UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

CASE NO: 1:22-CV-00031-CRH

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.

PLAINTIFFS' MEMORANDUM IN RESPONSE TO DEFENDANT-INTERVENORS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Charles Walen and Paul Henderson file this Memorandum in Response to Defendant-Intervenors the Mandan, Hidatsa and Arikara Nation, Cesar Alvarez, and Lisa Deville ("Intervenors") Motion for Summary Judgment. As part of their Response, Plaintiffs incorporate the facts and legal argument set forth in their previously filed Memorandum in Support of Motion for Summary Judgement. See Doc. 99.

I. The Subdistricts must meet the strict scrutiny requirements of the Equal Protection Clause because the Committee invoked the Voting Rights Act.

The Intervenors argue race did not predominate the Committee's decision to subdivide Districts 4 and 9. Intervenors' argument fails to acknowledge that by invoking the Voting Rights Act ("VRA"), the Committee triggered the strict scrutiny test which required the Committee to ensure the Subdistricts were narrowly tailored to achieve a compelling state interest. The legislative record demonstrates the Subdistricts were not narrowly tailored, and therefore violate the Equal Protection Clause of the Fourteenth Amendment.

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.

For example, in Cooper, the State of North Carolina invoked the VRA in its creation of two majority-minority districts. Id. at 299. In finding the state invoked the VRA, the Supreme Court relied on two quotes from the Co-Chairmen of North Carolina's Redistricting Committee:

> Senator Rucho and Representative 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.' . . .

Id. The Court ultimately struck down both at-issue districts because North Carolina's Redistricting Committee had failed to meet the Gingles preconditions prior to enacting the at-issue districts. Id. at 322-323.

In this case, the Committee invoked the VRA to justify its implementation of the challenged Subdistricts. The Chairman and Vice Chairman of the Committee both admitted this. See Doc. 100 at #8 at 18:5 - 7; see also Doc. 100, #6 at 22:14 – 17. In making the motion to subdivide Districts 4 and 9, Vice Chairman Holmberg stated: "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, #6 at 22:14 – 17. Chairman Devlin announced on the House floor: "We are putting in the subdistricts because that is a requirement of the Voting Rights Act." Doc. 100 at #8 at 18:5 – 7. These quotes prove the VRA was invoked as the justification for creating the Subdistricts. Further, the statements by the Chairman and Vice Chairman are stronger direct evidence of invocation of the VRA than those made by the legislators in Cooper. See 581 U.S. at 299 (finding the North Carolina Legislature invoked the VRA to justify race based districting).

In addition the statements of the Chairman and Vice Chairman, statements made by other members of the Committee confirm that the Committee relied on the VRA to justify the Subdistricts:

> 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 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.
> . . .
> [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.
> . . .
> 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 statements of the Committee members are direct evidence of the Committee's intent. The Committee justified its race-based districting by invoking compliance with the VRA. There can be no reasonable argument to the contrary. As such, the Committee was required to ensure the Subdistricts were narrowly tailored to achieve a compelling government interest. Cooper, 581 U.S. at 291.

The Intervenors argue these quotes are not evidence the State invoked the VRA. However, a review of the legislative record regarding the creation of the Subdistricts could lead to no other conclusion. Further, the Intervenors have failed to cite to any direct evidence that the Subdistricts were created for any other purpose than to comply with the VRA. The Intervenors want this Court to ignore the Committee's explicit invocation of the VRA in favor of some unknown evidence it has not cited in the record. Plaintiffs have brought forth direct evidence that the Committee invoked the VRA, thereby triggering strict scrutiny. In light of this evidence, the Committee was required to conduct a proper Gingles analysis. See Cooper, 581 U.S. at 291.

II. Race was the predominant factor motivating the Committee's drawing of Districts 4 and 9.

In addition to the Committee's invocation of the VRA, race was also the Committee's predominant consideration in the drawing of the Subdistricts. The Intervenors argue that race did not predominate the Legislature's drawing of Subdistrict 4A, rather the Committee followed traditional redistricting principles. The Intervenors motion fails to set forth evidence establishing traditional redistricting principles predominated the Committee's creation of the Subdistricts. Contrary to the Intervenors' argument, the legislative record establishes race was a predominant factor in enacting the Subdistricts. The Supreme Court explained 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, at 189-90 (stating if race is the overriding reason for creating a map, race will predominate).

