted in order to comply with the VRA.

C. The State Had a Compelling Governmental Interest in Complying with the Voting Rights Act With Respect to the Challenged Subdistricts.

In relation to the issue of compliance with the VRA,[6] Plaintiffs present the Court essentially with a false dichotomy. They argue that anytime a legislative redistricting decision is made, even in part on the basis of complying with the VRA or avoiding a VRA claim, the legislature must have performed a *Gingles* analysis in advance, and if that has not occurred, strict scrutiny cannot be met. Plaintiffs' SJ Memo. (Doc. 99) at 15, 29-30 (*e.g.*, stating: "State must conduct a 'pre-enactment analysis with justifiable conclusions'"; "a legislature must conduct a functional and statistical analysis for all three factors"). Plaintiffs reason: because the Legislature invoked the VRA and "[b]ecause the legislative record is void of any meaningful Gingles analysis, there is no evidence the Defendants can rely on to prove the Subdistricts are narrowly tailored to achieve a compelling government interest." *Id.* at 28. Plaintiffs' argument about "pre-enactment analysis" when invoking the VRA is not the controlling legal standard.

Rather, the standard set down by the U.S. Supreme Court provides: "[T]he State must establish that it had 'good reasons' to think that it would transgress the Act if it did not draw race-based district lines. [] That "strong basis" (or "good reasons") standard gives States "breathing

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[6] Plaintiffs concede compliance with the VRA is a compelling interest, alleging:

> "[Only] [w]here a challenger succeeds in establishing racial predominance [for his Equal Protection Claim], the burden [then] shifts to the State to demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." Bethune-Hill, 137 S.Ct. at 800-801 (internal citations omitted). Compliance with the VRA is "assumed to be" a compelling interest that satisfies strict scrutiny. *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 142 S. Ct. 1245, 1250 (2022) (citing *Cooper*, 581 U.S. at 301 ("we have long assumed that complying with the VRA is a compelling interest.").

Complaint at ¶¶ 20-23.

room" to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed." *Cooper*, 581 U.S. 285 at 293, 137 (citations omitted).[7] Based on their arguments, it is clear Plaintiffs have substituted the U.S. Supreme Court's "good reasons/strong basis in evidence" legal standard for VRA compliance with their own erroneous standard. Under the standard articulated by the U.S. Supreme Court, the undisputed evidence shows Defendants had good reasons and a strong basis in evidence to believe the challenged Subdistricts were necessary to comply with the VRA. That strong basis in evidence is shown where the state proves all three of the *Gingles* preconditions would have been met if the subdistricting had not been adopted.

The Eighth Circuit Court of Appeals has discussed and analyzed the *Gingles* preconditions in vote dilution cases on numerous occasions. For instance, in a case arising out of South Dakota's redistricting efforts in 2001, the Court provided the following standard concerning the *Gingles* preconditions:

> To establish a Section 2 violation, the plaintiffs must prove by a preponderance of the evidence three elements, often referred to as the "*Gingles* preconditions":
>
> > (1) [T]he racial group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the racial group is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.

[7] The *Bethune-Hill* Court fleshed out the "strong evidence" to support narrow tailoring as follows:

> Turning to narrow tailoring, the Court explained the contours of that requirement in *Alabama*. When a State justifies the predominant use of race in redistricting on the basis of the need to comply with the [VRA], "the narrow tailoring requirement insists only that the legislature have a strong basis in evidence in support of the (race-based) choice that it has made." 575 U.S., at 278, 135 S.Ct., at 1274 (internal quotation marks omitted). That standard does not require the State to show that its action was "actually ... necessary" to avoid a statutory violation, so that, but for its use of race, the State would have lost in court. *Ibid.* (internal quotation marks omitted). Rather, the requisite strong basis in evidence exists when the legislature has "*good reasons* to believe" it must use race in order to satisfy the [VRA], "even if a court does not find that the actions were necessary for statutory compliance." *Ibid.* (internal quotation marks omitted).

Id. at 193–94.

