UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

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 State of the State of North Dakota, Defendants, and The Mandan, Hidatsa and Arikara Nation, Cesar Alvarez, and Lisa Deville Defendant-Intervenors.	CASE NO: 1:22-CV-00031-CRH

PLAINTIFFS' MEMORANDUM IN RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Charles Walen and Paul Henderson submit this Memorandum in opposition to Defendants' Doug Burgum and Michael Howe's Motion for Summary Judgment. Summary judgment in favor of Plaintiffs is appropriate in this matter, as the evidentiary record is closed. The legislative redistricting process was completed in November of 2021, and the Legislative Assembly's basis for subdividing Districts 4 and 9 is limited only to the testimony and evidence in the legislative record. The evidence from the redistricting process proves the Legislative Assembly invoked the Voting Rights Act,

thereby prioritizing race in subdividing Districts 4 and 9, and it failed to conduct a proper Gingles analysis necessary to withstand strict scrutiny. Accordingly, Defendants' Motion for Summary Judgment must denied. Instead, Plaintiffs respectfully request an order from the Court granting their Motion for Summary Judgment.

For purpose of this Response, Plaintiffs incorporate the facts and argument in their Memorandum in Support of Motion for Summary Judgment. See Doc. 99.

I. Race was the predominant factor motivating the Legislature's creation of Subdistricts in Districts 4 and 9.

A. Invoking the Voting Rights Act as justification for the creation of race-based Subdistricts establishes race was the predominant factor motivating the Legislature's decision.

The Legislative Assembly invoked the Voting Rights Act ("VRA") as its justification to create the challenged Subdistricts in Districts 4 and 9. By invoking the VRA, the Legislative Assembly was required by law to establish the Subdistricts are narrowly tailored to achieve a compelling government interest. Because the Assembly did not do so, Defendants' arguments regarding Plaintiffs' duty to establish race as a predominant factor in subdividing Districts 4 and 9 misses the mark, and Defendants' Motion for Summary Judgment must be denied.

The Equal Protection Clause of the Fourteenth Amendment prevents a State, in the absence of sufficient justification, from separating its citizens into different voting districts on the basis of race. Cooper v. Harris, 581 U.S. 285, 291 (2017). When a voter sues state officials for drawing such race-based lines, a court must conduct a two-step analysis. Id. First, the plaintiff must prove that "race was the predominant factor motivating the

legislature's decision to place a significant number of voters within or without a particular district." Id. (citing Miller v. Johnson, 515 U.S. 900, 916 (1995)). Second, if racial considerations did predominate, the state must prove the district meets strict scrutiny by showing that its race-based sorting of voters serves a compelling interest and is narrowly tailored to that end. Id. at 292.

The ultimate objective of a racial predominance inquiry is to determine the legislature's motive for the design of the district. Bethune-Hill v. Virginia State Board of Elections, 580 U.S. 178, 192 (2017). A plaintiff may meet the burden to prove that "race was the predominant factor motivating the legislature's decision" by presenting evidence of a state's focus on race during the redistricting process. See Wisconsin Legislature v. Wisconsin Elections Comm'n, 142 S.Ct. 1245, 1249 (2022); see also Cooper, 581 U.S. at 292. A plaintiff may make the required showing through direct evidence of the legislative intent, circumstantial evidence of a district's shape and demographics, or a mix of both. Cooper, 581 U.S. at 291. However, this burden may also be met where a plaintiff demonstrates a state invoked the VRA to justify its race-based districting. Id. The Supreme Court has found that when a state invokes the VRA to justify race-based districting, it must withstand strict scrutiny by proving that it had a strong basis in evidence for concluding that the VRA required its action. Cooper, 581 U.S. at 292. "To have a strong basis in evidence to conclude that § 2 [of the VRA] demands such race-based steps, the State must carefully evaluate whether a plaintiff could establish the Gingles preconditions—including effective white bloc-voting—in a new district created without those measures." Id. at 304.

If a state does not prove the Gingles preconditions have been met, it cannot enact a race-based district under the Equal Protection Clause. Id.

In Cooper, North Carolina invoked the VRA to justify its enactment of two majority-minority districts. Id. at 299. There, the evidentiary record demonstrated North Carolina's Legislature believed the VRA required the creation of two majority African American districts. Id. As the Supreme Court noted, North Carolina was honest about this fact:

> Senator Rucho and Representative Lewis were not coy in expressing that goal. They repeatedly told their colleagues that District 1 had to be majority-minority, so as to comply with the VRA. During a Senate debate, for example, Rucho explained that District 1 "must include a sufficient number of African–Americans" to make it "a majority black district." App. 689–690. Similarly, Lewis informed the House and Senate redistricting committees that the district must have a majority black voting age population.

Id., Because North Carolina invoked the VRA to justify its race-based districting, the Court held the State was required to satisfy the strict scrutiny requirements of the Equal Protection Clause:

> Faced with this body of evidence – showing an announced racial target that subordinated other districting criteria and produced boundaries amplifying divisions between blacks and whites – the District court did not clearly err in finding that race predominated in drawing District 1. Indeed, as all three judges recognized, the court could hardly have concluded anything but.

Id. at 301-302.

In Wisconsin Legislature v. Wisconsin Election Comm'n, 142 S. Ct. 1245 (2022), the Supreme Court reaffirmed Cooper following the Wisconsin's Governor veto of the redistricting maps proposed by the Wisconsin Legislature and the proposal of his own map, which included one additional majority-black district. Id. The Governor argued the

additional majority-minority district was needed to comply with the VRA. Id. On appeal, the United States Supreme Court held the Governor's invocation of the VRA to justify the majority-black district triggered strict scrutiny. Id. at 1249. "We said in Cooper that when a State invokes § 2 to justify race-based districting, it must show (to meet the 'narrow tailoring' requirement) that it had 'a strong basis in evidence' for concluding that the statute required its action." Id. The Supreme Court found the Wisconsin Governor provided no evidence or analysis supporting his claim that the VRA required the majority-black district. Id. With this lack of evidence, the Court concluded the Governor's plan was not narrowly tailored. Id.

In this case, Defendants assert the Redistricting Committee ("Committee") adhered to race-neutral redistricting principles to draw the Subdistricts. But a thorough review of the legislative record reveals race was the sole focus of the Committee while drawing the Subdistricts. Again and again, the Committee invoked the VRA while discussing these Subdistricts. As the Court explained in Cooper and reaffirmed in Wisconsin Legislature, by relying on the VRA the Committee triggered strict scrutiny for these Subdistricts. Id. at 292.

The transcripts of the Committee hearings affirmatively establish the Committee invoked the VRA to justify its race-based districting. For example, in the motion to approve the Subdistricts, Committee Vice Chairman Holmberg explicitly stated the VRA was the basis for creation of the Subdistricts:

> [SENATOR HOLMBERG]: So, Mr. Chairman, I would move that we subdivide what is District 9 on this particular map and District 4 **under the provisions of the Voting Rights Act**.

