Docket No. 23-3655

In the

United States Court of Appeals

For the

Eighth Circuit

Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachery S. King, and Collette Brown,

Plaintiffs – Appellees,

v.

Michael Howe, in his official capacity as Secretary of State of North Dakota

Defendant- Appellant.

Appeal from Decision of the Unites States District Court
for the District of North Dakota
In Case No. 3:22-cv-00022

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NORTH DAKOTA LEGISLATIVE ASSEMBLY'S MOTION TO INTERVENE ON APPEAL

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STATEMENT OF REQUESTED RELIEF

The North Dakota Legislative Assembly ("Assembly") requests this Court allow it to intervene to protect its well-established sovereign interests in defending its enacted laws through appeal. As it currently stands, this is a § 1983 action for declaratory and injunctive relief against the Secretary of State ("Secretary") in his official capacity, and not a suit against the State. See Calzone v. Hawley, 866 F.3d 866, 872 (8th Cir. 2017). Therefore, the Assembly has an interest in defending its enacted legislation against the district court's finding of § 2 liability under the VRA on appeal. The Secretary has indicated he will no longer do so.

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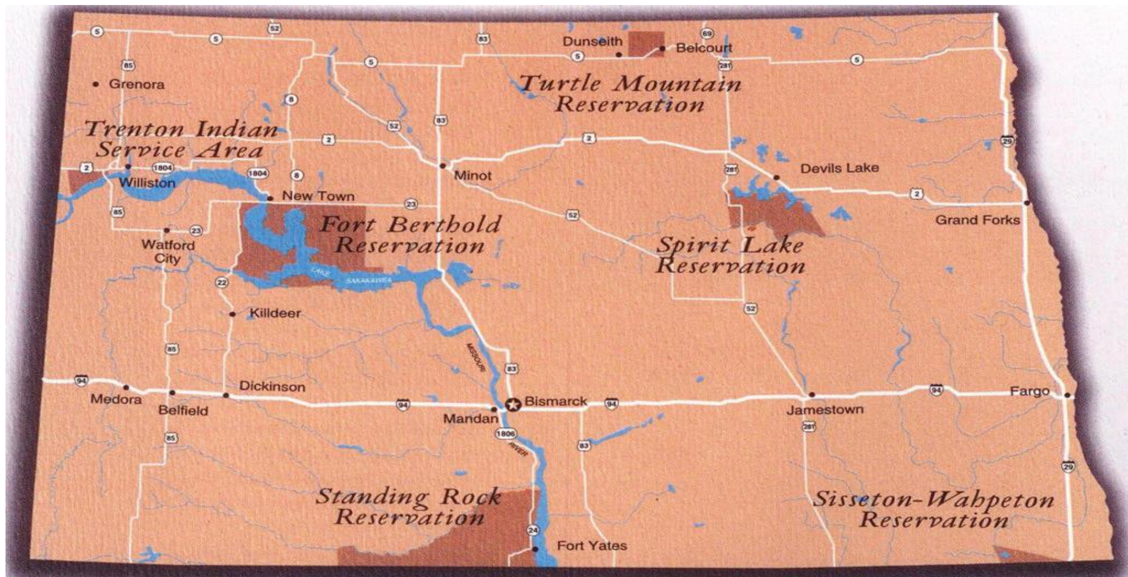
I. FACTS

A. Summary of District Court Proceedings Leading to Judgment.

Appellees' Complaint sought injunctive and declaratory relief against the Secretary in his official capacity pursuant to 42 U.S.C. § 1983 and § 2 of the VRA. (App4-App35.)[1] The Complaint alleged the Assembly's redistricting legislation enacted subsequent to the 2020 Census - and signed into law by the Governor – violated the VRA because it did not combine the Turtle Mountain and Sprit Lake Reservations into a single legislative district. (Id.) The Complaint included a map that shows the significant distance between these two reservations:

[1] "App" refers to the bates numbers filed in the attached appendix which includes the "*Accompanying Documents*" specified in Fed. R. App. 27(a)(2)(B).

Appellate Case: 23-3655 Page: 2 Date Filed: 12/17/2023 Entry ID: 5345208



(App13.)

