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

Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachery S. King, and Collette Brown Plaintiffs, vs. Michael Howe, in his official capacity as Secretary of State of North Dakota, Defendant.	Case No. 3:22-cv-00022 **DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Defendant Michael Howe, in his official capacity as Secretary of State of North Dakota ("Defendant" or "Defendant Howe") submits this memorandum in reply to *Plaintiffs' Response in Opposition to Defendant's Motion for Summary Judgment* (Doc. 65) ("Plaintiffs Response") and in support of in support of *Defendant's Motion for Summary Judgment* (Doc. 58).

LAW AND ARGUMENT

Plaintiffs stated in their opposition memorandum, "Citing the VRA, the legislature divided District 9 into two subdistricts each with one state representative seat, District 9A and 9B. Presumably this was because, as Defendant asserts in the Walen matter, the full District 9 violated the VRA." Plaintiffs' Response, Doc. 65 at p. 9. As an initial matter, Defendant does not assert in this case or the in *Walen* case that "the full District 9 violated the VRA." District 9 as drawn, with its subdistricts, complies with the Voting Rights Act. Plaintiffs do not need to "presum[e]" the reasons the State subdivided District 9 into Subdistricts 9A and 9B. The Redistricting Committee in fact issued a final report explaining its creation of subdistricts, including in Districts 9 and 4. Doc. 60-30, pp. 19-30. The State subdivided District 9 into Subdistricts 9A and 9B on the basis of

legislative testimony and the request of Tribal and Native American representatives, including representatives of Spirit Lake Tribe, a plaintiff in this case. In a September 15, 2021 hearing of the Redistricting Committee, Matt Campbell, a staff attorney with the Native American Rights Fund representing Plaintiff Spirit Lake Tribe, testified Plaintiff Spirit Lake Tribe was in favor of subdistricts to preserve its community of interest, and to provide more local, responsive representation. Redistricting Committee Hearing Transcript (September 15, 2021) at pp. 46-52.

From August 17, 2021 to September 29, 2021, the Tribal and State Relations Committee and Redistricting Committee held eleven legislative redistricting hearings, including hearings actually held on reservations, discussed in Defendants' initial memorandum in support of this motion. Throughout these legislative hearings, the State was urged to create subdistricts around reservations to comply with the Voting Rights Act, to preserve the tribal communities of interest, and to preserve political subdivisions (reservations). Doc. 60-3 through 60-29. Representatives of the Turtle Mountain and Spirit Lake Tribes waited until November 1, 2021, to change tactics and sent a letter to legislators to for the very first time request that the State draw a single district around both the Turtle Mountain and Spirit Lake Reservations instead of creating subdistricts. Doc. 1-2. November 1, 2021, the day of this new tribal request, is the same day the Redistricting Committee (the committee tasked with developing a legislative redistricting plan) issued its lengthy final report and final recommended maps. Doc. 60-30. Tribal representatives did not provide live testimony on their new proposal until November 8, 2021 at the Joint Redistricting Committee meeting in the reconvened legislature, the day before the House voted on the final bill (H.B. 1504).

Plaintiffs' expert in the present case, Dr. Loren Collingwood, is also supportive of the State's use of subdistricts around a reservation to comply with the Voting Rights Act. Dr.

Collingwood is also disclosed as an expert by the Intervenors in the *Walen* case, wherein Dr. Collingwood expresses an opinion that District 4 and its Subdistricts 4A and 4B as drawn fully comply with, and are in fact required by, the Voting Rights Act. In District 4, there is an overall Native American voting age population of 30.98%[1]. In Subdistrict 4A the Native American voting age population is 62.13%, and in Subdistrict 4B the Native American voting age population is 2.34%. *Id.* In his deposition, Dr. Collingwood testified he conducted a functional analysis in the *Walen* case, wherein he analyzed various past elections and determined whether the Native American candidate of choice would have won each election had it been held in the newly drawn district and subdistricts. Collingwood Depo., Exhibit 38 filed herewith, at pp. 40, 43. Dr. Collingwood found that in the elections he analyzed, the Native American candidate of choice would have won in almost 100% (all but one) of the elections for the House member in Subdistrict 4A (which encompasses the Fort Berthold Reservation). Collingwood Walen Report, Exhibit 40 filed herewith, at p. 5. Dr. Collingwood also found that the Native American candidate of choice would have won in 0% of the elections for the House member in Subdistrict 4B and 0% of the elections for the Senate member elected at large in the entirety of District 4. *Id.* This guaranteed House seat with no chance of any additional seats in District 4 is sufficient and necessary in Dr. Collingwood's opinion in the *Walen* case for the State to comply with the Voting Rights Act. Collingwood Depo., Exhibit 38 filed herewith, at pp. 63-64.