Doc. 100 at #6 (*emphasis added)*. Similarly, while introducing the Subdistricts on the House floor for final passage, Chairman Devlin invoked the VRA while explaining why the Committee created the Subdistricts:

> So the committee put it [the subdistricts] in because it is settled federal law. The Voting Act was passed by Congress and signed by the President of the United States.
> . . .
> **We are putting in the subdistricts because that is a requirement of the Voting Rights Act.**
> . . .
> 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.

Doc. 100, #8 at 17:16 - 18:23 (*emphasis added*). These statements by the Chairman and Vice Chairman are direct evidence the state invoked the VRA to justify the drawing of Districts 4 and 9. Further, the statements of the Chairman and Vice Chairman are also more direct invocations of the VRA than those made by the legislators that the Supreme Court relied on in Cooper to conclude North Carolina's redistricting plan was subject to strict scrutiny.

Along with the comments by the Chairman and Vice Chairman, statements by other members of the Committee show the Committee relied on the VRA to justify the drawing of Districts 4 and 9:

> REPRESENTATIVE SCHAUER: And just to be clear on this, this is numbers driven. This is what we have to do following the Voting Right Act. Doc. 100, #7 at 23:14 – 17.
> . . .
> [REPRESENTATIVE NATHE]: The districts meet the criteria as set by the voters rights act as we did it. We had a lot of discussions. It meets the Gingles

> requirements. We discussed that probably all morning one day. So we have gone through this very, very thoroughly. Doc. 100, #8 at 11:8 – 19.
> . . .
> [REPRESENTATIVE MONSON]: Now, we have – we have kept the reservations whole, giving them a big advantage in that, and a lot of their residents in that district that we have created or drawn at this point, they are Indian Americans. They are not on the reservation per se, but they're in the same district as the reservation. So we – at the hesitation of using the word "gerrymander," we have not gerrymandered. We have actually, I think, gerrymandered to give them every opportunity to get as many Indian Americans into that district and give them the advantage, especially when we keep the reservations whole. So would the courts look at that and say, you've – you've given them every opportunity to put up their own candidate? Doc. 100, #7 at 26:24 – 37:13.

The legislative record is clear on this point. The Committee enacted the challenged Subdistricts in an effort to comply with the VRA. There can be no reasonable argument to the contrary.

B. Race was the predominant factor in the creation of the Subdistricts, not traditional redistricting principles.

The legislative record plainly establishes the Committee prioritized race as a predominant factor in subdividing districts 4 and 9. Defendants' argument that Plaintiffs have failed to show the Legislature subordinated traditional and race-neutral redistricting principles to racial considerations is refuted by the legislative record. Notably, Defendants have failed to cite any relevant portions of the legislative record to support their assertion. Defendants have even gone so far to cite testimony that is unrelated to subdistricts 4 and 9 in their attempt to purposefully mislead this Court about the legislative record. If Defendants had any relevant testimony to support their position, they would have cited the same. The glaring absence of any such testimony is fatal.

This Court can easily determine whether race was the predominant factor in the Committee's creation of the Subdistricts by reviewing the transcript of the Committee hearings of September 28 and 29, 2021, when the Committee debated and voted on creation of the Subdistricts. In the discussion on those two days, the Committee referenced the VRA twenty times and the Gingles factors nine times. See Doc. 100, #6 at 21:1 – 44:4; see also Doc. 100, #7 at 16:4 – 41:19. Conversely, the Committee did not mention the traditional redistricting principles of contiguity, preservation of counties or communities of interest, or protection of incumbents a single time in debating the creation of Subdistricts. Id. Compactness was only mentioned on a single occasion when a member asked legislative counsel whether the term "gerrymandering," refers to the configuration of the boundaries of a district not being compact or whether it refers to a population statistic not being compact. See Doc. 100, #7 at 23:24 – 24:5. On September 28th, the Vice-Chairman of the Committee made the motion "that we subdivide what is District 9 on this particular map and District 4 under the provisions of the **Voting Rights Act**." Doc. 100, #6 at 22:14 – 17. It is important to recognize the motion was not to create the Subdistricts to comply with traditional redistricting principles. The vote was not held on September 28th because the Committee asked legislative counsel to prepare a memo on the VRA cases. Doc. 100, #6 at 42:12 – 43:20. Again, it is important to note that the Committee did not request research on contiguity or compactness of the Subdistricts. There would be no reason to discuss the VRA and Gingles if the Subdistricts were created to comply with traditional redistricting principles. No reasonable person could review the testimony of the Committee and reach

any conclusion other than race, specifically complying with the VRA, was the predominant factor in the Committee's decision to create the Subdistricts.

The Supreme Court has held "the racial predominance inquiry concerns the actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications the legislature in theory could have used but in reality, did not." Bethune-Hill, 137 S.Ct. at 799. Defendants' arguments rely entirely on *post hoc* theories about the types of traditional redistricting principles the Committee should have considered, but in reality, did not. Defendants' attempts to twist the legislative record to support their case is textbook revisionist history. As a result, Defendants have intentionally misrepresented the legislative record to the Court. Defendants have identified instances in the record where the Committee discussed traditional redistricting principles, but have purposely and knowingly failed to admit that every Committee discussion cited regarding traditional redistricting principles concerned other districts not at issue in this case. See Doc. 102 at 22-30. None of the cited testimony in Defendants' Memorandum is related to or references the challenged Subdistricts.

For example, Defendants cite a comment made by Senator Sorvaag in which he says "they're [traditional principles] all coming into play at some point." Doc. 102 at 24. First, Senator Sorvaag made this comment during a presentation regarding several eastern districts, not Districts 4 or 9. See Doc. 100, #4 at 66:16 – 85:18. Defendants have also omitted the rest of Senator Sorvaag's comments:

> [SENATOR SORVAAG]: But I just think as we're spending a lot of discussion to prioritize [traditional redistricting principles], well I don't think you need to . . . So I would hope as this discussion goes forward, we don't

> spend too much time ranking these [traditional redistricting principles], and rather, look at the whole picture.

Id. at 85:6 – 18. Substantive portions of Senator Sorvaag's comments have been ignored or left out by Defendants because the comments contradict Defendants' manufactured narrative. Context matters, and Senator Sorvaag expressed his hope that the Committee would not spend "too much time" analyzing traditional redistricting principles. Id. Defendants' deliberate efforts to misrepresent the legislative record cannot be ignored and should not be rewarded by this Court.

Attempting to show race did not predominate the Committee's decision to subdivide Districts 4 and 9, Defendants have made individual arguments for each traditional redistricting principle:

1. Compactness

Despite arguing "the State considered the compactness of the Challenged Subdistricts in its consideration of House Bill 1504," Defendants have failed to provide any citation to the legislative record to support this self-serving conclusion. Doc. 102 at 25. Defendants' citation to an initial orientation presentation from Ben Williams, a representative from National Council of State Legislators, fails to admit his presentation lacked any analysis of the compactness of the legislative districts in North Dakota, including the Subdistricts in 4 or 9. See Doc. 100, #1 at 51:1 – 57:15. Thus, while Mr. Williams provided an overview of the traditional redistricting principles in his opening presentation to the Committee, he did not provide a statistical analysis of compactness.