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The Secretary defended the validity of the Assembly's redistricting statute at the June 12-15, 2023 trial. (See App36.) More than five months after the conclusion of the trial, the district court issued its "Findings of Fact and Conclusions of Law" and entered Judgment. (See App40; App451-App491.) After noting this case presented a "closer decision than suggested by the Tribes" (App488), the district court entered a November 17, 2023 Judgment which provides the following:

> It is evident that, during the redistricting process…the…Assembly sought input from the Tribes and other Native American representatives. It is also evident…the…Assembly did carefully examine the VRA and believed [its enacted redistricting plan] would comply with the VRA. But unfortunately…those efforts did not go far enough to comply with section 2….The Secretary and…Assembly shall have until December 22, 2023, to adopt a plan to remedy the violation of Section 2.

(App491.)

Appellate Case: 23-3655 Page: 3 Date Filed: 12/17/2023 Entry ID: 5345208

B. Summary of Actions Taken by the Parties After Judgment.

The Assembly is a part-time legislative body, which is limited to meeting in regular session for no more than 80 natural days during the biennium. N.D. Const. Art. IV § 7. Nevertheless, in an attempt to comply with the Court's Judgment, Representative Lefor, Chairman of Legislative Management, called a meeting of Legislative Management, for which the Legislative Council posted notice on November 30, 2023.[2] (App543.)

On December 4, 2023, the Secretary filed a Notice of Appeal from the district court's Judgment. (App492.) This is the appeal in which the Assembly seeks to intervene by this motion[3]. Also on December 4, 2023, the Secretary filed a Motion for Stay of Judgment Pending Appeal. (App496-527.)

Legislative Management met on December 5, 2023. (App544-App545.) At that meeting, Chairman Lefor appointed an interim redistricting committee and Legislative Management approved issuing an RFP to retain an expert statistical

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[2] Legislative Management is an interim committee consisting of the majority and minority leaders of the House and Senate, the Speaker of House, and six Senators and six Representatives chosen before the close of each regular session N.D.C.C. § 54-35-01(1). Legislative Management has various powers to act during the interim period in furtherance of the Assembly's interests. N.D.C.C. § 54-35-02.

[3] The district court denied the Assembly's attempt to intervene in proceedings below on December 12, 2023. (App645-App650.) The Assembly also appealed that decision which is filed as Docket No. 23-3697. (App651-App653.)

consultant to aid in development of a remedial plan. (App545.) Legislative Management also passed a motion to intervene in this litigation to protect its constitutional duty to perform redistricting functions. (App544.)

In an apparent response to Legislative Management's actions, Appellees filed a "Motion to Amend Remedial Order" and "Motion to Expedite" approximately six and a half hours after Legislative Management adjourned. (See App528-App537; App544-App545.) The Appellees' acknowledged the Assembly must be afforded an opportunity to enact a remedial plan through its normal legislative process. (App529-App530.) Despite this, they requested the district court order their "Demonstrative Plan 1" into effect as a remedial plan by December 22, 2023. (Id.) The district court ordered a response be filed to the Appellees' motion by December 8, 2023. (App538.)

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Also on December 8, 2023, the Assembly filed a "Motion to Intervene, Joinder in the Secretary's Motion for Stay of Judgment Pending Appeal and Response to the Plaintiffs' Motion to Amend Remedial Order" with the district court[4]. (App540-542; App627-644.) Subsequent to full briefing on the Motion to

[4] The Assembly joined in the Secretary's motion for a Stay as part of its motion to intervene in the district court. (App627-App644.) The Assembly clarified in its motion that it "does not concede its existing plan violated Section 2 or that Plaintiffs met their burden to establish liability and preserves all arguments for appeal." (App634 at n. 5.)

Amend and Motion for Stay[5] (App627-App644; App562-App570; App571-App597; App598-App607; App608-App617; App618-App626), the district court issued its December 12, 2023 Order. (App645-App650.) This Order denied the motion for a stay of Judgment pending appeal. (App646-App649.) The district court also held the Secretary's Notice of Appeal (App492-App495) "divested this Court of jurisdiction over this case, the Plaintiffs' motion to amend or correct the remedial order (Doc. 134) and the Legislative Assembly's motion to intervene (Doc. 137) and motion to stay are also **DENIED**." (App650.) The Assembly appealed the December 12, 2023 Order denying its motion to intervene and it is filed as Docket No. 23-3697. (App651.)