> *League of United Latin Am. Citizens,* 126 S.Ct. at 2614 (internal citations and modifications omitted); *Harvell,* 71 F.3d at 1385. Failure to prove each of the preconditions defeats a Section 2 claim. *Clay v. Bd. of Educ.,* 90 F.3d 1357, 1362 (8th Cir.1996).

Bone Shirt v. Hazeltine, 461 F.3d 1011, 1018 (8th Cir. 2006) (citations and quotations in original)

The overwhelming and undisputed evidence confirms the Legislature considered and sufficiently analyzed the Challenged Subdistricts under the *Gingles* preconditions and they had good reasons to believe subdistricting was necessary under the VRA, even if it did not arrive at such conclusion through expert statistical analyses. For their part, Plaintiffs argue that legislators even mentioning the VRA essentially triggers strict scrutiny and they provide selective quotes from several legislators who discuss or ask questions about the VRA. Plaintiffs attempt to prove too much by their argument about invoking the VRA. In this regard, the U.S. Supreme Court has held it is not problematical in itself to invoke the VRA and it is likely even necessary:

> Finally, it must be kept in mind that references to race by those responsible for drawing or adopting a redistricting plan are not necessarily evidence that the plan was adopted for improper racial reasons. Under our precedents, it is unconstitutional for the government to consider race in almost any context, and therefore any mention of race by the decisionmakers may be cause for suspicion. We have said, however, that that is not so in the redistricting context [. . .] [A]ll legislatures must also take into account the possibility of a challenge under § 2 of the Voting Rights Act claiming that a plan illegally dilutes the voting strength of a minority community. See League of United Latin American Citizens v. Perry, 548 U.S. 399, 425, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006).

Cooper, 581 U.S. at 347 (Alito S., concurring) (citations in original). A review of the comments by the legislators confirms they were concerned with making redistricting decisions that comply with the VRA. This kind of consideration is expected and is not in itself evidence of racial gerrymandering.

Additionally, in relation to the evidence from the *entire* record, Plaintiffs ignore the testimony and documentary evidence the Legislature received and considered that implicates the

Gingles preconditions and Senate Factors, both at the Committee level and during floor debate. Much of that testimony and evidence is summarized in the Redistricting Committee's final report, which touched on the following topics among others:

> • Noted the growth of Native American populations in North Dakota;
> • Urged the creation of subdistricts for Native American voters to comply with the federal [VRA] and prevent dilution of votes cast by Native Americans;
> • Requested tribal members be considered communities of interest;
> • Urged the committee to provide equitable, more direct, and more responsive representation for Native Americans;
> • Urged the committee not to split reservations into multiple districts;
> • Noted multiple Native American candidates have had unsuccessful campaigns for membership in the House;
> • Asserted there has been a history of discrimination in North Dakota against Native Americans; and
> • Asserted a history of racial bloc voting has prevented Native American voters from electing their candidates of choice.

Wiederholt Aff., ***Exhibit 30*** [Doc. 104-14] at pp. 19-30. The final report went on to discuss the testimony and other evidence the Committee had received and had discussed concerning the changes to the populations in the Fort Berthold and Turtle Mountain Indian Reservations, the fact that such population increases mandated a consideration of subdistricting,[8] as well as various VRA considerations and legal cases. *Id.* at 29-30. Additional overwhelming evidence showing the Challenged Subdistricts were adopted with due consideration of the *Gingles* preconditions is cited herein above at 5-6.

[8] The census data available to the Legislature confirms the Native American population in and near Fort Berthold is sufficiently large and geographically compact to constitute a majority of the voting age population (62%) in the single member Subdistrict 4A which elects one member of the House. (Wiederholt Aff., ***Exhibit 43*** [Doc. 106-4]); *see also* https://www.ndlegis.gov/assembly/67-2021/special/approved-legislative-redistricting-maps. The Native American population in and near the Turtle Mountain Reservation is also sufficiently large and geographically compact to constitute a majority of the voting age population (77%) in the single member Subdistrict 9A which elects one member of the House. *Id.*