Defendants have identified no other testimony or evidence in the legislative record regarding the compactness of the Subdistricts in Districts 4 and 9. Defendants have also failed to identify any testimony or evidence that the Committee directly discussed the compactness of the subdistricts in Districts 4 and 9. If such evidence or testimony existed, Defendants would have certainly provided direct citations to the Court for its consideration. Instead, Defendants rely on an orientation presentation that did not analyze the compactness of any legislative district in North Dakota. In turn, Defendants have failed to show the Committee considered compactness as the predominant factor in creating the challenged Subdistricts.

2. Contiguity

There is no evidence in the legislative record to support Defendants' argument the Committee considered or discussed the contiguity of the Subdistricts. For their baseless assertion that the Committee considered contiguity, Defendants again cite Mr. Williams initial orientation presentation in which he provided an overview of the traditional redistricting principles. Doc. 100, #1 at 51:1 – 57:15. Mr. Williams' presentation lacks any evidence the Subdistricts are contiguous. Defendants have cited no other testimony or evidence to support their assertion, and Defendants have failed to cite any testimony or discussion about contiguity. See Doc. 102 at 26. The failure to submit any competent, admissible evidence to support Defendants' position should be taken as an admission no such evidence exists. The legislative record definitively shows the Committee did not discuss the contiguity of the challenged Subdistricts.

3. Preservation of counties and political subdivisions

There is no evidence or testimony in the legislative record that the Committee considered the preservation of counties and subdivisions in drawing the challenged Subdistricts. Defendants' argument that the Committee considered the preservation of counties and political subdivisions in its drawing of the Subdistricts is nothing more than an unsupported, self-serving, and conclusory statement. Id. at 26-28. Defendants have cited no testimony by the Committee regarding the preservation of counties and subdivisions as the basis for enacting the Subdistricts. Defendants again cite comments from Mr. Williams, but these comments have nothing to do with the challenged Subdistricts. Doc. 102 at 27. Additionally, Defendants cite testimony from a representative of the North Dakota Association of Counties ("NDAC"), but that testimony was also unrelated to the challenged Subdistricts See Doc. 100, #4 at 4:8 – 8:4. In fact, in his testimony, NDAC's representative was clear the Association was not analyzing specific districts:

> [MR. BIRST]: The Association of Counties is not interested in particular plans. We're not advocating for any certain plan. What we would like to remind the committee, and you already know this, but we would like the committee to take into strong consideration that county lines are looked at when you are doing you redistricting.

Id. at 4:22 – 5:3. Defendants' reference to the NDAC's concerns is quite interesting considering Subdistrict 4A carves out portions of 4 different counties and fails to adhere to any county lines. See Doc. 12, #1. In short, Defendants have not identified and cannot identify any discussions in which the Committee considered the preservation of counties and subdivisions in its drawing of the challenged Subdistricts.

4. Preservation of communities of interest

Defendants' argument that the Subdistricts were enacted to preserve communities of interest is unsupported by the legislative record. Defendants are correct in that the Committee heard testimony from tribal leaders requesting that each reservation be kept whole and preserved. It is also undisputed that the boundaries of the Fort Berthold and Turtle Mountain Reservations were fully contained in their respective Subdistricts. See Doc. 12, #1. Even so, the drawing of Subdistricts around each Reservation is not evidence itself that the Committee considered any traditional redistricting principles. Rather, the drawing of subdistricts to encompass each Reservation proves the Committee prioritized race in enacting the Subdistricts.

Defendants do not cite any Committee discussion regarding the preservation of communities of interest in creating the Subdistricts. To support their argument, Defendants have identified testimony provided by interested parties requesting all the Reservations be kept whole. Doc. 102 at 29. To be clear, testimony from interested parties is not evidence of traditional redistricting principles. See Abbott v. Perez, 138 S.Ct. 2305, 2334 (2018) (holding that demands from interested parties are not part of a proper race-based redistricting analysis). However, in citing this testimony, Defendants have again misrepresented the legislative record. Defendants cite exclusively to written testimony provided in the Affidavit of Emily Thompson. Doc. 20. Almost none of the testimony cited by Defendants relates to Districts 4 or 9. For example, Defendants cite written testimony by a representative of North Dakota Farmers Union, Matt Perdue. Doc. 102 at 29. Mr. Perdue's testimony did not reference District 4 or 9, or the challenged Subdistricts. See

Doc. 20, #7. Similarly, Defendants point to written testimony given by members of the Spirit Lake Nation and Standing Rock Sioux Tribe. Doc. 102 at 29. As Defendants know, despite being communities of interest, neither Spirit Lake or Standing Rock tribal nations were given their own Subdistrict. See Doc. 20, #5, #14, #15, #16, #20, #22, #24, #25. Defendants' use of this testimony to support their argument that the Committee considered traditional redistricting principles as a basis for the creation of the Subdistricts in Districts 4 and 9 is not only misleading, but it fails as a matter of law. See Abbott, 138 S.Ct. at 2334.

Inexplicably, and contrary to their arguments, Defendants also cite the written testimony of Turtle Mountain Tribal Chairman Jamie Azure. Doc. 102 at 29. In his testimony, Chairman Azure states that the Turtle Mountain tribe is opposed the subdividing District 9:

> I am very concerned about the Committee's proposed District 9 that encompasses the Turtle Mountain reservation. The Committee's proposed district would dilute the Native American vote, would not provide our tribal members with the ability to elect the candidates of their choice.

See Doc. 20, #25. Chairman Azure also attached a letter to his written testimony in which he stated:

> At that Redistricting hearing, representatives from Spirit Lake Nation, Standing Rock Sioux Tribe, and Three Affiliated Tribes advocated for the creation of legislative subdistricts . . . The Committee, however, also decided to create subdistricts in the Turtle Mountain Reservation area, even though no subdistricts were ever requested by Turtle Mountain to the Redistricting Committee. As a result of poor outreach to our Tribal Nations, despite our repeated requests, **the Redistricting Committee's proposed District 9, containing the Turtle Mountain Reservation, is illegally drawn and we believe it will be struck down in court if it is adopted by the State Legislature**.

Id. Defendants reliance on Chairman Azure's testimony to support their position reveals how illogical the Defendants' argument is and how far Defendants are willing to go to distort the legislative record.