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The Redistricting Committee met on December 13, 2023 to continue the process of developing a remedial plan to address the district court's concerns. (App761 at ¶7; App769-App771.)[6] The Redistricting Committee heard testimony

[5] In the course of this briefing, the Appellees asserted "the Secretary has waived any argument that he is likely to succeed on the merits of the Plaintiffs' Section 2 claim…." (App572.) While the Assembly was unaware this was the Secretary's intent at the time, the Assembly filed a reply brief clarifying the "Assembly does not agree with this statement as the merits were vehemently contested throughout trial. The Assembly contests the Court's application of *Gingles* and asserts the Plaintiffs failed to meet their burden of proof. (See Doc. 150 at p. 8 at n. 5.) The Assembly preserves its right to contest the merits on appeal." (App620 at n. 2.)

[6] The Affidavit of Emily Thompson was prepared for the Assembly's Emergency Motion for Extension of Deadline to Submit Remedial Redistricting Plan in Docket No. 23-3697. It is attached to this Motion as well, since there are overlapping facts.

from Scott Davis "on behalf of the members of the Turtle Mountain Band of Chippewa Indians" who noted the Tribe "never wished for their reservation to be combined into one voting district with Spirit Lake Reservation." (App770.) Davis expressed a preference for the "consideration of other options over the alternative plans provided by the plaintiffs and the district court." (Id.) Further, the Elections Director from the Secretary's office presented a timeline which provides "April 8th is the hard deadline for the state and counties to be able to successfully administer an election."[7] (App792.)

The Secretary filed a "Motion for Stay of Judgment Pending Appeal and Motion to Expedite" with this Court on December 13, 2023. (App654-App681.) The Secretary's motion indicated it will only contest whether Appellees possess a private right of action and will not pursue an argument on the merits of the district court's decision under *Gingles*. (App677-App678.) It is therefore now clear to the

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[7] The Assembly understands the Secretary has represented December 31st is the date after which he will have significant difficulties administering the election if a map is not in place. The district court labelled these concerns "not as to voter confusion but rather the administrative burden of correcting the Section 2 violation." (App646-647.) Most of the Secretary's early deadlines are established by state statute. The Assembly has the ability to pass legislation when it adopts the remedial plan to adjust for this unique situation. There is precedent for this procedure. See S.B. 2456, Section 6 (2001) *https://www.ndlegis.gov/assembly/57-2001/special/session-law/chpt691.pdf* (accessed Dec. 17, 2023.)
That being said, the Assembly does not purport to speak for or on behalf of the Secretary on this appeal.

Assembly that it must intervene to protect its enacted redistricting plan and ensure the district court's determinations under *Gingles* receive full appellate review. The Assembly submits this motion to intervene in the pending appeal as its interests are no longer aligned with those of the Secretary.

II. LAW AND ARGUMENT

The Assembly must be allowed to intervene on appeal as it is the sole body vested with the power to establish legislative districts under the North Dakota Constitution. N.D. Const. Art. IV § 2. The Assembly – not the Secretary – must ensure its legislative redistricting duties comply with federal law. See Wise v. Lipscomb, 437 U.S. 535, 539 (1978) (Explaining the Supreme Court "has repeatedly held that redistricting…legislative bodies is a legislative task…") Here, as noted by the district court, the Assembly carefully examined the "VRA and believed that creating the subdistricts in district 9 and changing the boundaries of districts 9 and 15 would comply with the VRA." (App491.) This observation was correct; however, the district court's conclusion that the Assembly's "efforts did not go far enough to comply with section 2" is not. See (Id.)

As it stands now, the Assembly is bound to follow "our long-deplorable vote-dilution jurisprudence" that "has spawned intractable difficulties of definition and application." Allen v. Milligan, 599 U.S. 1, 90 (2023) (J. Thomas dissent). Put another way, "the Court's case law in this area is notoriously unclear and

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confusing…there is considerable disagreement and uncertainly regarding the nature and contours of a vote dilution claim." Merrill v. Milligan, 142 S. Ct. 879, 881 (2022) (J. Kavanaugh concurrence joined by J. Alito). This case is no exception and the district court's findings misapplied the convoluted guideposts of a vote dilution claim. The Assembly must be allowed to intervene to ensure the plan it enacted receives complete appellate review.