As evidence that race did not predominate, the Intervenors point out Subdistrict 4A appears to be facially compact and contiguous. See Doc. 105 at 22. Additionally, the Intervenors rely on District 4A's alleged compliance with two other traditional redistricting principles: respect for political boundaries and preservation of communities of interest. Id. at 20-21. The Intervenors are correct that Subdistrict 4A follows the boundaries of the Fort Berthold Reservation. Additionally, Plaintiffs do not dispute the Three Affiliated Tribes are a community of interest. However, none of these things prove race was not the Committee's predominant consideration.

The Supreme Court has expressly rejected the Intervenors argument that a district's facial respect for traditional redistricting principles proves race was not a predominant factor. See Bethune-Hill, at 580 U.S. at 189 (holding the Equal Protection Clause does not prohibit misshapen district; it prohibits unjustified racial classifications). The Bethune-Hill Court explained 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." Id. at 189-90. The Court ruled a district which respects traditional redistricting principles on its face may still be a racial gerrymander. Id. As the Bethune-Hill Court found, the Supreme Court long ago "rejected the view that . . . strict scrutiny does not apply where a State respects or complies with traditional redistricting principles." Id. (citing Shaw v. Hunt, 517 U.S. 899, 906 (1996)). As the Court pointed out, "race may predominate even when a

reapportionment plan respects traditional principles . . . if race was the criterion that, in the State's view, could not be compromised, and race-neutral consideration came into play only after the race-based decision has been made." Id. For this reason, "showing a deviation from, or conflict with, traditional redistricting principles is not a necessary prerequisite to establishing racial predominance." Id at 191.

Thus, the court's job is not to look at whether a district is merely compact or contiguous on its face, it is to look at what motivated a legislature's decision "to place a significant number of voters within to without a district." Miller, 515 U.S. at 901. As the Cooper Court explained, "a plaintiff's task, in other words, is simply to persuade the trial court – without any special evidentiary prerequisite – that race was the predominant consideration in deciding to place a significant number of voters within or without a particular district." 581 U.S.318 (citing Alabama Legislative Black Caucus v. Alabama, 575 U.S. 254, 272 (2015)). The "special evidentiary prerequisite" the Cooper Court rejected was a prima facie showing that a district contravenes traditional redistricting principles. Id. In short, the Supreme Court has found that even where a district respects traditional redistricting principles on its face, race may still have been the motivating factor for its drawing. Id.; see also Navajo Nation v. San Juan Cnty., 266 F. Supp. 3d 1341 (D. Utah 2017) (recognizing the Supreme Court's precedent that a state's plan could comply with all traditional redistricting principles, but a plaintiff could still establish race predominated using direct evidence of legislative purpose); Singleton v. Merrill, 582 F. Supp. 3d 924 (N.D. Ala. 2022) (holding a conflict or inconsistency

between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition).

Here, the Intervenors misapply Supreme Court precedent to argue that because Subdistrict 4A allegedly respects certain traditional redistricting principles, the Committee did not allow race to predominate. Adoption of the Intervenors' argument would result in a legal absurdity. For example, under the Intervenors' theory, a state could create a district intentionally packing or cracking a group of minority voters into or out of a district, thereby intentionally diluting their voting strength. Based on the Intervenors' theory, if that district was drawn to facially respect traditional redistricting principles, those cracked or packed minority voters would have no legal recourse. This clearly is not the standard and is the exact reason the Supreme Court has rejected such an argument. The proper inquiry does not look at whether a district is facially misshapen, it examines what factors motivated a state to draw a district a certain way.

In this case, the direct evidence of the Committee's intent makes clear that Subdistricts 4A, 4B, 9A, and 9B were drawn solely on the basis of race and without proper justification. The legislative record is rife with statements from Committee members demonstrating that they purposefully established a racial target in creating the Subdistricts:

> 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.
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> . . .
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> 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. Doc. 100, #2 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? Doc. 100, #2 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? Doc. 100, #2 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.
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> . . .
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> [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.
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> . . .
>
> [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.
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> . . .
>
> [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 11:8 - 19.

