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**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS,  
*et al.*

*Plaintiffs-Appellees,*

v.

Michael Howe, in his official capacity as North Dakota Sec-  
retary of State,

*Defendant-Appellant.*

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

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**APPELLEES' RESPONSE IN OPPOSITION TO NORTH DAKOTA LEGISLA-  
TIVE ASSEMBLY'S MOTION TO INTERVENE ON APPEAL**

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## INTRODUCTION

The Assembly's motion should be denied. The Legislative Assembly ("the Assembly") lacks standing to appeal because under North Dakota law only the Attorney General is authorized to defend the enforceability of state laws in federal courts. The Supreme Court has held that in the absence of statutory authority authorizing a legislature to exercise that role, it lacks Article III standing to appeal. Because this Circuit requires intervenors to have standing, the Assembly cannot intervene on appeal. Even if the Assembly had standing, its motion is untimely, it lacks a protectable interest, the Secretary's defense is adequate, and Plaintiffs are severely prejudiced by the Assembly's intervention when it traded on its nonparty status to successfully evade discovery in this case. Moreover, the Assembly's merits arguments are premised on obvious misstatements of the facts and law—some conceded by the Secretary's expert at trial—and illustrate the impropriety of its post-judgment appearance in this matter.

## FACTUAL AND PROCEDURAL BACKGROUND

In November 2021, the Assembly enacted a legislative redistricting plan that substantially changed the districting configuration in northeastern North Dakota—home to the largest concentration of Native American voters in the state. App.454, 457-58. District 9, which previously was wholly contained within Rolette County with a Native American voting age population of 74.4%, was extended two counties

east—into Towner and Cavalier Counties, which have near-100% white populations. App.454, 481-82. The Assembly then subdivided District 9 for the state house, with District 9A having a near 80% Native American voting age population and District 9B having only a 32% Native American voting age population. App.458. Meanwhile, neighboring Benson County—home to the Spirit Lake Tribe and large Native American population—was placed in District 15 with a Native American voting age population of only 23.1%. App.458.

As a result of this configuration, the district court found that Native American voters in the region saw their opportunity to elect candidates of their choice reduced from three legislative positions (1 senator and 2 representatives) to just 1 representative in District 9A. App.471-84. Indeed, the incumbent Native American senator for District 9 was defeated on account of white bloc voting in Towner and Cavalier Counties in the November 2022 election. App.478. For the first time in over 30 years, no Native American serves in the North Dakota senate today as a result of the plan's configuration of districts in northeastern North Dakota.

After a four-day bench trial in June 2023, the district court entered judgment for the Plaintiffs on November 17, 2023. App.451. The district court found that all three *Gingles* preconditions were satisfied—indeed the Secretary's expert had conceded as much in several respects in his trial testimony—and that Plaintiffs had

shown that the totality of circumstances point to a finding of vote dilution. App.467-88.

The district court provided the Assembly with 35 days to enact a plan that remedies the Section 2 violation, setting a deadline of December 22, 2023, App.489, after which the Court would be obligated by law to enact its own remedial plan, *see Wise v. Lipscomb*, 437 U.S. 535, 540 (1978).

The Assembly did not take any official action until eighteen days into the 35-day remedial period. Then, on December 5, 2023 the Legislative Management Committee voted to hire counsel and intervene in the litigation. N.D. Leg. Mgmt. Comm. Mt'g (Dec. 5, 2023), <https://video.ndlegis.gov/en/PowerBrowser/PowerBrowserV2/20231204/-1/31899>; <https://www.ndlegis.gov/assembly/68-2023/interim/25-5076-03000-meeting-minutes.pdf>. Four days later, despite the fact that the Secretary had already noticed his appeal, App.492, the Assembly moved to intervene in the district court, App.540. The district court promptly denied the motion for lack of jurisdiction. App.645.