A. Legal Standard for Intervention on Appeal.

The Supreme Court recently acknowledged there is "no provision of law that deprives a court of appeals of jurisdiction to entertain a motion for intervention that is filed by a non-party who is bound by the judgment that is appealed." Cameron v. EMW Women's Surgical Center, P.S.C., 595 U.S. 267, 275 (2022). Further, "[n]o statute or rule provides a general standard to apply in deciding whether intervention on appeal should be allowed." Id. at 276. "Thus we have considered the policies underlying intervention in the district courts…including the legal interest that a party seeks to protect through intervention on appeal." Id. at 277 (internal quotations and citations omitted).

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It is now clear the Secretary's primary focus is ensuring a map is in place in time for him to efficiently administer the next election (barring any additional flexibility exacted by the legislature as discussed above in footnote 7). This is much

different than the Assembly's interest in defending the merits of the Assembly's duly enacted redistricting legislation.

The Assembly's motion is supported by the facts and framework set forth in Cameron. In Cameron, the Court held the Sixth Circuit should have permitted Kentucky's Attorney General to intervene pending *en banc* review even though the State's interests were previously defended by the Kentucky Secretary for Health and Family Services. Id. at 271-274, 282. The Court specifically held the Sixth Circuit's "assessment of timeliness was mistaken" when it found "the attorney general's motion was not timely because it came after years of litigation in the district court and after the panel had issued its decision." Id. at 279. The Court explained "timeliness is an important consideration in deciding whether intervention should be allowed, see, *e.g*., Fed. Rules Civ. Proc. 24 (a) and (b)(1), but timeliness is to be determined from all the circumstances, and the point to which a suit has progressed is ... not solely dispositive." Id. (quotations omitted) (cleaned up). Rather, "the most important circumstance relating to timeliness is that the attorney general sought to intervene as soon as it became clear that the Commonwealth's interests would no longer be protected by the parties in the case." Id. at 279-80 (quotation omitted). Although the attorney general's motion did not seek intervention until litigation had "proceeded for years, that factor is not dispositive. The attorney general's need to seek intervention did not arise until the secretary ceased defending the state law, and

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the timeliness of his motion should be assessed in relation to that point in time." Id. at 280 (emphasis added).

In reaching this decision, the Court noted "our Constitution split the atom of sovereignty…The Constitution limited but did not abolish the sovereign powers of the States, which retained a residuary and inviolable sovereignty…Paramount among the States' retained sovereign powers is the power to enact and enforce any laws that do not conflict with federal law." Id. at 277 (quotations omitted) (emphasis added).

Further, "a State clearly has a legitimate interest in the continued enforceability of its own statutes…and a federal court must respect…the place of the States in our federal system…This means that a State's opportunity to defend its laws in federal court should not be lightly cut off." Id. (internal quotations and citations omitted). The Court continued as follows:

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> The importance of ensuring that States have a fair opportunity to defend their laws in federal court has been recognized by Congress. Under 28 U.S.C. § 2403(b), when a state law "affecting the public interest is drawn in question" in any "court of the United States" and neither the State nor any state agency or officer is a party, the court must notify the state attorney general, and the State must be allowed to intervene. See also Fed. Rule Civ. Proc. 24(a)(1). Even if this provision is not directly applicable in this case because the secretary for Health and Family Services was still a party when the intervention motion was filed, it nevertheless reflects the weighty interest that a State has in protecting its own laws. The way in which Kentucky divides executive authority and the unusual course that this litigation took should not obscure the important constitutional consideration at stake.

Appellate Case: 23-3655 Page: 11 Date Filed: 12/17/2023 Entry ID: 5345208

Id. at 278 (emphasis added).