Evidence the Legislature considered the *Gingles* preconditions in adopting the Challenged Subdistricts is also found in the transcripts of the floor debate in the North Dakota House and Senate. In the House floor session, Representative Pollert spoke at some length about the previous Native American populations in Districts 4 and 9 not being in numbers sufficient for subdistricts, but noted that had now changed with the recent census, and he urged the passage of the Bill because of those increased Native American populations and to comply with the VRA:

> REPRESENTATIVE POLLERT: Thank you, Mr. Speaker, members of the Assembly. I would ask that you support the redistricting committee's recommendation for the passage of this bill.
>
> I too have been other places. And yes, I've been to and talked to other attorneys. And I've talked to legislative counsel. And I happened to be at a place this weekend when there's a gentleman, I think it was from the state of Mississippi, who has extensive background into this. And one of the questions asked -- because North Dakota had this happen in 1991. And, of course, at that time, the populations weren't in place for a subdistricts. So basically, that went favorable to the way the redistricting went.
>
> But also, I look at that as that's the first shot across the bow that basically says, populations, when they are in place, that the redistricting committee and the state has to take a look at subdistricts. I think that was a warning to us to get, I won't say this House in order, but for the House and the Senate to get order for redistricting.
>
> And having said that, we have that population base in those two districts and those two districts to have the subdistricts. So I would ask the House chambers to vote in favor of what the committee chairman brought forward and what the redistricting did. And let's move on.

See November 9, 2021 Transcription of Video File North Dakota House HB 1504/Joint Redistricting (Doc. 100-8) at 52: l. 22 – 54: l. 2.

Representative Devlin – the Chairman of the Redistricting Committee – testified to the same issue; that two of North Dakota's Reservations as of the new federal census now have populations sufficient to be subdistricted and that the populations of those Tribes mandated subdistricting:

> [REPRESENTATIVE DEVLIN]: [] Like I said, we didn't do this because of money. We did it because the federal law says this must be done in this situation

> if they meet these criteria. And two of those states meet that -- or two of those districts -- tribes meet that criteria. That is federal law.
>
> I'm not going to stand here and tell you to ignore federal law. I care too much about this country to do that. I am firmly convinced that we have no choice under the federal law and the constitution.
>
> There's no question either that North Dakota has been in this situation before. We have been before court on this case. We won the case so to speak. We won the case because the judge determined that the people bringing the suit couldn't prove or couldn't demonstrate they had a population equal to at least half of the subdistrict.
>
> That is no longer true. We can no longer prove that. Two Native American tribes had that. You know, that's the only reason North Dakota prevailed in that case before.
>
> Now, on the floor today, I heard arguments on where the population figures came from. The population figures came from the census, the federal census. Just as they did for every one of your districts. There was nothing different about it.
>
> I mean, I can guarantee you that many of your districts and some of the tribal districts maintain that they were undercounted. But we didn't look at that. We didn't look at that all. All's we looked as is the numbers that came in the census. They meet the qualifications established by the courts, established by Congress. And we firmly believe -- the majority of the committee firmly believed that we need to
>
> [. . . .]
>
> I firmly believe that under the federal law, the court decisions, which has been established and upheld repeatedly in courts, that we had to do this. There was no choice in the state of North Dakota. Yeah. You certainly have the right to ignore federal court, federal Congress, and the President. You certainly have that right. But I don't think that's the right decision to make . . .

See November 9, 2021 Transcription of Video File North Dakota House HB 1504/Joint Redistricting (Doc. 100-8) at 18: l. 13 – 20: l. 25.

Representative Schauer also testified about the increased Native American populations on the Reservations and avoiding a VRA claim as being critical factors that should sway the Legislature to adopt subdistricting in Districts 4 and 9:

> [REPRESENTATIVE SCHAUER]: [. . .] But we are lawmakers. And, as part of that, it includes law followers.
>
> Those advocating subdistricts in North Dakota have a powerful legal case based on the census numbers, the Voting Rights Act, and the precedent setting legal cases from the U.S. Supreme Court.
>
> In District 4A, total population is 8,350. American Indian population is 5,537, which is 66 percent.