The legislative record simply does not support Defendants' contention that the Committee prioritized traditional redistricting principles in drawing the challenged Subdistricts. Rather, the drawing of the Subdistricts to encompass each Reservation is evidence of racial gerrymandering. For the first time in North Dakota's history the Legislative Assembly enacted Subdistricts. It is not coincidental the Committee chose only to subdivide Districts 4 and 9. As the Committee discussions reflect, Districts 4 and 9 were chosen because Fort Berthold and Turtle Mountain are the only Reservations in North Dakota with a Native American population large enough to encompass a single member subdistrict. The Committee was not coy on this point:

> SENATOR HOLMBERG: We've – we've has numerous discussion about the Voting Rights Act, the – Gingles reality, and when you look at the population of the reservations, it – it does lend itself to either legislative action or, at some other point, court action . . . [t]oday our populations in two areas, two reservations, appear to meet that threshold. The threshold – the ideal population for a subdistricts district is 8,453. And if you recall, the other day we were told that Fort Berthold has, in the County in Rollette County, 9,278 Native Americans identified, and in the Turtle Mountain Reservation there is – oh, excuse me. Excuse me. In Forth Berthold there is 8,350 Native Americans. So it would lend itself, I believe, those two falling under the requirements of the Voting Rights Act . . . If you recall, I – I read the – Some of the other [reservation] populations, and they don't rise to the 8,453-person level. Doc. 100, #6 at 21:4 – 22:13.
>
> . . .
>
> REPRESENTATIVE MONSON: So really what I'm hearing is you're saying there's one district that might -- or one reservation that might qualify by the Gingles Act for a subdistrict. The other ones probably don't make it because they aren't even close to half. Correct? Is that what I heard you say?

> Doc. 100, #4 at 25:17 - 23.
> . . .
> REPRESENTATIVE SCHAUER: And just to be clear on this, this is numbers driven. This is what we have to do following the Voting Rights Act. Doc. 100, #6 at 23:14 – 23:18.
> . . .
> [SENATOR HOLMBERG]: We do have a question regarding subdivisions. I would look at two districts which have native populations. One of them, District 9, has 9278 American Indian population. And then Fort Berthold has 8350 people living on the reservation itself. And I think that we would make a mistake as a legislature not recognizing what the courts have said, which is if you have a population beyond a certain amount, a percentage, then subdividing is the direction that Voting Rights Act Title 2 of Section 2, whatever it is, would mandate. Doc. 100, #5 at 47:7 – 24.
> . . .
> REPRESENTATIVE SCHAUER: Those advocating Subdistricts in North Dakota have a powerful legal case based on the census numbers, the Voting Rights act, and 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 . . . Let's do what is right both legally and in support of our tribal friends who are also North Dakotans. Doc. 100, #8 at 10:22 – 11:19.

The Committee expressed that its sole criterion for enacting the Subdistricts was the minority population on each Reservation. If preservation of communities of interest was at the heart of the Committee's decision, the Committee would not have left out the other three Reservations in North Dakota. Defendants' argument that the Subdistricts were enacted to preserve communities of interest is not supported by the legislative record.

5. Protection of incumbent legislators.

Reviewing the legislative record, it is evident the Committee did not consider protection of incumbents while subdividing Districts 4 and 9. Despite being reelected to a four-year term in 2020, Rep. Terry Jones, Rep. Clayton Fegley, and Sen. Jordan Kannianen

of District 4 were forced to run for reelection in 2022 as a result of the Subdistricts. Defendants' argument that the Committee considered protection of incumbent legislators in the drawing of Districts 4 and 9 is unsupported and Defendants have cited no testimony or evidence to support their conclusion.

C. The legislative record proves race was the Committee's predominant consideration.

The transcripts of the legislative record provide direct evidence of the Committee's reliance on race as the predominant factor for enactment of the Subdistricts. Defendants have preemptively declared that Plaintiffs will "cherry pick" quotes from individual legislators "to paint a false portrait . . . to make it appear race predominated." Doc. 102 at 30. Notably, despite having transcripts of the entire redistricting process, Defendants failed to identify any substantive quotes or discussions showing the Committee considered traditional redistricting principles with respect to Districts 4 and 9. Instead, Defendants have misrepresented isolated quotes about districts which are not being challenged here. Defendants have identified no quotes or discussions regarding any traditional redistricting principles that were analyzed for the challenged Subdistricts. This is because no such discussions took place.

The Supreme Court has held that quotes from legislators are often the best evidence to prove race predominated a state's decision. For example, in Cooper, 581 U.S. 285, the Court's racial predominance analysis focused on quotes from the co-chairmen of North Carolina's Redistricting Committee. There, the co-chairmen – Senator Richard Rucho and Representative David Lewis – openly advocated for the enactment of a number of majority-

black districts in order to allegedly comply with the VRA. Id. at 299-300. As the Court points out, "[u]ncontested evidence in the record shows that the State's mapmakers, in considering District 1, purposefully established a racial target: African–Americans should make up no less than a majority of the voting-age population." Id. at 299. The Court found the racial target set by Rucho and Lewis was direct evidence race predominated. Id. at 300. The Court focused on just two statements made by Rucho and Lewis to reach this conclusion:

> [Rucho and Lewis] repeatedly told their colleagues that District 1 had to be majority-minority, so as to comply with the VRA. During a Senate debate, for example, Rucho explained that District 1 'must include a sufficient number of African–Americans' to make it 'a majority black district.' Similarly, Lewis informed the House and Senate redistricting committees that the district must have 'a majority black voting age population.' . . . Faced with this body of evidence - showing an announced racial target that subordinated other districting criteria and produced boundaries amplifying divisions between blacks and whites - the District Court did not clearly err in finding that race predominated in drawing District 1. Indeed, as all three judges recognized, the court could hardly have concluded anything but.

Id. at 300-301. Citing just two quotes from the co-chairmen of the North Carolina Redistricting Committee, the Supreme Court concluded the challenged map was a "textbook example of race-based districting." Id. at 301 (*quotations marks omitted)*.

In this case, both the Chairman and the Vice Chairman of the Committee established an explicit racial target for the Subdistricts. This racial target was two majority-minority Subdistricts in districts 4 and 9. Chairman Devlin admitted this on the House floor:

> [CHAIRMAN DEVLIN]: We are putting in the subdistricts because that is a requirement of the Voting Rights Act.

Doc. 100, #8 at 18:5 – 7. Additionally, Vice Chairman Holmberg announced The Committee's explicit racial target during a Committee hearing on September 23, 2021:

> [SENATOR HOLMBERG]: We do have a question regarding subdivisions. I would look at two districts which have native populations. One of them, District 9, has 9278 American Indian population. And then Fort Berthold has 8350 people living on the reservation itself. And I think that we would make a mistake as a legislature not recognizing what the courts have said, which is if you have a population beyond a certain amount, a percentage, then subdividing is the direction that Voting Rights Act Title 2 of Section 2, whatever it is, would mandate.

Doc. 100, #5 at 29:20 – 25. Based on the Supreme Court precedent, the establishment of a racial target by the Chairman and Vice Chairman proves race predominated the drawing of the Subdistricts. See Cooper, 581 U.S. at 301.