In District 9 (the district at issue in the present case), there is an overall Native American voting age population of 51.67%[2]. In Subdistrict 9A the Native American voting age population is 76.96%, and in Subdistrict 9B the Native American voting age population is 29.4%. *Id.* Notably,

[1] https://www.legis.nd.gov/downloads/redistricting-2021/final_maps_csv_file.csv

[2] https://www.legis.nd.gov/downloads/redistricting-2021/final_maps_csv_file.csv

Native American's have a majority of the voting age population in the overall District 9 as well as in Subdistrict 9A. In Dr. Collingwood's expert report in the *Walen* case, he provided a table laying out his functional analysis results in District 4 and its Subdistricts 4A and 4B. Collingwood Walen Report, Exhibit 40 filed herewith, at p. 5. Notably, in his expert report in the present case relating to District 9, Dr. Collingwood did not provide a similar table. Collingwood Initial Report, Doc. 65-2; Collingwood Depo., Exhibit 38 filed herewith, at p. 61. Defendant's expert, Dr. Trey Hood points out in his expert report in the present case that a functional analysis of the races analyzed by Dr. Collingwood in District 9 reveals that the Native American candidate of choice wins 60.0% of the elections in District 9, Subdistrict 9A, and Subdistrict 9B, only losing to the white majority bloc in 38.2% of the elections. Hood Report, Doc. 60-35. Not only do Native American's have a majority of the voting age population in Subdistrict 9A (where one House member is elected) and in the overall District 9 (where a Senator is elected), they also elect their candidate of choice in 60% of the elections in the entirety of District 9 and its Subdistricts in a functional analysis of the elections chosen for analysis by Dr. Collingwood. Plaintiffs' expert Dr. Collingwood does not disagree with Defendant's expert Dr. Hood's conclusion in that regard. Instead, Dr. Collingwood and Plaintiffs' counsel in Plaintiffs Response seek to skew the results by arbitrarily disregarding the outcomes of the elections in 2018, a year with higher Native American turnout, and focus instead primarily on 2022, a year with lower Native American turnout. Plaintiffs' Response at pp. 6-10. Dr. Collingwood acknowledged in his deposition, "Well, some people might say, well, an opportunity is -- 2018, look, it's possible. Native Americans voted at such high rates that it's possible. There's an opportunity if they just kept doing that, then they could continue to do that. So I think that's sort of disputed empirical point." Collingwood Depo., Exhibit 38 filed herewith, at pp. 102-03.

District 9 and its Subdistricts perform even better for Native Americans electing their candidates of choice than District 4 and its Subdistricts where Native American candidates of choice only ever win in one Subdistrict. However, Dr. Collingwood's opinion in the *Walen* case is that District 4 and its Subdistricts are Voting Rights Act compliant, while his opinion in the present case is that District 9 and its Subdistricts are not Voting Rights Act compliant. The only meaningful difference between Districts 4 and 9 is Plaintiffs' perceived opportunity to create a racially gerrymandered district in District 9, which Plaintiffs seek to force the State to do in this case. *See* Collingwood Depo., Exhibit 38 filed herewith, at p. 196.

Plaintiffs seek to force the State to create a new District 9, which encompasses both the Turtle Mountain and the Spirit Lake Reservations. Plaintiffs' expert Dr. Collingwood testified at his deposition that only a map encompassing both reservations with no subdistricts would be sufficient to comply with the Voting Rights Act. Collingwood Depo., Exhibit 38 filed herewith, at p. 98. In that regard, Plaintiffs have produced two demonstrative exhibits of districts that would encompass both reservations. Collingwood Initial Report, Doc. 65-2 at pp. 34, 41. In both demonstrative maps and in any conceivable map encompassing both reservations, Native Americans have a very high voting age population with nearly a guarantee of electing all three legislative seats (two House members and one Senator). In Plaintiffs' Demonstrative Map 1, Native Americans have a voting age population of 66.1% and in Plaintiffs' Demonstrative Map 2, Native Americans have a voting age population of 69.1%. Further, Dr. Collingwood has indicated based on a functional analysis that Native Americans would elect the candidates of their choice 91% of the time under Plaintiffs' Demonstrative Map 1 and 93% of the time under Plaintiffs' Demonstrative Map 2. Collingwood Depo., Exhibit 38 filed herewith, at p. 100. Any conceivable map encompassing both reservations would have similarly high results for Native American

candidates of choice. This all but guarantees the Native American voters in a redrawn District 9 would elect all three candidates of their choice for all three legislative seats. Plaintiffs seek to force the State to maximize to the greatest extent possible the number of candidates that Native American can possibly elect, which is not required by the Voting Rights Act. Dr. Collingwood admitted at his deposition the Voting Rights Act does not guarantee election outcomes and states are not required to create districts that maximize results in of a minority group. Collingwood Depo., Exhibit 38 filed herewith, at pp. 102, 118-19, 196-97; *see also Bartlett v. Strickland*, 556 U.S. 1 (2009). In his deposition, Dr. Collingwood testified:

> Q. … But the demonstrative maps submitted by the plaintiffs in this case, would it be fair to say that they give an extremely high chance Native American to elect their candidate of choice?
> A. Yes.
> Q. The Voting Rights Act doesn't require 90 plus percent odds of electing a minority's candidate of choice, does it?
> A. No.

Collingwood Depo., Exhibit 38 filed herewith, at pp. 103-04. Collingwood testified the legal test or "bar" for opportunity to elect is "more often than not". *Id.* at pp. 101-02.

Plaintiffs claim their demonstrative maps adhere to traditional redistricting criteria, which is not necessarily disputed. *See* Plaintiffs' Response at pp. 12-13, 20-30. However, regardless of whether Plaintiffs' demonstrative maps adhere to a particular standard with respect to traditional redistricting criteria, Plaintiffs' expert Dr. Collingwood agrees the District 9 as drawn by the State performs better with respect to the traditional redistricting criteria than Plaintiffs' demonstrative maps. The only traditional redistricting criteria Plaintiffs claim their demonstrative maps perform better on than the maps adopted by the State is communities of interest. It should be noted, while the Tribal and State Relations Committee and Redistricting Committee were conducting their legislative hearings on redistricting, the testimony from tribal representatives (including an

attorney representing Plaintiff Spirit Lake Tribe) was that subdistricts around reservations were a good way to protect tribal communities of interest. It is undisputed that due to population size, it was possible to draw a minority-majority subdistrict around the Turtle Mountain Reservation, but not around the Spirit Lake Reservation. The Tribal Plaintiffs now seek in this Court case to introduce declarations about their shared interests (*see* Plaintiffs' Response at pp. 13-14), but that information was not presented to the legislature. Plaintiffs seek now to force the state to accept a map of District 9 that scores less favorably in nearly all traditional redistricting criteria than the map actually adopted by the State, for the sole purpose of maximizing certain election outcomes, which the Voting Rights Act does not require.

It was only at the relative last minute in the legislative process that Turtle Mountain and Spirit Lake Tribes sought at all to obtain a joint district. They did so in order to maximize to the greatest extent possible the number of representatives Native Americans could elect in the Northeastern part of the State, seeking to guarantee Native Americans would in almost all elections elect their candidate of choice in all three seats in a redrawn District 9. The Voting Rights Act does not require that North Dakota draw a map to absolutely maximize electoral outcomes for a minority group. Rather, the Voting Rights Act requires that Native American's be given an opportunity to elect (*Bartlett v. Strickland*, 556 U.S. 1 (2009)), which District 9 and its Subdistricts does as drawn (allowing Native Americans to elect their candidate of choice 60% of the time). The only way Native Americans can be argued to not have an opportunity to elect their candidates of choice in District 9 is to do as Plaintiffs and their expert Dr. Collingwood have done: arbitrarily disregard elections with high Native American turnout, and focus only on elections in which Native American's had a relatively low turnout. The Court should not selectively disregard elections on the basis of turnout to skew the outcome in favor of Plaintiffs, and force North Dakota to adopt a

map that goes well beyond the requirements of the Voting Rights Act to guarantee the maximum electoral outcomes for Native American preferred candidates in all three legislative seats in District 9.