> District 9A, total population, 7,922; American Indian population, 6,460, which is 82 percent.
>
> The Equal Protection Clause of the 14th Amendment and the Voting Rights Act, Section 2 prohibits vote dilution, which happens when minority voters are dispersed or cracked among districts so that they are ineffective as a voting bloc. We may not like it for whatever reason. But it is the law.

See November 9, 2021 Transcription of Video File North Dakota House HB 1504 / Joint Redistricting (Doc. 100-8) at 10: l. 19 – 11: l. 14. In addressing a question about whether a racial polarization study had been done or was necessary for subdistricting, Representative Nathe provided a comprehensive and legally correct answer as follows:

> REPRESENTATIVE HOVERSON: Thank you, Mr. Speaker, Representative Nathe. As you heard it described, the polarization study, which is supposed to reveal a racial animus as well as the consistent voting record that Representative Jones just spoke about, did your committee conducts those at all?
>
> REPRESENTATIVE K. KOPPELMAN: Representative.
>
> REPRESENTATIVE NATHE: Mr. Speaker, Representative Hoverson, we did not. But we had plenty of testimony from the tribes who felt that there was some, some -- I don't know the word for it -- disadvantage. They had ran a number of different candidates in that district and had lost and felt that they did not have a fair shot. And that was one of the reasons to look at the subdistricts. Now, whether I agree with that or not, I don't know. But that was one of the reasons why they stepped forward with this.
>
> And to do the study -- I was on redistricting 10 years ago, and we had these kind of discussions. And we did not do any studies like this at all. And I don't think, quite frankly, and the chairman can correct me, there was no need to do a study like this. We had collected information for many weeks while working on this issue. So, as the chairman said, we made the best decision with the information that we had so we can move forward and do the work of the people.

See November 9, 2021 Transcription of Video File North Dakota House HB 1504 / Joint Redistricting (Doc. 100-8) at 45: l.4 – 46: l. 11. Representative Nathe stated part of the rationale for subdistricting was the evidence the Tribes themselves had presented concerning losses in prior elections with the boundaries drawn as they were and without subdistricting. *Id.*

During North Dakota Senate debate – while it is granted that the debate about subdistricting was not as lengthy as what occurred in the House – there were several speeches that evidence

consideration of all the *Gingles* preconditions. For instance, Senator Holmberg testified about the challenges to redistricting raised by increased population in the State, and how the Redistricting Committee had responded to that shift, how the Redistricting Committee had heard and considered abundant evidence, especially as it concerned compliance with the VRA due to increased populations on certain Reservations:

> [SENATOR HOLMBERG]: Mr. President, the other part of the challenge this year is North Dakota's population exploded for 117,000 people I believe. And they did not intersperse themselves across the state equally. They went to just a few areas. And you ended up, Mr. President, with vast areas of the state, which didn't have the population for the number of districts that were there.
>
> [. . . .]
>
> We looked at preservation of communities of interest. And that, Mr. President, really is very subjective. If you're happy with what is happening in your area, then you would say, yes, they followed communities of interest. If you were unhappy, you would say they weren't following communities of interest.
>
> That, Mr. President, is the same kind of logic that we see or the same kind of discussions that we see when people use the term "gerrymandering." If you like the plan, it's good. If you don't like it, it's gerrymandering.
>
> [. . . .]
>
> [Y]our committee looked at the North Dakota State law. We looked at the constitution. We followed the best we could with the Voting Rights Act.
>
> And the one area that had the most discussion was not necessarily the lines that were drawn as it was the fact that your committee was convinced that federal law, passed by Congress, signed by the President, and been held up in court on numerous occasions, that we should look at subdistricts in areas of the state that met the criteria that we understood.
>
> And, Mr. President, the information, the advice we got from a lot of studying, including a number of folks visiting with NCSL, and a few folks when to an NCSL meeting put on by NCSL specifically on redistricting, that particular area was discussed quite a bit.
>
> One of the things they told us though that was interesting is not that many years ago, there were many more states that had multi districts. In North Dakota's case, it's one senator and two representatives.
>
> Because of various court decisions, there are now only 10 states left that have the multi-district scheme that we have in North Dakota. And there are numerous occasions that the states have gone to court about the issue of multi districts.
>
> And the courts have held, as we understand it -- now, we're not lawyers – we listen to lawyers, not all of them, but we do listen to lawyers -- and we found that you can have a state that has multi districts and single districts in the same state.