The legislative record is replete with statements from Committee hearings and floor sessions establishing race was the predominant factor in creating the Subdistricts. The following statements are direct evidence of Committee's intent:

> MR. SCHAUER: In those districts where it's heavily minority, is there pressure from the courts to break those districts down into subdivisions to make sure those mino- -- that minority populations is represented? Doc. 100, #1 at 38:10 - 14.
>
> . . .
>
> MR. HOLMBERG: Uh, and I would just wonder your observations about if we have districts that have a native population of 8,000 or 6,000, uh, how thin does the ice get if we decide not to do any subdistricting in those areas, as South Dakota has in two reservations. They have subdistricts in two legislative districts. How thin, if you're at 8,000, 9,000 people of a -- of a 16,000 district, is the ice getting pretty thin? Doc. 100, #1 at 39:12 – 40:18.
>
> . . .
>
> SENATOR HOLMBERG: -- and you've talked about the native [American] populations, would your group be critical of a legislature that would subdivide reservation A and not reservation B because reservation B gave us clear messages that they really don't want that? Doc. 100, #2 at 96:2 - 96:7.
>
> . . .
>
> REPRESENTATIVE NATHE: Thank you, Mr. Chairman. So when you talk

about better representation, do you have any information that shows in the past that anybody from these reservations haven't had a chance to run? Because it seems to me they've [Native Americans] had as much chance to run as anybody else. Id. at 100:2 - 8.

. . .

REPRESENTATIVE NATHE: So, Rick, I want to go back. Senator Oban talked about a chance to win. If we go to subdistricts, they have a better chance to win. Are you saying right now if a Native American ran in, say, District 31 in Standing Rock, they have less of a chance now than if we subdivide? Id. at 105:19 - 25.

. . .

REPRESENTATIVE SCHAUER: But a question for Ms. Ness, and I'm just trying to get a handle on this. If race is the reason to subdivide a district, then what mandates are there to make sure that a candidate is of that race? Id. at 112:15 - 19.

. . .

VICE CHAIRMAN HOLMBERG: First of all, this Committee is very sensitive to our duties under the Voting Rights act. We know that. We get that. There are things we have to do, and there are things we can do. And we certainly will take care of the have to do, I believe, but there are also, within that particular legislative, there are certain thresholds; and I don't have them in front of me. I mean, if you have a district that has 50 percent -- if you subdivided a district and the Native population was 50 percent, that's pretty easy to argue. When you get down to 23 percent, that's less arguable. So in other words, we know what -- I believe what we should do, but there are thresholds that we also have to consider. Doc. 100, #3 at 64:16 - 65:6.

. . .

REPRESENTATIVE NATHE: So Claire, help me understand. I'm just confused what trips the Gingles preconditions. So we're looking at a subdistrict and in some of the discussions, all of a sudden, we have -- say we have 9000 Native Americans, and we have 8000 non -- whites -- say whites. Well, doesn't that trip the Gingles the other way? I mean, isn't that discriminating against, you know, the other way? Doc. 100, #4 at 28:27 - 25.

. . .

[REPRESENTATIVE HEADLAND]: Senator Holmberg, would if be fair to say that we really don't know if the Court would weigh in, or we really don't know how they would respond? You know, I have some issues with subdivisions and dividing them based upon race, so I – I just don't think I can support the proposal to subdivide. Doc. 100, #6 at 23:22 - 24:2.

. . .

[REPRESENTATIVE MONSON]: Now, we have – we have kept the reservations whole, giving them a big advantage in that, and a lot of their residents in that district that we have created or drawn at this point, they are

> Indian Americans. They are not on the reservation per se, but they're in the same district as the reservation. So we – at the hesitation of using the word "gerrymander," we have not gerrymandered. We have actually, I think, gerrymandered to give them every opportunity to get as many Indian Americans into that district and give them the advantage, especially when we keep the reservations whole. So would the courts look at that and say, you've – you've given them every opportunity to put up their own candidate? And They've actually got over half of the population within a district in some cases that are Indian Americans that could vote for them if they wanted . . . I mean, I'm not thinking these should be color-blind. I mean, I don't – I don't think that race should be a factor, and I don't think we've made it a factor until they have asked for the reservations to be included, but – so have we not given them every opportunity by keeping them as cohesive as we can at this point? Doc. 100, #7 at 34:15 – 35:21.
>
> . . .
>
> [REPRESENTATIVE SCHAUER]: 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 . . . Let's learn from South Dakota's mistake. Let's put our state in the best possible position to defend itself if we are sued. Let's do what is right both legally and in support of our tribal friends who are also North Dakotans. Doc. 100, #8 at at 11:8 - 19.

The racial target set by the Chairman and Vice Chairman, and the Committee's focus on race is fatal to the Defendants' Motion for Summary Judgment. These comments by members of the Committee are not cherry-picked or isolated. Defendants have access to the entire legislative record. Rather than bring forth direct evidence to support their claims, Defendants deflect by accusing Plaintiffs of "cherry picking" quotes. In essence, Defendants are asking this Court to ignore the legislative record, that they fought so hard to hide from Plaintiffs in this case, in favor of some unknown evidence they have not identified. The quotes cited are direct evidence of what the Committee considered when drawing the challenged Subdistricts. Defendants' inability to cite any relevant or substantive testimony in support of the Committee's decision is an admission of merit.

In addition to the direct evidence cited above, the circumstantial evidence of the Subdistricts' boundaries and demographics establish race was the predominant factor in their creation. The design of Subdistricts 4A and 9A was created to have a majority Native American voting age population. The Subdistrict boundaries were specifically drawn to follow the Forth Berthold and Turtle Mountain Reservations' respective borders to accomplish creation of a Native American minority-majority district. No other district in the State was designed to create a majority population of minority voters. Three other reservations exist in North Dakota, but none of them were given special subdistricts to reflect "traditional redistricting principles". The circumstantial evidence of the design of the Subdistricts to follow Reservation boundaries and to create a majority population of Native American voters establishes race was the predominant factor in creating the Subdistricts.

There is no question race predominated the Committee's decision to subdivide Districts 4 and 9. Because race was the predominant factor here, Defendants' Motion for Summary Judgment must be denied.

II. The challenged Subdistricts are not narrowly tailored because the Legislature failed to conduct a proper Gingles analysis.

When a plaintiff meets his burden to show race was a predominant consideration or the VRA was invoked in the drawing of district, the configuration of the district must withstand strict scrutiny. Cooper, 581 U.S. at 292. That is, the burden shifts to the state to show the majority-minority district is narrowly tailored to achieve a compelling government interest. Wisconsin Legislature, 142 S.Ct. at 1248. The Supreme Court has

held that a race-based redistricting plan is only narrowly tailored if a legislature has a "strong basis in evidence" to believe the use of racial criteria is required to comply with the VRA. Alabama Black Legis. Caucus v. Alabama, 575 U.S. 254, 278 (2015). "To have a strong basis in evidence . . . the State must carefully evaluate whether a plaintiff could establish the Gingles preconditions – including effective white bloc-voting – in a new district created without those measures." Cooper, 581 U.S. at 304.

Here, the Committee did not conduct a proper Gingles analysis. In their Memorandum in Support of Motion for Summary Judgment, Defendants state:

> As an initial matter, Plaintiffs argue that the ND Legislature must have conducted a statistical analyses through experts prior to passing house Bill 1504 in order to justify the Challenged Subdistricts under the VRA. In other words, Plaintiffs essentially argue the Legislature is not allowed to use its own judgment based on the evidence it has received in seeking to make redistricting decisions, but rather that it must have relied on experts and expert analysis for such decisions.