Cameron directly supports the Assembly's motion. It is true the Secretary and Assembly's interests were aligned through trial. The Secretary had an interest in avoiding an injunction which could only be accomplished by showing the Appellees could not satisfy *Gingles*. It is undisputed the Secretary defended the merits of the redistricting plan and argued Appellees failed to establish a § 2 violation through trial. However, after the injunction was in place, it became obvious in the Secretary's motion for stay to this Court that he did not intend to argue the district court erred in its *Gingles* analysis. (App677-App678.) ("[I]f the Secretary prevails in arguing the district court erred as a matter of law in finding a private right of action…Moreover, the Legislative Assembly has indicated in its intervention filings that it intends to appeal the district court's *Gingles* factor conclusions.") This is the point where it became clear the Secretary would not seek to appeal the district court's application of *Gingles*. This is vitally important as "the *Gingles* preconditions are designed to establish liability, and not a remedy." Bone Shirt v. Hazeltine, 461 F.3d 1011, 1019 (8th Cir. 2006).

The Assembly must be allowed to defend its duly enacted legislation against § 2 liability. Now, the Secretary has indicated he will only argue the Appellees lack a private right of action under the Court's recent holding in Arkansas State Conf.

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NAACP v. Arkansas Board of Apportionment, 86 F.4th 1204 (8th Cir. 2023)[8]. While the Assembly certainly agrees with the Secretary's position that no private right of action exists in light of Arkansas State Conf., it cannot forfeit its interest of protecting its enacted legislation against a finding of liability.

This is nearly identical to Cameron, except here the Assembly seeks to intervene prior to receiving a panel decision. As in Cameron - where the triggering event occurred on the date the secretary ceased defending the state law - the Assembly's triggering event is when the Secretary made it clear he was no longer defending whether the Assembly's enacted law violated the VRA.

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It is also clear the interest the Secretary seeks to protect is different than the Assembly's. Importantly, this case was brought pursuant to 42 U.S.C. § 1983 against the Secretary in his official capacity. This Court has made it clear a suit against government officials in their official capacity for declaratory and injunctive relief is "treated as an action against the official personally and not against the State." Calzone v. Hawley, 866 F.3d 866, 872 (8th Cir. 2017). North Dakota law recognizes situations may arise in which a member of the executive branch and the Assembly have differing interests. See N.D.C.C. 54-35-17 (authorizing Legislative Management to retain legal counsel to intervene in any action "when determined

[8] The Assembly is aware this decision is currently being considered for *en banc* review.

necessary or advisable to protect the official interests of the legislative branch"). Defending the merits of duly enacted redistricting legislation through appeal is certainly an official interest of the Assembly. See N.D. Const. Art. IV § 2; Wise, 437 U.S. at 539. As of December 13, 2023, the Secretary purports to no longer seek to protect the Assembly's official interest. (App677-App678.) Under Cameron, the Assembly's motion to intervene on appeal is timely and must be granted.

1. Arguments the Assembly will assert on appeal.

The district court's order presents numerous issues warranting appellate review. The Assembly seeks to protect its unique interest to enact legislation that does not conflict with federal law and further the State's legitimate "interest in the enforceability of its own statutes" which should "not be lightly cut off" by federal courts. See Cameron, 595 U.S. at 277. While not inclusive of all of the substantive arguments the Assembly intends to make on appeal, what is quite clear is that the district court erred in its application of the first and third *Gingles* precondition and the totality of the circumstances test.

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a. The district court misapplied the first *Gingles* precondition.

The first *Gingles* precondition requires the minority group to prove they are "sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district. A district will be reasonably configured…if it comports with traditional redistricting criteria." Allen, 599 U.S. at 18. The North

Appellate Case: 23-3655 Page: 14 Date Filed: 12/17/2023 Entry ID: 5345208

Dakota Constitution establishes traditional redistricting criteria and requires the Assembly "guarantee, as nearly as practicable, that every elector is equal to every other elector in the state in the power to cast ballots for legislative candidates." N.D. Const. Art. IV § 2. Further, North Dakota law requires legislative districts to "be as nearly equal in population as is practicable." N.D. Const. Art. IV § 2; N.D.C.C. § 54-03-01.5(5).

i. The district court's population findings show it erred in its analysis of the First Gingles precondition.