Several days later, the Assembly appealed the denial of its motion to intervene, App.651, which created a second proceeding in this Court, Case No. 23-3697. After this Court denied the Secretary's motion for a stay, *see* Dec. 15 Order, *Turtle Mountain v. Howe*, No. 23-3655, the Assembly simultaneously moved to intervene in the Secretary's appeal, and, for the first time in any court, sought emergency relief from

the district court’s remedial deadlines in its own collateral appeal of the denial of intervention. The Court ordered expedited responses from Appellants on both motions.

## ARGUMENT

### I. The Assembly lacks Article III standing to appeal.

The Assembly lacks Article III standing to appeal the district court’s decision and thus its motion to intervene should be denied. This Court has held that “the Constitution requires that prospective intervenors have Article III standing to litigate their claims in federal court.” *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996). “[S]tanding ‘must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.’” *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (quoting *Arizonaans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)). “[T]o appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing.” *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019).

In *Hollingsworth*, the Supreme Court held that proponents of a ballot initiative lacked standing to appeal where the official authorized by state law to defend the enforceability of state law—the California attorney general—had declined to appeal. 570 U.S. at 702, 709. The Court reasoned that the California Constitution gave initiative proponents a special role “only when it comes to the process of enacting the

law” and that after an initiative became law, the proponents “have no role—special or otherwise—in [its] enforcement.” *Id.* at 706-7. The Court recognized that “[n]o one doubts that a State has a cognizable interest in the continued enforceability of its laws that is harmed by a judicial decision declaring a state law unconstitutional.” *Id.* at 709-10 (internal quotation marks omitted). But it held that federal courts must look to state law to determine *which officials* are authorized to represent the *State’s* interest in its laws’ enforceability. “To vindicate that interest or any other, a State must be able to designate agents to represent it in federal court. . . . That agent is typically the State’s attorney general. But state law may provide for other officials to speak for the State in federal court . . . .” *Id.* at 710.

In so reasoning, the Court differentiated *Karcher v. May*, 484 U.S. 72 (1987), where two legislative leaders were permitted to defend a state statute where the attorney general had declined to do so because “the New Jersey Legislature had authority under state law to represent the State’s interests in both the District Court and the Court of Appeals.” *Hollingsworth*, 570 U.S. at 709 (quoting *Karcher*, 484 U.S. at 82). When the two legislators advancing the appeal in *Karcher* “lost their positions as Speaker and President” of the General Assembly and Senate yet remained individual legislators, the Court held that “they lost standing” to appeal. *Id.* at 710.

Indeed, the Supreme Court has made clear that state law must authorize the legislature to represent the *State* in federal court for the legislature to have standing

to appeal. In *Berger v. North Carolina State Conference of the NAACP*, 142 S. Ct. 2191 (2022), the Court held that North Carolina’s legislative leaders could defend the validity of a state statute because “North Carolina has expressly authorized” it. *Id.* at 2202 (citing N.C. Gen. Stat. Ann. § 1-72.2(b) (providing that “[t]he Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State, by and through counsel of their choice,” “shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution.”)). By contrast, in *Virginia House of Delegates*, the Supreme Court held that the Virginia House did not have standing to appeal because no state law authorized it to represent the State. “Authority and responsibility for representing the State’s interests in civil litigation, Virginia law prescribes, rest exclusively with the State’s Attorney General.” 139 S. Ct. at 1951. “Virginia has thus chosen to speak as a sovereign entity with a single voice.” *Id.* at 1952. That choice, the Supreme Court explained, “belongs to Virginia, and the House’s argument that it has authority to represent the State’s interests is foreclosed by the State’s contrary decision.” *Id.*