November 10, 2021 Transcription of Video File North Dakota Senate HB 1504 / Joint Redistricting (Doc. 100-9) at 3: ll. 12-19; 4: l. 25 – 5: l. 11; 6: l. 12 – 7: l. 21. Moreover, while Senator Kannianen definitely did not support subdistricting, his floor speech provided other legislators with something of a lesson on the *Gingles* preconditions, and he even performed his own version of a *Gingles* analysis on the Senate floor:

> SENATOR KANNIANEN: Well, Mr. President, the redistricting committee heard about the Thornburg v. Gingles Supreme Court case from 1986 when it comes to determining what preconditions need to be met, what factors needs to be considered in establishing these types of subdistricts.
>
> Now, the preconditions -- first, there are three preconditions. And, if all three of those are met, then there are other factors to also consider.
>
> So the first precondition is that the racial or language minority group is sufficiently numerous and compact to form a majority in a single member district. So in one of the subdistricts, are they large enough to form a majority in one of those subdistricts?
>
> The second one is that the minority group is politically cohesive such that its members tend to vote together in a block.
>
> And the third one is that the majority group votes sufficient as a block. So, in other words, the non-Natives in the district vote sufficient as a block themselves to still – as it says, "usually" to defeat the minority's preferred candidate despite their block voting.
>
> Now, this third precondition, the big concern I have is that the committee -- I didn't see, as the senator from District 3 mentioned, the polarization studies. This third precondition is not met.
>
> [. . . .]
>
> And my contention simply is that all three preconditions in the Gingles case have not been met for either District 4 nor District 9. . .

November 10, 2021 Transcription of Video File North Dakota Senate HB 1504 / Joint Redistricting (Doc. 100-9) at 27: l. 3 – 28: l. 8; 31: ll. 17-19. Senator Kannianen went on at length to discuss the historical results of elections in Districts 4 and 9 in relation to whether the Native Americans' preferred candidate of choice had or had not been elected historically. *Id*. at 28 et seq.

While the Plaintiffs go to great lengths to focus on stray comments from various legislators that seem to indicate the sole reason for adopting the Challenged Subdistricts was the VRA and seem to indicate that the *Gingles* preconditions were wholly ignored, a review of the *entire* record

confirms this is not accurate. The evidence actually shows the Legislature considered all three of the *Gingles* preconditions (in addition to traditional race-neutral redistricting principles) in its considerations of the Challenged Subdistricts, and thus there is no Equal Protection violation. Nor should the Court give credence to Plaintiffs argument the ND Legislature was required to conduct a technical statistical analysis by use of experts prior to making their subdistricting decision.

Plaintiffs reliance on *Growe v. Emison*, 507 U.S. 25, 40-41 (1993) and similar cases in this regard is misplaced.[9] Those cases do not stand for the proposition that a legislature must conduct pre-vote statistical analyses by use of experts in order to show that the challenged redistricting is being done in order to comply with Section 2 of the VRA. Rather, *Growe* stands for the proposition that *judicially* drawn maps that provide for super-majority minority voting districts are held to a higher level of scrutiny[10] than a legislatively drawn map would be held, and for the proposition that the federal courts are to give due deference in crafting remedial districts to states as previously held in Scott v. Germano, 381 U.S. 407, 409 (1965) ("*Germano*"). The *Growe* Court determined the district court's map (containing a "super-majority districting remedy" that was obviously based on race alone) violated Section 2 of the VRA as there was no evidence to show the *Gingles* preconditions (especially "proof of minority political cohesion") had been met. *Id.* at 41. The *Growe* Court, applying this heightened standard to a court-drawn map, stated: "We are satisfied that in the present case the *Gingles* preconditions were not only ignored but were unattainable. As

[9] Plaintiffs' reliance on *Abbott v. Perez*, 138 S. Ct. 2305, 2310 (2018) is likewise unavailing. *Abbott* concerned the State of Texas drawing lines to incorporate a large number of Latino voters into a district, without any evidence of a "Legislative inquiry" into the *Gingles* preconditions, which was held to violate Due Process. Id. at 2335.