Doc. 102 at 31. Defendants are correct on this point. The United States Supreme Court has found that, in order to have a strong basis in evidence to meet the Equal Protection Clause's strict scrutiny requirements, a thorough statistical analysis of the Gingles preconditions is required. Cooper, 518 U.S. at 304 (holding that unless each of the three Gingles prerequisites is established, there has neither been a wrong nor can there be a remedy.); see also Growe v. Emison, 507 U.S. 25, 41-42 (1993) (holding the Gingles preconditions had not been met because "**the record simply contains no statistical evidence of minority political cohesion or of majority bloc voting**.") (*emphasis added*); League of Latin Am. Citizens v. Perry, 548 U.S. 399, 427 (2006) (relying on statistical evidence to find the second and third Gingles preconditions were met). Importantly, in Gingles, the Court relied

on several statistical studies to conclude the preconditions were met. 478 U.S. at 52-53 (analyzing a "bivariate ecological regression analysis" to determine the existence of racial bloc voting and political cohesion).

Numerous lower courts, including the Eight Circuit, have concluded a statistical analysis is needed to meet the Gingles preconditions. See Buckanaga v. Sisseton Indep. Sch. Dist., No. 54-5, S. Dakota, 804 F.2d 469, 473 (8th Cir. 1986) (holding the surest indication of race conscious politics is a pattern of racially polarized voting extending over time); see also Shirt v. Hazeltine, 336 F. Supp. 2d. 976, 1010 (S.D. Dist. Ct. 2004) (finding that no mathematical formula or simple doctrinal test is available . . . the inquiry therefore focuses on statistical evidence to discern the way voters voted); Sanchez v. State of Colo., 97 F.3d 1303 (10th Cir. 1996) (stating the heart of each inquiry requires a searching look into the statistical evidence to discern the way voters voted); Missouri State Conference 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) (holding a state must consider a statistical and non-statistical evaluation of the voting behavior and election results in the relevant elections).

Defendants erroneously assert "the United States Supreme Court in Wisconsin Legislature did not require expert analyses and complex statistical calculations prior to the adoption of a redistricting plan." This assertion is demonstrably false. In Wisconsin Legislature, 142 S. Ct. 1245, the Supreme Court cited the lack of expert analysis in finding the Governor had not met the Gingles preconditions. Id. at 1250. For example, regarding the second precondition, the Court found that "the discussion of the second precondition

consisted of nothing but the statement that 'experts from multiple parties analyzed voting trends and concluded political cohesion existed.'" Id. The Court found that by simply citing to an expert report without any actual analysis, the lower court "made virtually no effort to parse the data . . . or respond to criticisms of the expert's analysis." Moreover, regarding the third precondition, the Court found that "while the [lower] court did cite one specific expert report for the third precondition" the court failed to properly analyze the data from that expert report. Id. In striking down the Governor's map, the Supreme Court directly rejected the lower court's lackluster statistical analysis:

> No single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength . . . When the Wisconsin Supreme Court endeavored to undertake a full strict-scrutiny analysis, it did not do so properly under our precedents, and its judgment cannot stand.

Id. (*emphasis added*) Defendants argument that the Court in Wisconsin Legislature "did not require expert analyses and complex statistical calculations" is incorrect. Even the most cursory reading of the Court's opinion demonstrates the same.

In their Memorandum, Defendants briskly walk through the Gingles preconditions in an effort show each was met by the Committee. See Doc. 102 at 36. But Defendants fail to cite a single statistical or expert analysis considered by the Committee. There is no evidence the Committee parsed through data or even identified the data that was allegedly analyzed. Instead, Defendants exclaim the Committee should be "allowed to use its own judgment" to meet the Gingles preconditions. Id. at 31. In their summation of evidence on this point, the Defendants state: **"[i]t is well known in North Dakota that Native American populations tend to vote for the Democratic candidate and White**

populations tend to vote for the Republican candidate." It is incomprehensible the Governor and Secretary of State would make such a brazen proclamation to support their argument the Gingles factors were met. This unsupported statement exemplifies exactly why the Legislature's "own judgment" cannot justify race-based districting.

The legislative record is void of any evidence the Committee satisfied the Gingles preconditions. In erroneously arguing the second Gingles precondition was met, Defendants cite to a quote from an unidentified Senator. Doc. 102 at 36. Specifically, Defendants exclaim "Senator ____ [sic] stated the obvious fact for District 4 that not one Republican had been elected out that District in decades, and he stated what all of the State Senators knew: that the precincts on the reservation voted for and then which candidates won, right, so you which was the candidate of their choice." Id. This quote is not only a misstatement, but it lacks proper context. The quote Defendants appear to be referencing is from Senator Jordan Kannianen of District 4 during the Senate floor debate on the Subdistricts. While Defendants assert this quote supports their position, proper context shows it does not. Senator Kannianen was speaking about District 9 (not District 4, as Defendants allege), and he was arguing the Gingles preconditions were clearly not met:

> 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.
>
> . . .
>
> And the third [precondition] is that the majority group votes sufficient as a bloc. So, in other words, the non-Natives in the district vote sufficient as a bloc themselves to still -- as it says, "usually" defeat the minority's preferred

> candidate despite their bloc 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 so then you look at what candidates – the precincts on the reservation voted for and the which candidates won, right, so you know which was the candidate of their choice.
> . . .
> And my contention simply is that all three preconditions in the Gingles case have not been met for either District 4 nor District 9. And it seems pretty clear that applying subdistricts to District 9 will have actually an adverse effect to the Native majority to the benefit of the non-Native majority. I don't think that's what we really want or the route we should be going either.

Doc. 100, #9 at 27:3 - 31:25. It is unclear why Defendants believe Senator Kannianen's statement supports their argument that the second Gingles factor was met. Simply reviewing the rest of Senator Kannianen's statement shows he was claiming the Committee did not satisfy the Gingles preconditions. In their Memorandum, Defendants identify no other evidence to support their contention the Committee satisfied the second Gingles precondition.

Similarly, Defendants cite no statistical or expert evidence to show the Committee satisfied the third Gingles precondition. As the Court is aware, to satisfy the third precondition a state must present evidence that a district's majority population votes sufficiently as a "bloc" to usually defeat the minority's preferred candidate. Cooper, 137 S. Ct. at 1470. A cursory reading of Defendants' Memorandum on this point shows no evidence supports such an argument. Defendants cite a quote from Chairman Devlin, in which he states:

> The Federal Voting Rights Act prohibits redistricting from diluting the vote of a racial minority by giving the racial minority less opportunity that other groups to elect a minority group's candidate of choice. The candidate of choice, as you well know, doesn't have to be a minority or tribal member. It can be anyone. But it is their choice.

Doc. 100, #8 at 20:8 – 16. It is unclear how this statement proves the Committee satisfied the third Gingles precondition, but it does show the Committee invoked the VRA in its creation of the Subdistricts in Districts 4 and 9. Other than this statement from the Chairman, Defendants have not directed the Court to any evidence in the record of majority bloc voting in either District. This is because none exists. Defendants lack of evidence for the Gingles preconditions is an admission such preconditions were not met.