Here, the Assembly lacks standing because North Dakota law grants it an interest solely in *enacting* laws—not in *enforcing* them—and certainly not in defending the State in legal challenges to the validity of state law. Like Virginia, North Dakota law provides that the Attorney General is the exclusive officer authorized to

represent the State’s interests in federal court. State law provides that the attorney general, *inter alia*, “shall . . . ‘[a]ppear and defend all actions and proceedings against any state officer in the attorney general’s official capacity in any of the courts of this state or of the United States.” N.D.C.C. § 54-12-01(3). The Assembly cites N.D.C.C. § 54-35-17, but that statute only authorizes the Assembly to retain legal counsel to intervene in a suit “when determined necessary or advisable to protect the official interests of the legislative branch.” That statute does not convert the legislative branch’s interest in *enacting* laws into the attorney general’s interest in *defending the enforceability* of laws. Indeed, the Assembly recognizes as much, highlighting this statute as illustrating that “situations may arise in which a member of the executive branch and the Assembly have differing interests.” Mot. at 12. Moreover, the statute cannot constitutionalize for Article III standing purposes the “interests of the legislative branch” to render them sufficient to afford standing to defend the State in ways the attorney general declines to do.<sup>1</sup>

The Assembly contends that it “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.” Mot. at 7. But that provides the Assembly with a special

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<sup>1</sup> The Assembly does not mention or address standing in its motion, but its motion relies heavily on *Cameron v. EMW Women’s Surgical Center, P.S.C.*, 595 U.S. 267 (2022). Notably, *Cameron* did not involve a question of the Kentucky Attorney General’s *standing* to intervene on appeal because he was authorized by Kentucky law to do so. *Id.* at 277-78.



role “only when it comes to the process of enacting the law,” not with defending the enforceability of those districts. *Hollingsworth*, 570 U.S. at 706. And state law forecloses the Assembly’s contention that it has an interest “in defending the merits of the Assembly’s duly enacted redistricting legislation.” Mot. at 9. Nor is it “[i]mportant[],” as the Assembly suggests, Mot. at 12, that plaintiffs sued the Secretary in his official capacity rather than suing the State. North Dakota law expressly authorizes the Attorney General, not the Assembly, to defend actions against state officials. *See* N.D.C.C. § 54-12-01(3).<sup>2</sup>

Under Supreme Court precedent and North Dakota law, the Assembly lacks standing to appeal in this case. And because this Circuit requires that “prospective intervenors have Article III standing to litigate their claims in federal court,” *Mau-solf*, 85 F.3d at 1300, the Assembly’s motion to intervene on appeal must be denied.

**II. Even if it had standing to intervene, the Assembly has not shown intervention is warranted.**

Even if the Assembly could overcome the standing hurdle, it has not shown that intervention is warranted. “Without any rule that governs appellate

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<sup>2</sup> Nor has the district court ordered the Assembly “to do or refrain from doing anything.” *Hollingsworth*, 570 U.S. at 705. Although the district court afforded the Assembly the opportunity to adopt a remedial plan and set a December 22 deadline by which the district court would undertake that obligation in the absence of legislative action, the district court did not order the Assembly to take any action or refrain from taking any action. Nor could it have—a federal court cannot order a state legislature to pass a law or refrain from passing a law.

intervention,” courts consider the “‘policies underlying intervention’ in the district courts” to assess a motion to intervene on appeal. *Cameron v. EMW Women’s Surgical Center, P.S.C.*, 595 U.S. 267, 277 (2022) (quoting *Automobile Workers v. Scofield*, 382 U.S. 205, 217 n.10 (1965)). Those policies include timeliness, presence or absence of a protectable legal interest, adequacy of representation, and prejudice. *See id.* at 277, 279, 281; *see also* Fed. R. Civ. P. 24.