[10] *See Abrams v. Johnson*, 521 U.S. 74, 98, 117 S. Ct. 1925, 1939, 138 L. Ed. 2d 285 (1997) (holding, "Court-ordered districts are held to higher standards of population equality than legislative ones.").

the District Court acknowledged, the record simply "contains no statistical evidence" of minority political cohesion (whether of one or several minority groups) or of majority bloc voting in Minneapolis." *Id.*

Growe's analysis does not apply to the case at bar, as the political cohesion of the Native American Tribes in the Challenged Subdistricts is well known and well documented. *See* November 10, 2021 Transcription of Video File North Dakota Senate HB 1504 / Joint Redistricting (Doc. 100-9) at 30: ll. 5-11 (Senator Kannianen testifying: "Before 2016, there's only -- you have to go back decades. There's only one Republican elected in decades in District 4. And so then you look at what candidates -- the precincts on the reservation voted for and then which candidates won, right, so you know which was the candidate of their choice."); *see also* Expert Report of M.V. Hood III (Walen case) (Doc. 100-10) at 6, 9; Expert Report of Dr. Collingwood (Wiederholt Aff., ***Exhibit 42*** [Doc. 106-3) at 21.[11]

In a similar vein, the more recent *Wisconsin Legislature* opinion likewise does not support Plaintiffs' arguments about pre-enactment statistical analyses, as the redistricting at issue in that case (a seventh majority black district assumed to have been created either by the Wisconsin Supreme Court or by the Wisconsin Governor) was not proven by the State to be necessary under the VRA. *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 142 S. Ct. 1245, 1249 (2022). The U.S. Supreme Court further determined the Wisconsin Supreme Court had applied an incorrect

[11] Plaintiffs further cite Tenth Circuit case law and *Missouri State Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1041 (E.D. Mo. 2016), *aff'd*, 894 F.3d 924 (8th Cir. 2018), for the proposition that the Legislature must have performed a pre-enactment "statistical analysis" in order to show the *Gingles* preconditions are met. But that is not the standard provided in those cases. Rather, citing *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1023 (8th Cir. 2006), the Missouri Federal Court's opinion states that *courts* are required as part of their VRA analysis to "conduct an intensely local appraisal" which "typically [but not always] requires a statistical and non-statistical evaluation".) (internal citations omitted).

Gingles analysis to the evidence, in that the aforementioned Court held the seventh majority black district "*may*" be required under the VRA while the U.S. Supreme Court's jurisprudence holds such minority districts *must* have a "strong basis in advance" and thus essentially "must be" required by the VRA. *Id.* at 1250-51. The case was remanded with instructions to consider the case specific evidence utilizing the proper *Gingles* analysis. *Id.* at 1251.

The Court should reject Plaintiffs arguments based on case law that is either clearly distinguishable from the case at bar or does not support Plaintiffs' incorrect contention of pre-enactment expert analysis. The overwhelming undisputed evidence confirms the Challenged Subdistricting was adopted because the Legislature had "good reasons" to believe they complied with the VRA, and those good reasons are assumed to satisfy strict scrutiny.

D. Plaintiffs' Requested Relief Would Violate Section 2 of the VRA.

In addition to the foregoing bases to deny summary judgment to Plaintiffs and to grant summary judgment to Defendants, Plaintiffs also seek a remedy that would itself violate State and federal law.