In considering whether race was the predominant factor, it is "evidentially significant that at the time of redistricting, the State had compiled detailed racial data for use in redistricting," but made no comparable attempt to compile similar data for other

traditional redistricting principles, such as communities of interest. Bush v. Vera, 517 U.S. 952, 967 (1996). In the present case, the evidence of an announced racial target and Subdistrict boundaries separating voters on the basis of race demonstrates that race predominated creation of the Subdistricts. See Cooper, 581 U.S. at 300-301 (concluding the district court did not err in finding race predominated the drawing of a district when there was an announced racial target and produced boundaries amplifying racial division).

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 creating a 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.

The Intervenors will argue the statements from legislators cited herein are cherry-picked from the transcripts of redistricting hearings, and do not prove race predominated. However, the Intervenors have access to the entire legislative record, which contains all

the testimony, evidence, and discussion utilized by the Committee. Yet their Memorandum in Support of Motion for Summary Judgement is completely void of citations to the legislative record showing the Committee discussed and considered traditional redistricting principles in the drawing of Districts 4 and 9. This is because no such discussion took place.

The Intervenors cite to testimony from tribal representatives of MHA asking for the Committee to enact a single member Subdistrict surrounding the Fort Berthold Reservation. However, testimony from tribal representatives is not proof the Committee respected traditional redistricting principles. Importantly, it is not evidence that race did not predominate the Committee's decision to enact the Subdistricts. See Abbott v. Perez, 138 S.Ct. 2305, 2334 (2018) (explaining that one group's demands for subdistricts is insufficient, as a group's demands alone "cannot be enough."). The undisputed evidence contained in the legislative record proves the Committee was singularly motivated by race. This Court should reject the Intervenors' argument that because District 4A is facially compact, contiguous, and respects the boundaries of the Forth Berthold Reservation, race was not the predominant factor. Instead, the Court must look at the evidence put forth by the parties from the legislative record. That evidence unequivocally shows race predominated the drawing of Districts 4 and 9.

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

The Intervenors next argue that even if race was the predominant factor, Subdistrict 4A passes strict scrutiny. See Doc. 105 at 23. In an effort show Subdistrict 4A

meets strict scrutiny, the Intervenors rely solely on their own retained experts' reports, and do not cite **any** evidence that was considered by the Committee. The Supreme Court has expressly rejected the use of *post hoc* evidence to justify race-based districting. See Bethune-Hill, 580 U.S. at 189-190 (holding a court's inquiry must concern 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**.") (*emphasis added*). As such, this Court must reject the Intervenors' attempts to supplement the legislative record with evidence and expert reports not considered by the Committee.

As this Court knows, where a plaintiff meets his burden to show race was a predominant consideration or the VRA was invoked, 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 was narrowly tailored to achieve a compelling government interest. Wisconsin Legislature, 142 S.Ct. at 1248. The Supreme Court expalined 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 was required to comply with the VRA. Alabama Black Legis. Caucus, 575 U.S. at 278. "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.

Importantly, this Court's inquiry into whether the Legislature had a strong basis in evidence –whether a state met the Gingles preconditions – must focus on the evidence

considered by the Committee at the time the Subdistricts were enacted. See Wisconsin Legislature, 142 S.Ct. at 1250. The Intervenors correctly point out that a state has leeway to make reasonable mistakes in the redistricting process. See Doc. 105 at 23. However, as the Supreme Court expressed in Wisconsin Legislature, "that leeway does not allow a State to adopt a racial gerrymander that the State does not, **at the time of imposition**, judge necessary under a proper interpretation of the VRA." Wisconsin Legislature, 142 S.Ct. at 1250. Thus, the inquiry into whether the Gingles preconditions are satisfied "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, 580 U.S. at 189-190.

In an effort to justify the Committee's lack of Gingles evidence, the Intervenors allege the existence of a so-called "safe harbor provision." See Doc. 105 at 23. According to the Intervenors, this alleged safe harbor provision allows states to "engage in race-based districting in a mistaken but good faith attempt to comply with the VRA." Id. The Intervenors' safe harbor argument has no basis in law. In support of their argument on this point, Intervenors misconstrue and misapply language from Alabama Black Legislative Caucus, 575 U.S. 245. In that case, the Court was considering a challenge to Alabama's redistricting plan under Section 5 of the VRA, which is not applicable in this case. Id. There, the Court held that "a court's analysis of 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." Id. at 278. Expanding on its holding in Alabama Black Legislative Caucus, the Supreme Court has provided:

> Or said otherwise, the 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 room' to adopt reasonable compliance measure that may prove in hindsight not to be needed.