**A. The Assembly’s motion is untimely.**

The Assembly’s motion is untimely. “[T]he timeliness of a motion to intervene is a threshold issue.” *United States v. Ritchie Special Credit Inv.*, 620 F.3d 824, 832 (8th Cir. 2010) (citing *NAACP v. New York*, 413 U.S. 345, 365 (1973)). “To assess timeliness, courts consider four factors: (1) the extent the litigation has progressed at the time of the motion to intervene; (2) the prospective intervenor’s knowledge of the litigation; (3) the reason for the delay in seeking intervention; and (4) whether the delay in seeking intervention may prejudice the existing parties.” *United Food & Commercial Workers Union, Local No. 663 v. United States Dep’t of Agric.*, 36 F.4th 777, 780 (8th Cir. 2022). This Court “disfavors intervention late in litigation” where the case “has progressed to the end-game.” *Id.*

Here, the Assembly moved to intervene nearly two years after the case was filed, five months after trial, weeks after judgment was entered, and weeks after the Secretary noticed an appeal. The Assembly’s sole argument for why its motion is

timely is its belief that the Secretary will not appeal the merits of this case. Mot. at 8-11. It is not clear, however that the Assembly has correctly characterized the Secretary's appellate intentions.<sup>3</sup> Its motion is nevertheless untimely. The Assembly rests its argument on *Cameron*, in which the Supreme Court found the Kentucky Attorney General's motion to intervene on appeal timely where it was filed *two days* after he became aware that the Kentucky Secretary of Health and Family Services would no longer defend state law. 595 U.S. at 280. The Court emphasized that the intervention motion was filed "as soon as it became clear" that the existing parties would no longer represent the State's interest. *Id.* at 279-80 (quoting *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977)).

Here, the district court issued its decision on November 17. The Assembly waited 18 days to hold a meeting on whether to seek intervention, and on December 5 approved a motion to seek intervention. App.544. The Committee specifically noted its intent to seek intervention in the Eighth Circuit at that meeting. *See* N.D. Leg. Mgmt. Comm. Mt'g at 10:50, <https://perma.cc/W74V-NE3T> (Chairman Lefor). That vote came the day after the Secretary moved for a stay in the district court—limiting his argument to the question of whether 42 U.S.C. § 1983 provides a cause

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<sup>3</sup> The Court should not make a determination of adequacy of representation based solely on the Assembly's interpretation of the Secretary's stay briefing. If the Assembly is incorrect about the Secretary's appellate plans, its motion is plainly untimely. *See* App.649 (district court ruling that "[i]t is axiomatic that the [Assembly's] motion to intervene is untimely per Federal Rule of Civil Procedure 24").

of action for Plaintiffs to enforce Section 2 of the Voting Rights Act. *See* Brief in Support of Motion for Stay, *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 3:22-cv-22 (Dec. 4, 2023), Doc. 132. Notwithstanding the glaring omission of any argument on the *merits* of Plaintiffs’ Section 2 claim in the Secretary’s stay motion in the district court, the Assembly did not act to protect its purported interests in this Court. Instead, the Assembly waited 13 days—nearly 7 times the amount approved by the *Cameron* Court—to seek intervention in this Court.<sup>4</sup>

This is a “far cry” from the 2-day interval at issue in *Cameron*. *United Food and Comm. Workers Union v. U.S.D.A.*, 36 F.4th 777, 781 (8th Cir. 2022); *see also id.* (finding proposed intervention one month into a 90-day remedial period to be “extremely late” such that it “weigh[ed] strongly” against intervention, despite the fact that judgment was stayed for 90 days to allow defendants time to decide how to proceed); *see also Arkansas Elec. Energy Consumers v. Middle South Energy, Inc.*, 772 F. 2d 401, 403 (8th Cir. 1985) (finding proposed intervenors’ contention that the

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<sup>4</sup> The Assembly’s multiplication of the proceedings has also prejudiced Plaintiffs and drained judicial resources. The Assembly delayed filing of its motion to intervene in the district court until after it should have been obvious that the district court lacked jurisdiction to grant it. Then it appealed that denial, resulting in a second meritless appeal. (Case No. 23-3697). Now—weeks later—the Assembly has filed another motion to intervene in this appeal. The Assembly’s delay in filing that motion—which it could have filed over two weeks ago—has resulted in a 2.5-day emergency briefing schedule on both this motion and its eleventh-hour request to delay the district court remedial process—which it failed to even raise in the district court and only sought *after* this Court denied the Secretary’s motion for a stay.