In short, the legislative record proves the Committee did not conduct a proper Gingles analysis. The Defendants have failed to bring forth any evidence to show the Committee satisfied the Gingles preconditions. As a result, the Court should deny Defendants' Motion for Summary Judgment. Instead, summary judgment for Plaintiffs is appropriate.

III. The Equal Protection Clause requires permanent enjoinment of the Subdistricts.

Defendants argue "removal of the entirely lawful Subdistricts is not redressable in this action" because such removal "would violate the VRA". Doc. 102 at 38. Contrary to Defendants' argument, North Dakota's Constitution does not, and legally cannot, allow the for implementation of racially gerrymandered subdistricts in violation of the Equal Protection Clause. Any argument that North Dakota's Constitution permits the Assembly to racially gerrymander Districts 4 and 9 is erroneous.

To support their claims, Defendants point out that "North Dakota law expressly provides for subdistricting." Id. Defendants are correct that Article IV § 2 of North Dakota's Constitution allows for both at-large and single members representation in the House of Representatives. But, simply because the Committee can create subdistricts it does not empower the Committee to implement racially gerrymandered subdistricts in violation of the Equal Protection Clause. As this Court knows, the Equal Protection Clause's prohibition of racial gerrymandering applies on a state level and overrules any conflicting state law provisions. Cooper v. Aaron, 358 U.S. 1 (1958) (holding that the Fourteenth Amendment is the "supreme law of the land" and preempts any conflicting state laws). For this reason, Defendants' argument fails.

Moreover, Defendants' argument that enjoinment of the Subdistricts would violate the VRA is a legal fallacy. The Plaintiffs brought this lawsuit under the Equal Protection Clause. See Doc. 1. This lawsuit is not governed by the VRA, nor should it be. A VRA analysis should have occurred when the Committee enacted the Subdistricts. It is undisputed it did not. Defendants argue this Court cannot correct a blatant constitutional violation because it would allegedly violate a federal statute, the VRA. This argument is nonsensical. In essence, Defendants ask this Court to prioritize a federal statute over the Constitutional rights of over 30,000 voters in Districts 4 and 9.

Further, acceptance of Defendants' argument would require the Court to issue an order based on future speculation. That is, Defendants argue that if the Court enjoins the Subdistricts, another Court in the future **might** find that Districts 4 and 9 dilute the strength of Native American voters. This is not the standard. The Supreme Court routinely strikes

down racially drawn districts where a legislature fails to conduct a proper Gingles analysis. Under Defendants' theory, a court could not find a racially drawn district to be unconstitutional because a court in the future **might** find the districts pre-redistricting configuration results in vote dilution. The Court should reject this argument.

Finally, Defendants argue that "Dr. Hood indicates in his 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." Doc. 102 at 39. Defendant's argument is disingenuous. As this Court is aware, there is currently a separate lawsuit ongoing regarding the drawing of District 9. See Turtle Mountain Band of Chippewa Indians, et al. v. Jaeger, No. 3:22-cv-00022-PDW-ARS (D.N.D. Feb. 7, 2022). In that case, Plaintiffs are alleging that District 9, as drawn, violates the VRA. Id. Defendants have retained Dr. Hood as their statistical expert in that case as well. In his expert report in the Turtle Mountain case, Dr. Hood opined the Gingles preconditions **cannot** be met in District 9. See Ex. A (State's Expert Report of Dr. Hood in the Turtle Mountain lawsuit.) Specifically, Dr. Hood states "the Native American candidate of choice is not typically defeated by the white voting bloc in [District 9]." Id. at 2. Dr. Hood concludes "There appears to be a decided lack of evidence by which prong 3 [of Gingles] might be substantiated in LD9." Dr. Hood's opinion is supported by the Intervenors' expert, Dr. Collingwood, who has concluded that from 1990 to 2022, District 9 elected a Native American candidate to the state senate, as well as two state representatives who were the candidates of choice of Native American voters. See Exhibit B (Dr. Collingwood rebuttal report). Despite their own expert's contradictory opinions,

Defendants represent to the Court it is "undisputed" the Committee satisfied the Gingles preconditions for Subdistricts 9A and 9B. Doc. 102 at 39. Defendants' argument is intellectually dishonest and should be rejected.

IV. Plaintiffs have standing to challenge the Legislative Assembly's violation of the Equal Protection Clause in District 9.

Defendants allege that Plaintiffs lack standing under Article III of the Constitution to challenge the creation of Subdistricts in District 9 as racial gerrymanders in violation of the Equal Protection Clause. Defendants' standing argument lacks merit. Plaintiff Paul Henderson is a resident of District 9, and therefore has the constitutional standing necessary to bring this claim. Accordingly, the Court should reject Defendants' standing argument.

The United States Supreme Court found that, in order to have constitutional standing under Article III, a Plaintiff must meet three requirements: 1) a plaintiff must have suffered an injury in fact; 2) a plaintiff must show there is some causal connection between the injury complained of and the conduct of the defendants; and 3) the alleged injury suffered by the plaintiff must be redressable by a favorable decision of the court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992). The invasion of a legal protected interest must be "concrete and particularized" and cannot be "conjectural or hypothetical." Id. To be concrete or particularized, the injury in fact "must affect the plaintiff in a personal and individual way." Id.

In racial gerrymandering cases, the U.S. Supreme Court has found the "central purpose" of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race." Shaw v. Reno, 509 U.S. 630,

643 (1993). The individual and personalized injuries that arise from a state's racial gerrymandering "include being personally subjected to a racial classification" and potentially "being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group." Bethune-Hill v. Virginia State Bd. of Elections, 580 U.S. 178 (2017) (citing Alabama Legislative Black Caucus v. Alabama, 575 U.S. 254, 263 (2015)). In a racial gerrymandering claim, the particular race of a plaintiff is not determinative of whether an injury has occurred. Abbott, 138 S.Ct. at 2314. Rather, the injury arises from the intentional assignment of the plaintiff to a voting district based on a racial classification. Id. For this reason, the Supreme Court has found that racial classifications of any kind "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Shaw, 509 U.S. at 643.

In order to have suffered a particularized injury in fact, a plaintiff must reside in the voting district that has allegedly been racially gerrymandered. United States v. Hays, 515 U.S. 737, 745 (1995). That is, a plaintiff must show he has "been subjected to a racial classification" based on his placement in a particular voting district. Id. When a plaintiff resides in voting district that has been drawn or split on the basis of race, he "has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action." Id.

a. Plaintiffs have suffered a constitutional injury in District 9.

In this case there is no question Plaintiffs meet the injury in fact requirements to establish constitutional standing in District 9. Plaintiffs' Complaint clearly establishes this cause of action challenges the subdivision of both Districts 4 and 9:

> [40] However, under the redistricting plan enacted by the Legislative Assembly, Districts 4 and 9 are now subdivided into Districts 4A and 4B, and 9A and 9B respectively. Under this place, Representatives from Districts 4 and 9 are no longer elected at-large, but are instead elected only by citizens in their respective Subdistrict.
>
> . . .
>
> [42] The creation of Subdistricts in Districts 4 and 9 is a racial gerrymander for which race was the predominant factor, and for which the Legislative Assembly had no compelling state interest.
>
> [43] As a result of the Legislative Assembly's racial gerrymander, citizens of Districts 4 and 9 will be denied equal representation under the law.