Cooper, 581 U.S. at 293. However, that "breathing room" still requires a race-based district to meet the Gingles preconditions "at the time of imposition." Wisconsin Legislature, 142 S.Ct. at 1250.

In this case, there is no dispute the Committee did not conduct a proper Gingles analysis. To meet the strict scrutiny requirements of the Equal Protection Clause, the Committee was required to conduct an in-depth statistical analysis demonstrating the existence of political cohesion and majority bloc voting. See Growe v. Emison, 507 U.S. 25, 41 (1993) (invalidating a state's redistricting plan because "the record simply contains **no statistical evidence** of minority political cohesion or majority bloc voting.") (*emphasis added*). The legislative record clearly demonstrates the Committee never conducted any statistical analysis. The fact the Intervenors' and Defendants' attempt to backfill the record with statistical expert reports created for this litigation, rather than providing the Court with citations to statistical analysis considered by the Committee demonstrates no such analysis was conducted. Had the Committee conducted a proper analysis, the Intervenors and Defendants would not need *post hoc* expert reports. The Intervenors also ignore the statements from Committee members where they admit they did not analyze any statistical data with respect to the second and third Gingles factors. See Doc. 100, #8 at 45:6 – 16 (Rep. Nathe admitting "we did not" in response to a question asking if the Committee examined any statistical evidence). The Intervenors

cannot cite to any evidence because the Committee never considered any statistical evidence or conducted a proper Gingles analysis.

Thus, while the Supreme Court has found that a state has "breathing room" to make "reasonable mistakes" in its Gingles analysis, that precedent does not allow a state to completely ignore the Gingles preconditions. Nor does the law allow the Intervenors to attempt to supplement the legislative record with evidence and statistics not considered by the Committee. In an effort to show the Gingles preconditions are met in Subdistrict 4A, the Intervenors point to a statistical report drafted by their expert, Dr. Loren Collingwood. See Doc. 105 at 26-27. Similarly, to show the so-called Senate factors are met in Subdistrict 4A, the Intervenors point to expert reports drafted by Dr. Daniel McCool and Dr. Kate Magargal. See Id. at 30-31. There is no dispute these expert reports were written solely for this litigation and were not considered by the Committee. For this reason, the reports are not are not relevant in this case. See Wisconsin Legislatute, 142 S.Ct. at 1250.

The Intervenors correctly point out that Plaintiffs have not hired an expert to rebut the reports of Dr. Collingwood, Dr. McCool, and Dr. Margargal. See Doc. 105 at 33. That is because rebuttal of these reports is unnecessary to Plaintiffs' racial gerrymandering claim. The Supreme Court has made clear "*post hoc*" expert report cannot justify a state's racial gerrymandering. See Bethune-Hill, 580 U.S. at 189-190; see also Wisconsin Legislature, 142 S.Ct. at 1250. The Intervenors accuse the Plaintiffs of "weaponizing" the so-called safe-harbor provision – a provision which does not exist – to invalidate Subdistrict 4A. What the Intervenors fail to realize is that by not conducting a

proper Gingles analysis, Districts 4 and 9 are racial gerrymanders which currently violate the Equal Protection Rights of every citizen living in those Districts. Despite this constitutional violation, the Intervenors ask this Court to uphold the Committee's racial gerrymandering based on expert reports the Committee never considered. This argument is absurd and must be rejected.

Finally, in a last-ditch attempt to show the Committee met the Gingles preconditions, the Intervenors point to testimony provided by MHA Chairman Mark Fox and other tribal representatives. As has been pointed out previously, the Supreme Court has found that lay testimony by interested parties is not sufficient to meet the Gingles preconditions. See Abbott, 138 S.Ct. at 2334. Respectfully, Chairman Fox and other tribal representatives did not present any statistical studies showing the existence of political cohesion or majority bloc voting in either District 4 or 9. Instead, Chairman Fox highlighted a school board election from nearly 30 years ago in which he was a candidate. See Doc. 105 at 38. Additionally, Chairman Fox discussed one recent election in which two tribal members were unsuccessful in running for office. Id. To be clear, this is not Gingles evidence. If this evidence was sufficient to meet the Gingles preconditions, the Intervenors would not have retained three experts to produce *post hoc* reports regarding the same.