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The district court found there are approximately 19,000 members of the Turtle Mountain Tribe who "live on and around the Turtle Mountain Reservation, including on Turtle Mountain trust lands in Rolette County[9]." (App452-App453.) Further, the district court found there are approximately 4,500 members of the Spirit Lake Tribe who live "on or near the Spirit Lake Reservation[10]." (App453.) Both of the Appellees' proposed maps combine the Turtle Mountain and Spirit Lake Reservations into a single legislative district. (App459.) Based on the district

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[9] Turtle Mountain Tribal Chairman, Jamie Azure, testified "a little over 19,000" tribal members live on and around the reservation which lies completely within Rolette County, North Dakota. (App257 at 17-19.)

[10] The former Chairman of the Spirit Lake Tribe testified that 4,500 of the Tribes 7,500 enrolled members live on the reservation "at any given time." (App87 at 47:20-24.)

court's findings, both of the Appellees' proposed maps would result in a total population of at least 23,500. (App452-App453.)

The "ideal" legislative district in North Dakota is 16,576. Either of the Plaintiffs' proposed maps – based on the district court's findings – would result in a district that is 41% larger than the "ideal" district by population. Currently, District 8 is the most populous legislative district in the State with 17,385 residents. Based on the district court's findings, either of the Plaintiffs' proposed districts would result in a district with at least 6,115 more people than any other district in the State. The Appellees' own data established it could not propose a map that complies with traditional redistricting principles. Therefore, the district court erred in finding the Appellees satisfied their burden to satisfy the first *Gingles* precondition.

ii. Other issues related to the district court's findings on the First Gingles precondition.

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The district court also erred by finding Plaintiffs' proposed map was "compact" within the meaning of *Gingles*. The Supreme Court has said:

> …scientific literature contains dozens of competing metrics on the issue of compactness…Which of these metrics should be used? What happens when the maps they produce yield different benchmark results? How are courts to decide?...
> …And neither the text of § 2 nor the fraught debate that produced it suggests that 'equal access' to the fundamental right of voting turns on computer simulations that are technically complicated, expensive to produce, and available to only a small cadre of university researchers [that] have the resources and expertise to run them.

Allen, 599 U.S. at 35-36 (internal quotations and citations omitted).

Appellate Case: 23-3655 Page: 16 Date Filed: 12/17/2023 Entry ID: 5345208

The district court's decision appeared influenced by the compactness scores supporting the Appellees' expert's assertion that "both proposed districts are reasonably compact." See (App469.) The district court erred by evaluating this issue in a vacuum. Obviously, redistricting maps are aesthetically imperfect because they are driven by population distribution. Based on the population data Appellees offered, they propose to develop a land bridge between the Turtle Mountain Reservation – which by Appellees' own proffered testimony is **by itself** approximately 1,685 residents larger than North Dakota's most populous legislative district – to the Spirit Lake Reservation. See (App452-App453, App459.) "Compactness" - within the meaning of § 2 - cannot mean connecting two geographically distant and distinct sovereign nations by a narrow land bridge to create a legislative district that is 41% more populous – according to Appellees' own data - than any other legislative district in North Dakota. The Assembly certainly has an interest in protecting the integrity of its enacted map against the district court's findings under the First *Gingles* precondition.

b. The district court misapplied the third *Gingles* precondition.

The district court's notable error with respect to the third *Gingles* precondition was its determination that 2018 election data should be omitted due to "special circumstances that made it atypical." See (App474 n. 7.) In fact, the district court

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excluded 2018 election data in its analysis under the third *Gingles* precondition. See (App473-App479.) The district court noted that in 2018 "Native American preferred candidates also performed much better than in any other years" due to higher turnout rates. (App481.) The district court found the fact "voter identification law caused backlash among Native American voters" and "[n]ational celebrities gave concerts and performances on the reservations to promote turnout" for the 2018 election. (Id.)