Plaintiffs request the Court enter an injunction order that effectively removes the Challenged Subdistricts arguing such relief would not require the Court to draw a new map or new boundaries, and contending the traditional race-neutral districting principles would remain in Districts 4 and 9.[12] Yet Plaintiffs do not have the legal ability to obtain the relief requested because the Legislature's subdistricting of Districts 4 and 9 was not race based, its actions are expressly provided for in North Dakota law, and neither Plaintiff has challenged North Dakota's Constitution

[12] This is a concession by Plaintiffs that traditional race-neutral redistricting principles were utilized and were not subordinated to racial considerations.

or statutory mechanism that expressly allow subdistricting.[13] The reality given the evidence is that the removal of the entirely lawful Subdistricts is not redressable in this action where North Dakota law allows it and those laws remain unchallenged by these Plaintiffs. Assuming *arguendo* the Court determined Plaintiffs' Equal Protection claims were in some respect meritorious, the Court should furthermore take care not to order the kind of drastic relief requested by Plaintiffs when North Dakota law expressly provides for subdistricting, and, the U.S. Supreme Court has counseled against preempting or to seriously intruding on the redistricting prerogatives of the states.[14]

Just as importantly, the undisputed evidence regarding the *Gingles* preconditions demonstrates Plaintiffs' requested remedy of the removal of the Subdistricts would itself be a violation of Section 2 of the VRA. In this regard, Dr. Hood indicates in his expert report that removal of the subdivision in District 9 would result in Native American populations that would usually not be able to elect their candidate of choice, which would be a violation of Section 2 of the VRA. Dr. Hood Report (Wiederholt Aff., ***Exhibit 41*** [Doc. 106-2]) at 7 (concluding "Given the presence of racially polarized voting in the district ("LD 9"), it is unlikely that the Native

[13] N.D. Constitution, Section 2, Article IV ("[a] senator and at least two representatives must be apportioned to each senatorial district and be elected at large or from subdistricts from those districts. The legislative assembly… may provide for the election of senators at large and representatives at large or from subdistricts from those districts."); N.D.C.C. § 54-03-01.5 (providing for the requirements of districts and subdistricts, if created).

[14] "The Supreme Court has repeatedly held that 'redistricting [] legislative bodies is a legislative task which the federal courts should make every effort not to preempt.'" *Diaz v. Silver*, 932 F. Supp. 462, 465 (E.D.N.Y. 1996) (quoting *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978)). "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that "reapportionment is primarily the duty and responsibility of the State."" *Miller v. Johnson*, 515 U.S. 900 (1995) (citations omitted). "[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison*, 507 U.S. 25 (1993) (citing U.S. Const. art. I, § 2).

American candidate of choice would be regularly elected if the district did not contain a majority Native American voting age population."). He provides similar opinions in relation to the voting situation in District 4, with the subdivision removed. *Id.* at 10 (concluding, "With the exception of LD 4A, it is highly unlikely that a Native American preferred candidate of choice would be elected within the geographic boundaries of LD 4 as a whole."). Intervenors' expert agrees that removing the subdivision in District 4 would essentially result in a violation of the VRA. *See* Dr. Collingwood Report (Wiederholt Aff., ***Exhibit 42*** [Doc. 106-3]) at 21 (concluding in part, "Sub-District 4A thus affords Native American voters the opportunity to elect their candidates of choice that they otherwise lack in the absence of the sub-district.").

All experts in this action have indicated in no uncertain terms that the removal of the Subdistricts would usually result in the Native Americans' preferred candidates of choice being defeated by the White population. In other words, the removal of the Challenged Subdistricts would cause the *Gingles* preconditions to be instantly satisfied, thus setting up the State for another lawsuit. This is not the remedy envisioned or intended by the U.S. Supreme Court in its Equal Protection jurisprudence or by Congress in the enactment of the VRA. Even if the Court were to determine Plaintiffs' claims had some merit, the remedy requested by them is not redressable under the VRA, and thus the Court should enter summary judgment against Plaintiffs as to their requested remedy. *Noem v. Haaland*, 41 F.4th 1013, 1018 (8th Cir. 2022) (stating, redressability focuses on the "link between the injury and the remedy" and finding the requested remedy would not truly provide a remedy for plaintiffs alleged injury).

CONCLUSION

For the foregoing reasons, Defendants request the Court deny Plaintiffs' Motion for Summary Judgment in its entirety.

Dated this 21st day of March, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS DOUG BURGUM AND MICHAEL HOWE'S MEMORANDUM IN OPPOSITION TO PLAINITFFS' MOTION FOR SUMMARY JUDGMENT** was on the 21st day of March, 2023, filed electronically with the Clerk of Court through ECF:

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