Doc. 1 (Complaint). Defendants' argument that this cause of action only challenges Subdistricts 4A and 9A is unsupported by the pleadings. When the Legislative Assembly subdivided each District on the basis of race, it subjected every citizen in those Districts to a racial classification. Citizens living in Subdistrict 9B suffered the same constitutional injury as citizens living in 9A.

Moreover, the Governor and Secretary of State's contention that only Subdistricts 4A and 9A can be challenged because they were drawn to encompass Native American Reservations is nonsensical. Defendants' argument continues to demonstrate their fixation with race. Defendants' argument fails to acknowledge that by subdividing District 9 on the basis of race, the State violated the Equal Protection Rights of every voting age citizen in the district; not just the citizens living on the Reservation in Subdistrict 9A.

In this case, it is undisputed that Plaintiff Paul Henderson is a resident of Subdistrict 9B. Doc. 105, #4 at 12:12 - 16. The Supreme Court has found that any citizen living in a gerrymandered district has standing to bring a claim for relief. Hays, 515 U.S. at 744-745 (holding where a plaintiff resides in a racially gerrymandered district, 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); see also Rice v. Cayetano, 528 U.S. 495 (2000) (allowing voters of any race in Hawaii to challenge a state law allowing only citizens of traditional Hawaiian heritage to vote for certain elected positions). The Defendants' argument that Paul Henderson is excluded from challenging the Subdistricts in District 9 because he does not live on the Turtle Mountain Reservation defies logic. By being placed in District 9B, Henderson faced the same erroneous racial classification as citizens in 9A. As such, Henderson has suffered a concrete and personalized injury in fact under the Equal Protection Clause of the Fourteenth Amendment, and has standing to bring this action. See Shaw v. Hunt, 517 U.S. 899, 903 (1996).

b. Plaintiffs have shown a causal connection between the constitutional injury and the conduct of Defendants.

Along with showing a plaintiff has suffered an injury in fact, a plaintiff must demonstrate there is a causal connection between the injury and the conduct of the defendants. Lujan, 504 U.S. at 560. In order to show a causal connection, plaintiff must prove the alleged injury "is fairly traceable to the challenged action of the defendant[s], and not the result of the independent action of some third party not before the court." Id.

In this case, Defendants do not dispute Plaintiffs' constitutional injury is fairly traceable to the conduct of Defendants. The Defendants are the Governor and Secretary of State of the state of North Dakota. The entire redistricting process which resulted in the State's racial gerrymandering was set in motion by Governor Burgum when he signed House Bill 1397 into law during the regular session of the 67th Legislative Assembly. Doc. 37 at 2 (Order Denying Motion for Preliminary Injunction). House Bill 1397 established the interim Redistricting Committee and tasked the Committee with creating "a legislative redistricting plan to be implemented in time for use in the 2022 primary election." Id. Moreover, on October 29, 2021, Governor Burgum issued Executive Order 2021-17, which convened a special session of the Legislative Assembly for the purposes of redistricting government." Doc. 12 at (Memorandum in support of Motion for Preliminary Injunction). It was during this special session that the Legislative Assembly approved the final redistricting plan created by the Governor's Redistricting Committee. The final redistricting plan approved by the Assembly included the challenged Subdistricts, 4A, 4B, 9A, and 9B. Governor Burgum ultimately signed the final redistricting plan into law on November 11, 2021, which included the racially gerrymandered Subdistricts. Id. at 4. Plaintiffs have established a clear causal connection between Defendant Burgum's conduct and the constitutional injuries alleged.

There is also a clear causal connection to the conduct of the Secretary of State. The North Dakota Secretary of State is the official supervisor of all elections in North Dakota. N.D.C.C. § 16.1-01-01. The enactment of the challenged redistricting plan, including the Subdistricts, is enforced and overseen by the Secretary of State's office. Id. N.D.C.C. §

16.1-01-01 provides "the Secretary of State shall . . . publish and distribute . . . a map of all legislative districts." Thus, in this matter, Secretary of State Howe's office is solely responsible for publishing a map of the challenged Subdistricts and overseeing the administration of elections in those Subdistricts. Id. Thus, the conduct of Secretary of State Howe has a direct causal connection to Plaintiffs' constitutional injury.

The evidence establishes a clear causal connection between Plaintiffs' injury in fact and conduct of both Defendants Burgum and Howe. As such, Plaintiffs' have shown the second requirement needed for Article III standing. See Lujan, 504 U.S. at 560.

c. Plaintiffs' constitutional injury in fact is redressable by the Court.

The third and final requirement for a plaintiff to establish Article III standing is a showing that the alleged injury is redressable by a favorable decision in the case. Id. at 561. There is no question Plaintiffs' injury is redressable by a favorable decision from the Court.

Plaintiffs challenge the enactment of Subdistricts 4A, 4B, 9A, and 9B. Plaintiffs allege the Subdistricts are racial gerrymanders which are not narrowly tailored to achieve a compelling government interest. Plaintiffs request this Court to permanently enjoin the challenged Subdistricts, by removing the subdivision boundary that separates each neighboring Subdistrict. That is, Plaintiffs are requesting that the Court return Districts 4 and 9 to at-large contiguous districts. As previously established, the Court has the authority to redraw a legislative district to redress an Equal Protection Violation. See North Carolina v. Covington, 138 S.Ct. 2548, 2554 (2018); see also Upham v. Seamon, 456 U.S. 37, 39 (1982) (explaining that although a court must defer to legislative judgments on reapportionment as much as possible, it is forbidden to do so when the legislative plan

would not meet the special standards of population equality and racial fairness that are applicable to court-ordered plans). If the Court were to conclude the Challenged Subdistricts violate the Equal Protection Clause of the Fourteenth Amendment, the Court has the authority to directly redress Plaintiffs' constitutional injury.

Plaintiffs have shown they meet all three requirements necessary to establish Article III standing in Districts 4 and 9. As a result, the Court should reject Defendants' argument about the same, and deny Defendants' Motion for Summary Judgment.

CONCLUSION

There is no question of fact that the Committee invoked the VRA, focused entirely on race, and failed to narrowly tailor Districts 4 and 9. Despite having transcripts of the entire legislative record, Defendants have failed to bring forth any competent evidence to support their arguments. The Committee did not consider traditional redistricting principles in drawing the challenged Subdistricts. The Committee did not undertake any statistical or expert analyses to meet the Gingles preconditions—the existence of white bloc voting and political cohesion in Districts 4 and 9. As such, Defendants' Motion for Summary Judgment must be denied. Instead, Plaintiffs respectfully request an Order from the granting their Motion for Summary Judgment.

Respectfully submitted this 21st day of March, 2023.

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