IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

NAVAJO NATION, a federally recognized Indian Tribe; NAVAJO NATION HUMAN RIGHTS COMMISSION; LORENZO BATES; JONNYE KAIBAH BEGAY; GLORIA ANN DENNISON; TRACY DEE RAYMOND; and BESSIE YAZZIE WERITO,

Plaintiffs,

v.

SAN JUAN COUNTY, NEW MEXICO; SAN JUAN COUNTY BOARD OF COMMISSIONERS; JOHN BECKSTEAD, in his official capacity as Chairman; TERRI FORTNER, in her official capacity as Commissioner; STEVE LANIER, in his official capacity as Commissioner; MICHAEL SULLIVAN, in his official capacity as Commissioner; GLOJEAN TODACHEENE, in her official capacity as Commissioner; and TANYA SHELBY, in her official capacity as County Clerk,

Defendants.

No. 1:22-cv-00095-JB-JFR

PLAINTIFFS' OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT ON *GINGLES* 1

Defendants' motion for summary judgment purportedly based wholly on Plaintiffs' alleged failure to meet the *Gingles* 1 precondition is actually a challenge to Plaintiffs' right to bring this case in the first place. *See* Dkt. 101. The motion is predicated primarily on the misguided premise that there is a "bright line rule" precluding a Section 2 vote dilution claim if the challenged district is majority-minority, even if – as is the case here – that district does not perform for the

demographic group in question. There is no such "bright line rule." Indeed, as will be demonstrated below, the precedent is decidedly to the contrary.

The issue of whether a district with a majority-minority population can be challenged under Section 2 is simply not a *Gingles* 1 precondition issue. Rather, it is an issue that goes to the essence of a claim under Section 2 of the Voting Rights Act ("VRA"). Because Section 2 is designed to combat political structures that limit the ability of voters of color to participate equally in the political process, federal courts have repeatedly recognized that Section 2 challenges to districts that are majority-minority population are not foreclosed for that reason.

For these reasons and others, more fully set forth below, Defendants' motion for summary judgment should be denied.[1]

RESPONSE TO MOTION'S "UNDISPUTED MATERIAL FACTS" ("DSOF")

1. Undisputed that San Juan County's total population is 121,661 according to the 2020 Census. Disputed as to the remaining data cited, which appears to use single-race data regardless of Hispanic origin. The correct 2020 Census data is cited *infra* PSOF ¶ 10.

2. Undisputed that based upon 2010 Census data and 2020 Census data, the 2012 Plan only had a single district in which the American Indian Voting Age Population of a single-race ("VAP") was a majority of the VAP. The second sentence is disputed because it is a fragment and does not identify the Census data to which it is referring and it is immaterial because the 2012 Plan

[1] Shortly after filing the instant Motion, Defendants also filed a separate motion for summary judgment on the remaining two *Gingles* preconditions. Collectively, both motions amount to 49 pages, far in excess of the page limit of 27 pages for a summary judgment motion set out in Local Civil Rule 7.5. Defendants, who never asked Plaintiffs if they would stipulate to a page length extension for a summary judgment motion, offer no rationale for filing separate summary judgment motions and thereby seek to circumvent this Court's rules.

is not being challenged. Furthermore, all references to Citizen Voting Age Population ("CVAP") are immaterial to this case for the reasons stated *infra* footnote 4.

3. Undisputed that the 2021 Enacted Plan includes two districts in which the majority of the VAP is American Indian of a single-race. Immaterial to the question whether District 2 is an effective majority American Indian district.

4. The reference to CVAP is immaterial to this case for the reasons stated *infra* footnote 4.

5. Undisputed that the Navajo Nation Plan contains two districts in which American Indians of a single-race are a majority of the VAP.

6. Undisputed that Dr. Rush's report includes remedial plans with two districts in which American Indians of a single-race are a majority of the VAP.