This Court previously explained a "special circumstance" may occur in a situation "such as the minority candidate running unopposed…." Bone Shirt v. Hazeltine, 461 F.3d 1011, 1026 (8th Cir. 2006). This Court's precedent does not support a conclusion the 2018 election presented a "special circumstance" under the third *Gingles* precondition. The only noted irregularity was attributed to the additional promotion and motivation of the Native American voting population for the 2018 election. (App481.) The 2018 election merely established that when the Native American voting population is motivated, its preferred candidates performed "much better." See (Id.) If anything, this data established the Native American population was provided an opportunity to select the candidate of their choice which is all § 2 requires. See Johnson v. De Grandy, 512 U.S. 997, 1014 n. 11 (1994) (Explaining § 2 of the VRA provides the ultimate right to "equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race.") The Assembly believes the district court erred in its conclusion and will argue

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the district court committed reversable error with respect to the Third *Gingles* precondition[11].

c. **The district court misapplied the totality of circumstances test.**

The district court also misapplied the totality of circumstances test. The district court found the totality of circumstances test presented "a closer decision than suggested by the Tribes." (App488.) Notably, the district court evaluated "proportionality" as part of the totality of the circumstance test. (App487-488.) Specifically, the district court found:

> Based on their share of state wide VAP, Native Americans should hold three Senate seats and six House seats. However, under the 2021 redistricting plan, Native Americans hold zero seats in the Senate and two House seats…this obvious disparity as to proportionality is further evidence of vote dilution under the totality of the circumstances.

(Id.)

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This was a clear error under De Grandy, 512 U.S. 997 (1994). In De Grandy, the Court explained "proportionality" as follows:

> "Proportionality" as the term is used here links the number of majority-minority voting districts to minority members' share of the relevant population. The concept is distinct from the subject of the proportional representation clause of § 2, which provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). This proviso speaks to the success of minority candidates, as distinct from the political or electoral power of minority voters. Cf.

[11] The Secretary's expert testified the election data established the Plaintiffs could not satisfy the third *Gingles* precondition. (App329-App332.)

> Senate Report 29, n. 115 (minority candidates' success at the polls is not conclusive proof of minority voters' access to the political process). And the proviso also confirms what is otherwise clear from the text of the statute, namely, that the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race.

Id. at 1014 n. 11 (emphasis added).

In fact, De Grandy casts serious doubt as to whether the district court's extensive election result analysis under the third *Gingles* precondition is even permissible within the scope of a § 2 claim. The district court's analysis was based solely on election results and excluded results of the 2018 election which was most representative of the "opportunity" for success of the Native American preferred candidate.

All of this is a product of the "intractable difficulties and definition of application" of "our long-deplorable vote-dilution jurisprudence" that "is notoriously unclear and confusing." Allen, 599 U.S. at 90 (J. Thomas dissent); Merrill, 142 S. Ct. at 881 (J. Kavanaugh concurrence joined by J. Alito). Unlike the Secretary, the Assembly will challenge these findings - among other issues – in an effort to "protect its own laws" and ensure it can perform its sovereign power to enact "laws that do not conflict with federal law." See Cameron, 595 U.S. at 277-78.

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III. CONCLUSION

"[A] State's opportunity to defend its laws in federal court should not be lightly cut off." Cameron, 595 U.S. at 277. The interests of the Assembly in defending and protecting its enacted legislation against a VRA challenge are now substantially different than the Secretary's in this § 1983 claim for an injunction and declaratory relief against only his office. See Calzone, 866 F.3d at 872. The Assembly's motion to intervene must be granted.

Dated this 17th day of December, 2023.

SMITH PORSBORG SCHWEIGERT
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By /s/ Scott K. Porsborg

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CERTIFICATE OF COMPLIANCE

This Motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) as it uses the proportionally spaced typeface of Times New Roman in 14-point font.

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) as it contains 4630 words, excluding parts of the motion exempted by Fed. R. App. P. 27(d)(2).

The electronic version of the foregoing Motion submitted to the Court pursuant to Eighth Circuit Local Rule 28(A)(d) was scanned for viruses and that the scan showed the electronic version of the foregoing is virus free

Dated this 17th day of December, 2023.

By /s/ *Scott K. Porsborg*
SCOTT K. PORSBORG

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2023, I electronically submitted the foregoing **NORTH DAKOTA LEGISLATIVE ASSEMBLY'S MOTION TO INTERVENE ON APPEAL** to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit for review by using the CM/ECF system and that ECF will send a Notice of Electronic Filing (NEF) to all participants who are registered CM/ECF users.

By /s/ Scott K. Porsborg
SCOTT K. PORSBORG

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