Labor Day holiday contributed to their delay unpersuasive when motion to intervene was not filed until more than a week after the holiday); *see id.* (finding intervenors' assertion that they needed time to coordinate among 15 member organizations "plausible, yet not overly convincing in justifying nearly a week's delay"). The Assembly's reliance on *Cameron* is thus misplaced because it did not act "as soon as it became clear" that the Secretary might, *see supra* n.3, limit its appeal to non-merits issues. *Cameron*, 595 U.S. at 280 (internal quotation marks omitted).

The Assembly's delay is especially problematic because it took the position in the district court that it necessarily had a divergent interest from the Secretary by virtue of its distinct governmental role. App.634. But the Assembly was indisputably on notice of the litigation long before judgment was entered in this case. And given that its purportedly divergent interest with the Secretary arose out of their respective roles in state government, *see* App.634, the Assembly cannot claim it was previously unaware that its interests would be implicated in the event of an adverse judgment. As such, it cannot justify delaying intervention until after judgment was entered, even if it now thinks it has an *additional* divergent interest. *See United Food*, 36 F.4th at 780 (faulting would-be-intervenors for seeking post-judgment intervention when it became clear at least eight months before they sought to intervene that no party would protect their interests in the event of an adverse judgment); *see also NAACP v. New York*, 413 U.S. 345, 368-9 (1973) (affirming denial of intervention

in Voting Rights Act case where plaintiffs’ answer filed on March 21, 1972 should have made it clear it would no longer press case and prospective intervenors waited until April 7, 1972 to intervene rather than taking “immediate affirmative steps to protect their interests”).

**B. The Assembly has no protectable legal interest in this appeal.**

For the same reason that the Assembly lacks Article III standing to appeal the district court’s decision, it likewise has no protectable legal interest that supports intervention. Its proffered interest in enacting redistricting legislation, Mot. at 7, is not implicated by the appeal, which deals with the enforceability of state law. And it has no interest in “defending the merits of the Assembly’s duly enacted redistricting legislation,” Mot. at 9, because North Dakota has vested that interest exclusively with the attorney general, *see supra* Part I. For this reason, the Assembly’s reliance on *Cameron* is misplaced because Kentucky specifically “empower[ed] multiple officials to defend its sovereign interests in federal court,” including particularly the intervenor in that case—the state’s Attorney General. 595 U.S. at 277.

**C. The Assembly is adequately represented.**

The Assembly’s interests are adequately represented. The Assembly contends that the Secretary does not adequately represent its interests because “it is [] now clear” that the Secretary “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*.” Mot. at 6. Even if that is so, the Assembly *has no interest* in defending the enforceability of the enjoined redistricting map because North Dakota law places that interest solely with the Attorney General—the official who is prosecuting this appeal on behalf of the Secretary. A proposed intervenor cannot have their interests inadequately represented where they lack a cognizable interest.

This is especially so where the existing party is a government official. “Where a proposed intervenor’s asserted interest is one that a governmental entity who is a party to the case is charged with protecting, we presume that the government’s representation is adequate.” *Entergy Arkansas, LLC v. Thomas*, 76 F.4th 1069, 1071 (8th Cir. 2023). To overcome that presumption, a proposed intervenor must show an interest different than the public’s at large, a “narrower and more parochial” interest than the government’s, or make a “strong showing” of inadequacy, “such as by demonstrating that the [Secretary] has committed misfeasance or nonfeasance in protecting the public.” *Id.* at 1071-72 (internal quotation marks and citations omitted). But the Assembly has no cognizable interest in a particular redistricting configuration—least of all one that violates the Voting Rights Act,<sup>5</sup> it has no parochial interest in any particular configuration of Districts 9 and 15, and it certainly cannot

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<sup>5</sup> That is so notwithstanding the Assembly’s apparent view that it is “deplorable” that federal law provides Native Americans in North Dakota the right to equal participation in the political process. Mot. at 7.

show that the Secretary has exhibited misfeasance or nonfeasance by allegedly narrowing his focus on appeal.