7. Disputed to the extent Defendants mischaracterize Commissioner GloJean Todacheene's cited testimony. Immaterial to *Gingles* 1.

8. Undisputed, but immaterial to *Gingles* 1.

9. Disputed to the extent Defendants mischaracterize the precincts located each chapter.

10. Disputed. Immaterial to *Gingles* 1.

11. Disputed. Immaterial to *Gingles* 1.

12. Disputed to the extent Defendants suggest there are no common interests between the Northern and Eastern Agencies. Immaterial to *Gingles* 1.

13. Disputed. Immaterial to *Gingles* 1.

14. Disputed. Immaterial to *Gingles* 1.

15. Immaterial to *Gingles* 1.

16. Immaterial to *Gingles* 1.

17. Immaterial to *Gingles* 1.

18. Immaterial to *Gingles* 1.

19. Immaterial to *Gingles* 1.

20. Disputed to the extent that Defendants mischaracterize the statistics in the cited document. Immaterial to the extent that Defendants rely upon Census data that is generally not used by federal courts in a *Gingles* 1 analysis.

21. Disputed. In District 2, the American Indian VAP of a single-race is 52.3 percent. *See* Dkt. 1, Compl. ¶ 67.

22. Disputed. Defendants' erroneous statement is the subject of Plaintiffs' Response to the instant Motion.

23. Disputed. Defendants' erroneous statement is the subject of Plaintiffs' Response to the instant Motion.

24. Disputed. Defendants' erroneous statement is the subject of Plaintiffs' Response to the instant Motion.

25. Disputed to the extent it mischaracterizes Tye Rush's cited testimony.

PLAINTIFFS' UNDISPUTED MATERIAL FACTS

I. Background of *Gingles* 1

1. San Juan County's Board of Commissioners is comprised of five members elected from single-member districts to four-year, staggered terms. N.M. Const. art. X, §§ 2, 7; N.M. Stat. Ann. §§ 4-38-2, -3, -6.

2. State law requires that the Board of Commissioners (or "the Board") redistrict after "each federal decennial Census." N.M. Stat. Ann. § 4-38-6.

3. Counties such as San Juan County, which has a population exceeding thirteen thousand, must be "divided by the board of county commissioners into as many compact single-member districts as there are board members to be elected." *Id.*

II. The Enacted Plan

4. The majority of San Juan County's land, just under two-thirds, is located on the tribal lands of the Navajo Nation, with American Indians constituting the County's largest single population group. Citizens of the Navajo Nation comprise the overwhelming majority of the County's American Indian residents. Dkt. 1, Compl. ¶¶ 2, 35; Dkt. 30, Answer ¶¶ 2, 35.

5. San Juan County's population has declined over the past decade, decreasing from a total population of 130,044 in the 2010 Census to a total population of 121,661 in the 2020 Census, which represents a decrease of 8,383 people. Dkt. 1, Compl. ¶¶ 36-37; Dkt. 30, Answer ¶¶ 36-37.

6. The County's population loss has been driven by "significant amounts of white, non-Hispanic population [that] left between 2010 and 2010." Thomas M. Bryan Expert Demographic Rep. ("Bryan Rep.") ¶ 60 (attached as **Exhibit 2**). During that same period, the number of American Indian residents has increased. *See id.*; Dkt. 1, Compl. ¶ 6.

7. The 2020 Census demographics for San Juan County are as follows, using non-Hispanic single-race data to avoid double-counting (Dkt. 1, Compl. ¶ 42; Dkt. 30, Answer ¶ 42):

Figure 1 – San Juan County Population (2020 Census)

	Total Population		Voting Age Population (VAP)	
Non-Hispanic American Indian and Alaska Native Alone	48,413	39.8%	34,663	38.7%
Non-Hispanic White Alone	43,583	35.8%	35,509	39.6%
Non-Hispanics of Some Other Race Alone	1,947	1.6%	1,494	1.7%

Hispanics of any Race	23,630	19.4%	15,477	17.3%
Two or More Races	4,088	3.4%	2,521	2.8%
Total	121,661		89,664	

Source: U.S. Census, 2020 Census Redistricting Data (Public Law 94-171) Summary File, Hispanic or Latino, and Not Hispanic or Latino by Race, Tables P2 and P4.