In their response memorandum, Plaintiffs attempt to misconstrue the deposition testimony of Defendants' expert Dr. Hood to suggest he made concessions he did not make. For example, in Plaintiffs' Response, Plaintiffs discuss a line of deposition questioning about Dr. Hood's opinion in the *Walen* case, and suggest he Dr. Hood did not analyze certain 2022 elections. Plaintiffs' Response at p. 16-17. However, in the present case (as distinguished from the *Walen* case), Dr. Hood expressly analyzed the exact same elections chosen by Dr. Collingwood for analysis, including the same 2022 elections. Hood Report, 60-35. Dr. Hood's analysis in his expert report in the present case is primarily a critique of Dr. Collingwood's report in this case, and Dr. Collingwood is the person who chose the elections for inclusion in the analysis, including various elections from 2014 to 2022. *Id.*; Collingwood Depo., Exhibit 38 filed herewith, at pp. 121-22. Plaintiffs also state, "Dr. Hood testified that if the four 2022 elections he agreed should be added to his analysis were included, 'that would show 60% defeat rate for the Native American preferred candidates in District 9,' which would demonstrate that white voters usually defeat the candidates preferred by Native American voters in enacted District 9." Plaintiffs' Response at pp. 20-21. Plaintiffs also state, "In sum, Plaintiffs, Defendant, and both experts now agree that white voters in Districts 9, 9B and 15 usually defeat Native American voters' preferred candidates." *Id.* at p. 21. These and other similar statements in Plaintiffs' Response represent an attempt by Plaintiffs to obfuscate the total analysis of District 9 and its Subdistricts. Plaintiffs' analysis totally ignores the electoral outcomes in Subdistrict 9A, in which Native Americans have a very high likelihood of electing their candidate of choice. As discussed above, a functional analysis of the elections chosen

by Dr. Collingwood himself results in Native Americans electing the candidates of their choice in 60% of the elections in District 9 and Subdistricts 9A and 9B, springing from the majority Native American voting age population in District 9 overall, and in Subdistrict 9A. By selectively eliminating the outcomes in Subdistrict 9A, or selectively disregarding elections in high Native American turnout races, as the Plaintiffs and Dr. Collingwood have done, it can be made to appear that Native Americans do not have an opportunity to elect the candidates of their choice, but that appearance is false. Plaintiffs then present demonstrative maps and options that create the maximum possible electoral outcomes for Native American voters as if those options are the only legally permissible options under the Voting Rights Act. They are not. There is no requirement to maximize electoral outcomes for a minority group. North Dakota is required to provide an opportunity to elect district, which the State has done in District 9, considering the District as a whole and its Subdistricts acting together.

District 9 as drawn has a majority Native American voting age population overall (which votes at large for the Senate seat) and a majority Native American voting age population in Subdistrict 9A (which votes for a House member) which is high enough to provide a very high likelihood of Native Americans electing their candidate of choice. Native Americans are a minority of the voting age population in Subdistrict 9B (which also votes for a House member). This arrangement is even more favorable to Native Americans than with respect to District 4 and its Subdistricts, which Dr. Collingwood opines complies with the Voting Rights Act. Collectively, in this District and its Subdistricts, Native Americans elect the candidate of their choice 60% of the time based on a functional analysis, counting all the elections Dr. Collingwood chose to include in his analysis. Dr. Collingwood claims some elections are more probative than others, however he does not apply any mathematical formula to account for probativeness, instead simply pointing

out which elections he believes are more or less probative among the elections he chose to include in his analysis. Collingwood Depo., Exhibit 38 filed herewith, at pp. 57-58. He ultimately concludes the only option available to the State is the one that maximizes to the greatest extent possible certain electoral outcomes, which the Voting Rights Act does not require.

Plaintiffs also argue Defendant's position that the demonstrative maps are racial gerrymanders is not supported by evidence and is allegedly contradicted by United States Supreme Court precedent. Plaintiffs' Response at pp. 36-40. Plaintiffs make arguments about the testimony of Defendant's expert Dr. Hood, as if Dr. Hood made an admission regarding racial gerrymanders, which he did not. *See id.* Dr. Hood only opined that Plaintiffs' demonstrative maps raise questions about whether they result in a racial gerrymander, an issue that is ultimately for the Court to decide, and which Defendant has requested the Court to decide on summary judgment. Hood Report, Doc. 60-35. Dr. Hood noted accurately in his testimony that in issues of racial gerrymandering, it is important to consider how a district is configured and how it connects concentrations of racial minorities across a distance. Hood Depo. at pp. 196-97. None of the cases cited by Plaintiffs involve a racial minority on each end of a barbell shaped district. *See Sensley v. Albritton*, 385 F.3d 591 (5th Cir. 2004). The United States Supreme Court has invalidated some very oddly shaped districts in the past (some of which are shown in Plaintiffs' Response [p. 39]). Their citations to these cases do not establish that their own maps are Constitutional, which is intentionally drawn to connect two geographically distant minority populations connected by a land bridge with the effect of maximizing Native American voting power to the greatest mathematical possibility.

Dated this 15th day of March, 2023.

By: */s/ David R. Phillips*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was on the 15th day of March, 2023, filed electronically with the Clerk of Court through ECF:

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