The Court should reject Intervenors' attempts to backfill the legislative record with after-the-fact expert reports that were not considered by the Committee in creation of the Subdistricts. Likewise, the Court should not consider lay testimony from tribal representatives as evidence the Committee met the Gingles preconditions. Rather, the

Court should consider the ample direct evidence from the legislative record. That evidence unequivocally shows the Committee failed to conduct a proper Gingles analysis prior to enacting the challenged Subdistricts. As such, the Subdistricts are racial gerrymanders which violate the Equal Protection Clause.

IV. Plaintiffs have standing to challenge the Legislative Assembly's violation of the Equal Protection Clause in Districts 4 and 9.

The Intervenors allege that Plaintiffs lack standing under Article III of the Constitution to challenge the creation of Subdistricts in Districts 4 and 9. The Intervenors argument is without merit. Plaintiff Charles Walen lives in Subdistrict 4A and Plaintiff Paul Henderson lives in Subdistrict 9B. Each Plaintiff has constitutional standing to challenge the drawing of their respective Districts. As a result, the Court should reject the Intervenors' argument and deny their Motion for Summary Judgment.

The United States Supreme Court has 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). If a plaintiff does not meet these requirements, a cause of action must be dismissed in accordance with Article III. Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016). For the reasons set forth below, Plaintiffs satisfy each requirement to establish Article III standing.

a. Plaintiffs have challenged drawing of Districts 4 and 9 in their entirety.

As an initial matter, the Intervenors have alleged in their Motion that Plaintiffs have only challenged Subdistricts 4A and 9A. See Doc. 102; see also Doc. 108. This argument is directly contradicted by Plaintiffs' Complaint. See Doc. 1. Plaintiffs' Complaint explicitly declares:

> [4] The creation of Subdistricts in District 4 and 9 was a racial gerrymandering for which race was the predominant factor.
>
> [5] The Legislative Assembly made no statistical analysis or inquiry regarding voting history or racial voting patterns in Districts 4 and 9 that would justify the use of race as a predominant factor in its creations of the Subdistricts. Therefore, the Legislative Assembly did not have a compelling state interest for creating the Subdistricts.
>
> [6] The Subdistricts cannot pass constitutional muster because they were drawn with race as the predominant factor and without a compelling justification or narrow tailoring.
>
> [7] Plaintiffs seek a declaration that the challenged Subdistricts are invalid and an injunction prohibiting the Defendants from calling, holding, supervising, or taking any action with respect to legislative elections based on the challenged Subdistricts as they currently stand.

Doc. 1 at 2. In addition, in their "Prayer for relief" in the Complaint, Plaintiffs request:

> **WHEREFORE**, Plaintiffs request that this Court:
>
> 1. Declare that Subdistricts 4A and 4B, and 9A and 9B are racial gerrymanders in violations of the Equal Protection Clause of the Fourteenth Amendment.

Doc. 1 at 9. It is unclear why the Intervenors insist Plaintiffs' have only challenged the drawing of Subdistricts 4A and 9A. Nonetheless, Plaintiffs' Complaint unequivocally challenges the drawing of Districts 4 and 9 in their entirety. Any argument to the contrary is without merit.

b. Plaintiffs have suffered a concrete constitutional injury.

In order to have standing, a plaintiff must show he has suffered an "injury in fact." Lujan, 504 U.S. at 560. To establish an injury in fact, a plaintiff mush show he has "suffered an invasion of a legally protected interest." Id. 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 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) ("Shaw I"). The individual 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, 580 U.S. 178 (citing Alabama Legislative Black Caucus, 575 U.S. at 263.

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 a 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.

Intervenors allege "[n]either Plaintiff has offered any evidence of injury tied to their claim of racial gerrymandering." Doc. 105 at 14. As evidence in support of this argument, the Intervenors point to deposition testimony from both Plaintiffs in which they assert their chief concern has been the loss of multi-member representation. See id. In essence, Intervenors rely on the statements from two lay persons with no legal training to prove Article III standing is not met, completely disregarding the legal allegations in the Complaint they filed in this action. The Intervenors' argument is one of semantics and faults each Plaintiff for not precisely invoking the words "racial gerrymandering" in their depositions, while ignoring those same assertions in their Complaint. This argument is meritless.