8. The American Indian population is geographically concentrated in the western and southern portions of the county. Declaration of Matthew Barreto ("Barreto Decl.") at ¶ 14 (attached as **Exhibit 3**); *see also id.* at ¶ 15 (Figure 1).

9. In 2021, San Juan County contracted with Rod Adair of NM Demographic Research to assist the Board with the process of redistricting following the U.S. Census Bureau's release of the redistricting data from the 2020 Census using the following guidelines:

a. "Districts shall be equal in population as practicable, with a population that deviates plus or minus five percent from the ideal. San Juan County's population was 121,661 therefore the ideal population would be 24,332";

b. "Districts shall not be comprised of split precincts";

c. "Districts shall be contiguous precincts and reasonably compact, with an attempt to preserve communities of interest"; and

d. "Not dilute a protected minority's voting strength."

San Juan County Commission, Minutes 3 (Dec. 7, 2021) (attached as **Exhibit 4**).

10. The Board was presented with several maps prepared by Rod Adair as well as a map prepared by the Navajo Nation Human Rights Commission (the "NNHRC Proposed Plan"). San Juan County Commission, Dec. 7, 2021 Meeting (attached as **Exhibit 10)**; *see also* NNHRC Proposed Plan (attached **Exhibit 11**).

11. On December 21, 2021, the Board enacted a redistricting plan drawn by Rod Adair, i.e., the Enacted Plan. San Juan County Commission, Dec. 21, 2021 Meeting (attached as **Exhibit 12)**; *see also* Enacted Plan (attached as **Exhibit 13**).

12. The American Indian population of San Juan County is sufficiently large and geographically compact to constitute a majority in at least two of the County Commission districts. Mot. at 3; Declaration of Tye Rush ("Rush Decl.") at ¶¶ 19, 21, 32, 44 (attached as **Exhibit 5).**

13. In some instances, districts that are narrowly majority-minority in population do not perform as minority equal opportunity districts in elections, meaning that minority voters in those districts still lack the ability to elect their candidates of choice in typical elections. Barreto Decl. at ¶ 14 (Ex. 3).

14. Although the Enacted Plan includes two districts with a majority American Indian population, Dkt. 1, Compl. ¶ 67; Mot. at 8 (2020 VAP Percentage for Enacted Plan), the Enacted Plan "consists of only one performing American Indian District in District 1 (D1). This map cracks the Navajo population in multiple other districts across the county, rendering it too small to have meaningful . . . equal opportunities to elect outside of District 1 . . ." Barreto Decl. at ¶ 16 (Ex. 3).

15. Under the Enacted Plan, District 1 has an American Indian VAP of 83.31 percent and District 2 has an American Indian VAP of 52.29 percent. Dkt. 1, Compl. ¶ 67; Mot. at 8 (2020 VAP Percentage for Enacted Plan).

16. District 1 has a VAP "of 83% American Indian which overly packs American Indian voters into this single district." Barreto Decl. ¶ 16 (Ex. 3).

17. While District 2 in the Enacted Plan is 52 percent American Indian VAP, it does not "perform to elect American Indian preferred candidates"—meaning that, "among actual votes cast, D2 is not majority-American Indian"—in part because of the Board's inclusion in D2 of

"some of the most polarized voting precincts which bloc vote against [the] American Indian candidate of preference" combined with lower turnout rates among American Indian voters. Barreto Decl. ¶¶ 14-17 (Ex. 3); *see also id.* at ¶ 30 (describing the polarized precincts).