**D. The Assembly’s intervention would severely prejudice Plaintiffs.**

The Assembly’s intervention would severely prejudice Plaintiffs. The Assembly spent over nine months vigorously opposing discovery requests served by Plaintiffs on the ground that the Assembly, its members, and its staff were non-parties whose participation would represent an unwarranted intrusion on the legislative process.<sup>6</sup> As a result, the Assembly and its members succeeded in preventing Plaintiffs from obtaining discovery related to, among other topics, whether it is in fact true that “the Assembly carefully examined the ‘VRA and believed that creating the sub-districts in district 9 and changing the boundaries of district 9 and 15 would comply with the VRA.’” Mot. at 7 (quoting App.491). Indeed, the only legislator from whom

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<sup>6</sup> See, e.g. N.D. Leg. Assembly’s Memo. in Support of Mot. to Quash at 1, *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 3:22-cv-22 (Nov. 17, 2022), Doc. 38 (emphasizing that “neither the Legislative Assembly nor [an individual legislator] is a party to this action and neither has made any appearance in this action” with respect to the merits of the case.); *id.* at 2 (contending that legislative participation in this litigation “would chill the legislative process”); N.D. Leg. Assembly’s Appeal from Magistrate Judge’s Decision at 4, *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 3:22-cv-22 (January 5, 2023), Doc. 49 (relying on precedent stating that “the time and energy required to defend against a lawsuit are of particular concern” in support of its effort avoid participation in this action) (internal citations omitted); N.D. Leg. Assembly’s Memo. in Opposition to Mot. to Enforce Subpoenas at 10, *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 3:22-cv-22 (Jan. 5, 2023), Doc. 50 (objecting to the participation of the Assembly and its members in this action “when the lawmakers are not a named party to the litigation because complying with discovery requests detracts from the performance of official duties”).



Plaintiffs obtained discovery was one the district court found to have waived legislative privilege by voluntarily participating in the litigation—a ruling this Court declined to disturb in the mandamus proceeding. *See In re North Dakota Legislative Assembly*, 70 F.4th 460, 465 (8th Cir. 2023).

Only after judgment—once discovery was no longer possible—did the Assembly demand to be made a party to this action. The Assembly now asserts that allowing this case to proceed *without* its participation would unreasonably intrude on the performance of its official duties with respect to redistricting. *See* Mot. at 7. Because this assertion is fundamentally at odds with its previous position, and because the Assembly accrued specific benefits and Plaintiffs suffered particular harms as a result of that position, the Assembly should be judicially estopped from belatedly taking any position on the merits of Plaintiffs’ claims.

Had the Assembly intervened at the beginning of this case, it would have been subject to discovery as a party in the litigation, *see, e.g.*, Fed. R. Civ. P. 26, 30, 33, 35, 36, 37. Moreover, its party status would have had significant implications for its efforts to avoid discovery on the basis of legislative privilege. *See, e.g., In re North Dakota Legislative Assembly*, 70 F.4th at 465 (declining to disturb waiver finding given Rep. Jones’s participation in litigation); *Powell v. Ridge*, 247 F.3d 520, 522 (3d Cir. 2001) (holding that legislators have no basis in law to assert legislative privilege against discovery when they voluntarily intervene to assert “the unique

perspective of the legislative branch”); *Singleton v. Merrill*, 576 F. Supp. 3d 931, 934 (N.D. Ala. 2021) (finding that state legislators who intervened in redistricting litigation because they were “uniquely positioned” with respect to redistricting legislation waived legislative privilege); *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX, 2023 WL 8183557 (D. Ariz. Sept. 14, 2023) (finding legislative leaders waived privilege by voluntarily intervening to defend lawsuit and challenge key factual assertions by plaintiffs), *mandamus denied sub nom In re Toma*, No. 23-70179, 2023 WL 8167206 (9th Cir. Nov. 24, 2023) (unpublished), *stay denied*, No. 23A452, 2023 WL 8178439, (U.S., Nov. 27, 2023).