Plaintiffs' Complaint makes clear Plaintiffs are alleging a direct constitutional injury as a result of Committee's racial gerrymandering:

> [46] Legislative Assembly's creation of Subdistricts in Districts 4 and 9 constitutes racial gerrymandering, as it assigns citizens to specific legislative districts predominantly on the basis of race.
>
> [47] Racial considerations predominated over other traditional redistricting principles in creating the challenged Subdistricts.
>
> [48] The Legislative Assembly's plan for the creation of the challenged Subdistricts is not narrowly tailored to achieve a compelling state interest.
>
> [49] Accordingly, the subdistricting of Districts 4 and 9 into Subdistricts 4A and 4B, and 9A and 9B, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Doc. 1 at 8. The Complaint clearly alleges each Plaintiff lives in a racially gerrymandered voting district, and therefore each plaintiff has suffered a direct constitutional injury.

In Hays, 515 U.S. at 744-745, the Supreme Court found that "[w]here 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." That is, a legislature's reliance on racial criteria to draw a voting district subjects each citizen living in that district to a constitutional harm. Id.; see also Goosby v. Town Bd. of Town of Hempstead, N.Y., 1997 981 F.Supp. 751 (E.D.N.Y. Oct. 20, 1997) (holding that the injury arises "from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about.").

The Intervenors' argument that Plaintiffs have not shown a cognizable injury has been expressly rejected by the Supreme Court in Shaw II, 517 U.S. 899. In Shaw II, a group of white voters challenged the drawing of their respective legislative districts alleging racial gerrymandering. Id. at 903. Specifically, the voters alleged that the North Carolina General Assembly intentionally enacted two majority-minority districts based on race without proper justification. Id. The defendants challenged the voters standing, arguing the voters had not pled a specific personal injury other than simply being residents of the gerrymandered district. Id. at 904. The Supreme Court rejected the defendants' argument. Id. The Court held that "a plaintiff who resides in a district which is the subject of a racial-gerrymander claim has standing to challenge the legislation which created that district." Id. That is, the constitutional injury occurs "when race becomes the dominant and controlling consideration." Id. at 905. Thus, by living within the boundaries of a racially gerrymandered district, each individual citizen has suffered a

constitutional injury and therefore have standing to challenge the drawing of that district. Id.

Plaintiffs Walen and Henderson have each suffered a concrete and cognizable constitutional injury. Walen lives in Subdistrict 4A, while Henderson lives Subdistrict 9B. By their very residency in these racially gerrymandered districts, each Plaintiff has standing in this case. See Id. at 903. The Intervenors argue that because Plaintiff Henderson does not live in Subdistrict 9A, he lacks standing to challenge the drawing of District 9. See Doc. 105 at 14-15. This argument is based on the incorrect assertion that Plaintiffs have only challenged Subdistricts 4A and 9A. Id. at 15. As noted earlier, the Complaint explicitly challenges "Subdistricts 4A and 4B, and 9A and 9B" as "racial gerrymanders in violations of the Equal Protection Clause." Doc. 1 at 9. The Court should reject this argument.

Finally, the Intervenors assert that Plaintiffs "have not alleged any legally protected interest." Doc. 105 at 16. In support of this argument, the Intervenors cite to non-analogous case law unrelated to racial gerrymandering claims. See id. As the Intervenors know full well, the right to equal protection under the law is a legally protected interest. As the Supreme Court explained, the central purpose of the Fourteenth Amendment is to "prevent the State from purposefully discriminating between individuals on the basis of race." Shaw I, 509 U.S. at 642. The argument that Plaintiffs Henderson and Walen do not have a legally protected interest in equal protection under the law is incorrect.

Because Plaintiffs have demonstrated a concrete and cognizable constitutional injury, the Intervenors standing argument must be rejected.

c. Plaintiffs' injury is redressable by this Court.

The Intervenors next argue that, even if Plaintiffs have suffered a cognizable injury, such an injury is not redressable by this Court. The Intervenors allege that because Plaintiffs have not directly challenged a North Dakota Constitutional provision, the State's racial gerrymandering is not redressable by this Court. In support of this argument, the Intervenors rely on Arizonans for Fair Elections v. Hobbs, 454 F.Supp.3d 910 (D. Ariz. 2020).