18. Professor Barreto analyzed 58 San Juan County elections between 2010 and 2022, "one of the most comprehensive reviews of election results and voting patterns [he has] ever undertaken for an expert report," Barreto Decl. at ¶ 21 & Tables 2-3 (Ex. 3) (57 elections); *see also* Barreto Rebuttal Rep. ¶¶ 16-20 & App. A (appeals court election) (attached as **Exhibit 6**), finding that, in both endogenous and exogenous elections, "American Indian voters are cohesive while non-American Indian voters consistently bloc vote for opposite candidates." Barreto Rebuttal Rep. ¶¶ 31-32 & Tables 2-3 (Ex. 6).

19. In every election for San Juan County Commission District 2 from 2010 through 2022, the American Indian preferred candidate lost. Barreto Decl. ¶ 29 (Ex. 3); *see also id.* at Tables 2-3.

III. Plaintiffs' Proposed Plans

20. The American Indian population of San Juan County is sufficiently large and geographically compact to permit the drawing of two performing districts in which American Indian voters have an equal opportunity to elect their candidates of choice as do white voters. Barreto Decl. at ¶ 14 (Ex. 3).

21. For example, the NNHRC Proposed Plan proposed two majority-American Indian districts: District 1 with an American Indian VAP of 63.3 percent, and District 2 with an American Indian VAP of 63.2 percent. Dkt. 1, Compl. ¶ 59; Dkt. 30, Answer ¶ 59.

22. In addition, using 2020 Decennial Census data, Plaintiffs' expert Dr. Tye Rush drew two demonstrative maps that each include two majority American Indian VAP districts

("Demonstrative Map 1" and "Demonstrative Map 2," and collectively, "Demonstrative Maps"), Rush Decl. at ¶¶ 13, 15, 21-49 (Ex. 5).

23. Professor Barreto analyzed Dr. Rush's two Demonstrative Maps and found that both majority American Indian VAP districts in each map "perform and can elect American Indian candidates of choice" because they "have American Indian voting populations high enough that see their majority preferred candidate winning the entire district." Barreto Decl. at ¶ 41 (Ex. 3).

24. Dr. Rush "did not consider race" in drawing his demonstrative maps. Deposition of Tye Rush ("Rush Dep.") at 136:13–22 (attached as **Exhibit 7**).

25. In Dr. Rush's Demonstrative Map 1, the American Indian VAP for District 1 is 74.45 percent and 66.19 percent for District 2. Rush Decl. at ¶¶ 26, 32 (Ex. 5). In Dr. Rush's Demonstrative Map 2, the American Indian VAP for District 1 is 74.01 percent and 66.41 percent for District 2. *Id.* at ¶¶ 38, 44. In both maps, American Indian voters were well "above the 50.01 percent *Gingles I* [numerosity] threshold" in two San Juan County Commission districts and performed as majority-minority districts. *Id.* at ¶¶ 26, 32, 38, 44; *see also* Barreto Decl. at ¶ 41 (Ex. 3); Deposition of Matthew Barreto ("Barreto Dep.") at 160:15–162:3 (attached as **Exhibit 8**).

26. Dr. Rush used Defendants' own stated redistricting criteria of a) population equality; b) maintenance of precinct boundaries; c) compactness and contiguity, with an attempt to preserve communities of interest; and d) maintenance of protected minority voting strength, to draw his demonstrative maps. Rush Decl. at ¶¶ 18, 22, 31, 43 (Ex. 5); *see also* San Juan County Commission, Minutes 3 (Dec. 7, 2021) (Ex. 4).

27. Both demonstrative maps equalize population between districts with a deviation of less than five percent. Rush Decl. at ¶¶ 28, 40 (Ex. 5).

28. Both demonstrative maps are contiguous, do not split precincts, and consider communities of interest including Navajo Nation Chapters and all geographies defined by the Census Bureau. *See* Rush Decl. at ¶¶ 29–30, 33, 41–42, 45 (Ex. 5); *see also* Bryan Rep. at ¶ 99 (Ex. 2) ("[E]ach district of each plan drawn . . . is drawn with contiguous [precinct] geography and no split [precinct] geography.").