By delaying its intervention until after judgment issued in this case, the Assembly succeeded in preventing Plaintiffs from using its party status to overcome its assertion of legislative privilege. The Assembly should be precluded from wielding its status as a non-party as a club to fend off Plaintiffs’ discovery requests, only to turn around and demand the benefits of party status when the threat of discovery has passed. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (holding that state was estopped from taking an inconsistent position in a later proceeding, where it had succeeded in persuading a court to accept that party’s earlier position, to the unfair detriment of the opposing party). Plaintiffs would be severely prejudiced by the Court permitting the Assembly to intervene now after it previously traded on its nonparty status to Plaintiffs’ detriment.

### **III. The Assembly’s merits arguments underscore the impropriety of its delayed appearance in this litigation.**

The Assembly previews what it characterizes as the “quite clear” errors made by the district court that it chastises the Secretary for not planning to advance on appeal. *See* Mot. at 13-19. These arguments—some absurd on their face—misstate the factual record and law and demonstrate how the Assembly’s belated appearance in this matter is improper, prejudicial, and a waste of the parties’ and Court’s resources.

First, the Assembly contends that the district court erred in concluding that Plaintiffs’ demonstrative plans satisfied *Gingles* prong one because it says that Plaintiffs’ demonstrative district has 23,500 people in it—41% larger than the ideal district size. Mot. at 14-15. That would be a serious problem if it were true. But it isn’t true. The Assembly cites the tribal chairpersons’ estimation of the populations “on and around” or “on or near” the reservations. Mot. at 14. But district populations are determined by Census data for the district boundaries—not population estimates “on and around” the district, and the Census data for Plaintiffs’ demonstrative districts are undisputed and in the record. *See* PX113 (Demonstrative Plan 1 District 9’s population is 17,096—a 3.14% deviation); PX114 (Demonstrative Plan 2 District 9’s population is 17,327—a 4.53% deviation).<sup>7</sup> The Secretary’s expert conceded on

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<sup>7</sup> The Tribes believe that the Census Bureau significantly undercounted Native Americans in the region. Nevertheless, Census data governs the redistricting

cross examination that the demonstrative districts had permissible population deviations *lower* than other enacted districts, as the Assembly’s own Appendix reveals. App.356-57.

Also wrong is the Assembly contention that there is a “land bridge” connecting Turtle Mountain and Spirit Lake “which by Appellees’ own proffered testimony is approximately 1,685 residents larger than North Dakota’s most populous legislative district.” Mot. at 16. This appears to be a confused combination of (1) the Assembly’s disregard of Census data and mistaken math, and (2) the fact that the supposed “land bridge” is *geographically larger* than most of the legislative districts in the state, a fact that disproves the Assembly’s compactness complaint. PX42 at 13.<sup>8</sup> Indeed, the Secretary’s expert *conceded* that Plaintiffs’ demonstrative districts are

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process. Indeed, the Assembly’s Legislative Council released reports *today* confirming that Plaintiff’s proposed plans having total populations within permissible deviations. See N.D. Leg. Council, Comparison of Proposed Maps, <https://ndlegis.gov/sites/default/files/committees/68-2023/COMPARISON%20OF%20PROPOSED%20MAPS.pdf>.

<sup>8</sup> The Assembly’s contention is likewise contradicted by its own report, released as part of today’s Redistricting Committee meeting, concluding that “the Tribes produced two plans containing alternative districting configurations that demonstrate the Native American population in northeast North Dakota is sufficiently large and geographically compact to constitute an effective majority in a single multimember district.” N.D. Leg. Council, Proposed Map 3, <https://www.ndlegis.gov/sites/default/files/resource/committee-memorandum/25.9190.01000.pdf>. That, of course, is the *Gingles* prong one requirement that the district court likewise concluded Plaintiffs had met.

compact on cross examination. App.358. Even if the “quite clear” errors the Assembly identifies were not basic misstatements of the factual record, they would nevertheless be waived on appeal for contradicting the defense expert’s own testimony and advancing arguments never raised in the district court. *See Shanklin v. Fitzgerald*, 397 F.3d 596, 601 (8th Cir. 2005) (“Absent exceptional circumstances, we cannot consider issues not raised in the district court.”). The absurdity of these arguments reveals the slapdash nature of the Assembly’s understanding of the merits of the case and the impropriety of its belated appearance.