In Hobbs, two initiated measure campaigns brought suit against Arizona's Secretary of State arguing an Arizona initiated measure statute, A.R.S. § 19-112(A), violated their Constitutional rights. Id. at 914. Arizona statute § 19-112(A) provides "every qualified elector signing a petition shall do so in the presence of the person who is circulating the petition and who is to execute the affidavit of verification." Additionally, the statute requires each circulator of the petition to verify the petition's accuracy before a notary public. 914 A.R.S. § 19-121.01. The statute merely codifies Article IV of Arizona's Constitution, which requires signature sheets to be "verified by the affidavit of the person who circulated said sheet or petition, setting forth that each of the names on said sheets was signed in the presence of affiant."

The Hobbs plaintiffs argued that as a result of the coronavirus pandemic, plaintiffs were not able to conduct in-person signature gathering in accordance with the statute. Hobbs, 454 F.Supp.3d at 915. However, in bringing the lawsuit, plaintiffs only challenged

the statutory provisions of the A.R.S., they did not challenge the identical Arizona Constitutional requirements. Id. As a result, the district court ruled the plaintiffs' injury was not redressable. Id. That is, even if the district court ruled A.R.S. § 19-121 violated plaintiffs' rights, Article IV of Arizona's Constitution would remain in effect because Plaintiffs had not challenged it. Id. at 918.

In an attempt to avoid their action being dismissed, the plaintiffs argued that if the federal district court found the challenged statute unconstitutional, it would pave the way for an Arizona state court to similarly find Article IV unconstitutional. Id. The federal district rejected this argument, finding it could not issue an order based on speculation about what a state court might decide. Id.

The concerns about redressability in Hobbs are not present in this case. Here, Plaintiffs are not challenging a state statute or North Dakota's Constitution. See Doc. 1. Plaintiffs are challenging the configuration of Districts 4 and 9, which violate the Equal Protection Clause of the U.S. Constitution. Id. The Intervenors are correct that Art. IV § 2 of North Dakota's Constitution allows for the creation of subdistricts. However, North Dakota's Constitution does not allow for the creation of racially gerrymandered subdistricts in violation of the U.S. Constitution. The Intervenors argument is a red herring. The Intervenors claim, in essence, that because the state Constitution allows subdistricts, the Court cannot redress blatant racial gerrymandering. Such an argument is nonsensical and attempts to render meaningless this Court's inherent authority to redress Equal Protection violations. See North Carolina v. Covington, 138 S.Ct. 2548, 2553

(2018). Simply because the creation of subdistricts is authorized by North Dakota's Constitution does not mean their enactment can violate the Equal Protection Clause.

Moreover, the Intervenors argue the enjoinment of Subdistrict 4A cannot be redressed in this lawsuit, See Doc. 105 at 17. The Intervenors claim:

> If the Court finds the challenged plan unlawful, it must provide the Legislature the opportunity to enact a remedial plan, or alternatively order a remedial plan be put in place. Because there is no dispute that Subdistrict 4A is necessary to comply with the VRA, it is substantially likely that any remedial plan will require the creation of a subdistrict in District 4.

Id. at 17-18. First, the Redistricting Committee never considered any evidence proving Subdistrict 4A is required to comply with the VRA. The legislative record is clear on this point. Second, the Intervenors ask this Court to speculate what the Legislative Assembly might do if this Court invalidates Subdistrict 4A. Speculation about what the Assembly might do at some point in the future does not prove this claim is not redressable by the Court. The Court has the clear authority to redress the Committee's racial gerrymandering. See Covington, 138 S.Ct. at 2553.

The undisputed evidence in this case demonstrates Plaintiffs have standing to challenge the drawing of Districts 4 and 9. As a result, the Intervenors argument must be rejected, and their Motion for Summary Judgment should be denied.

CONCLUSION

The challenged Subdistricts perpetuate a clear racial gerrymander that is not narrowly tailored to serve a compelling government interest. The legislative record unequivocally shows the Committee invoked compliance with the VRA to justify the Subdistricts. Moreover, the legislative record plainly demonstrates race was the

Committee's predominant consideration. Because the Committee never conducted a functional or statistical analysis of the Gingles preconditions, the challenged Subdistricts cannot withstand strict scrutiny. The Court must reject the Intervenors' attempt to backfill the legislative record with *post hoc* expert reports and lay testimony to justify the Committee's decision. The Intervenors' 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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