Second, the Assembly contends that the district court could not attach less probative value to the 2018 elections because it presented special circumstances of “dramatically” increased Native American turnout that “inverted the normal pattern of lower turnout in midterm versus presidential elections.” App.480-81. This was caused by the “extraordinary resources” expended by national groups to increase Native turnout that were “unlike anything [the tribes] have seen before or since.” App.480-81. This was error, the Assembly says, because this Court has only cited unopposed candidates as special circumstances that warrant discounting elections for the third *Gingles* precondition. Mot. at 17. But in listing unopposed candidates (among other examples) as a special circumstance, the Supreme Court in *Gingles* specifically instructed that its “list of special circumstances is illustrative, not exclusive.” *Thornburg v. Gingles*, 478 U.S. 30, 57 n.26 (1986). The district court thus did

not err in concluding that “[o]nly minority electoral success in typical elections is relevant to whether a Section 2 majority voting bloc usually defeats the minority’s preferred candidate.” App.480 (quoting *Ruiz v. City of Santa Maria*, 160 F.3d 543, 557 (9th Cir. 1998)). In any event, the district court did not “omit” the 2018 elections from its analysis, Mot. at 16, but instead gave them less probative value relative to more recent elections and in light of their special circumstances—consistent with this Court’s precedent. App.482-83. Indeed, as the district court noted, the Secretary’s expert *conceded* that the third *Gingles* precondition was satisfied under his *own* analysis, even giving the 2018 elections equal weight. App.483-84 (district court concluding “[t]hat alone satisfies the third *Gingles* precondition”).

Third, the Assembly contends that the district court could not consider the stark nonproportionality of Native American opportunity districts as part of its totality of the circumstances analysis, citing *Johnson v. De Grandy*, 512 U.S. 997 (1994). Mot. at 18-19. This turns *De Grandy* upside down. In *De Grandy*, the Court explained that the *presence* of rough proportionality of a minority’s statewide population to the number of minority opportunity districts counseled against a finding of vote dilution, even if the *Gingles* preconditions were satisfied. 512 U.S. at 1014. Here, the district court found that Native American voters fall far short of a proportional number of opportunity districts *even with* Plaintiffs’ demonstrative plans. App.487-88. The district court’s analysis of proportionality followed exactly the

Supreme Court’s directive that “[w]hile [] proportionality is not dispositive in a [Section 2 challenge], it is a relevant fact in the totality of circumstances.” *De Grandy*, 512 U.S. at 1000; *accord League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 436 (2006); *Stabler v. Thurston County*, 129 F.3d 1015, 1022 (8th Cir. 1997). The Assembly’s contrary argument is unintelligible.

If the Secretary does not intend to challenge the merits of this case on appeal, the Assembly’s arguments in its motion to intervene well illustrate the wisdom of that decision. And these arguments—blatant misstatements of the facts and law—underscore why the Assembly’s belated entry into this case should not be allowed.

### **CONCLUSION**

For the foregoing reasons, the Assembly’s motion should be denied.

December 20, 2023

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

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

Plaintiffs-Appellees have simultaneously moved the Court for an extension of the page limitation of Fed. R. App. P. 27(d)(2)(A). This response contains 5,509 words, excluding parts of the brief exempted by Fed. R. App. P. 27(d)(2).

The electronic version of the foregoing Brief 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 20th day of December, 2023.

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## CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2023, I electronically submitted the foregoing **APPELLEES' RESPONSE IN OPPOSITION TO 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.

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