29. Both Demonstrative Maps are reasonably compact. Bryan Rep. at ¶¶ 159–60 (Ex. 2). Under two accepted mathematical measures of geographic compactness (known respectively as the Reock score and the Polsby-Popper score), the Demonstrative Maps are *more* geographically compact than the Enacted Plan. Rush Decl. at ¶¶ 76–77 (Ex. 5); *see also* Thomas Bryan, acknowledged that fact. *See* Deposition of Thomas Bryan ("Bryan Dep.") at 125:12-20 (attached as **Exhibit 1**) ("Rush Plans 1 and 2 … were either similar to or had slightly better compactness measures [as compared to the Enacted Plan]"); Rush Decl. at ¶¶ 103–07 (Ex. 5) (concluding that "Demonstration Plan 1 and Demonstration Plan 2 are slightly more compact [than the Enacted Plan]").

30. The NNHRC Proposed Plan equalized population between districts with a less than five percent deviation, did not split precincts, was contiguous, and was mathematically more compact than the Enacted Plan. Rush Decl. at ¶¶ 54–57, 76–77 (Ex. 5); Bryan Rep. at ¶ 99 (Ex. 2) ("[E]ach district of each plan drawn . . . is drawn with contiguous [precinct] geography and no split [precinct] geography."). Defendants' expert Mr. Bryan similarly concluded "[t]he Navajo Nation plan is identically compact [with the Enacted Plan]." Bryan Rep. at ¶¶ 103–07 (Ex. 2); *see also* Bryan Dep. at 125:12-20 (Ex. 1) (stating NNHRC Proposed Plan was "either similar to or had slightly better compactness measures [as compared to the Enacted Plan]"). By contrast, the

Enacted Plan's total population deviation of 5.31 percent is greater than under the NNHRC Proposed Plan. Dkt. 1, Compl. ¶ 67; Dkt. 30, Answer ¶ 67.

31. Both of Plaintiffs' Demonstrative Maps and the NNHRC Proposed Plan "respect[] some existing communities of interest." Bryan Rep. at ¶¶ 159–61 (Ex. 2).

32. Regarding the use of VAP, Dr. Barreto stated in his report that "VAP can provide reliable race estimates because [San Juan County] has a very small non-citizen population." Barreto Decl. at ¶ 26 n. 18 (Ex. 3) (parenthesis omitted). Using the 2021 American Community Survey ("ACS") five-year estimates, Dr. Barreto determined that two percent of the population in San Juan County is non-citizen, and among the American Indian population in the county, there are "just 24 non-citizen adults which accounts for 0.068%, less than one-tenth of one percent of their total VAP." *Id.*; *see also* Bryan Dep. at 99:6–24 (Ex. 1) ("Q: do you find that the percentage of American Indians and Alaska Natives … is very, very close to 100 percent U.S. citizenship? A: Yes.").

33. Accordingly, the Demonstrative Plans and the NNHRC Proposed Plan are each "compliant with Gingles 1." Bryan Rep. at ¶¶ 159–61 (Ex. 2); *see also id.* at ¶¶ 88-90 (concluding that Demonstrative Plans and NNHRC Proposed Plan contain two "majority-minority [American Indian] districts and the district fulfills the majority requirement of Gingles 1"); *see also* Barreto Dep. at 160:15–162:3 (Ex. 8).

34. Defendants' other expert, Mr. Adair has not offered a *Gingles* analysis nor does he make "any opinion about the *Gingles* test." June 12, 2023 Deposition of Rod Adair ("Adair Dep.") at 88:4; 89:21–22 (attached as **Exhibit 9**).

IV. Performance of Various Maps

35. Defendants' expert did not conduct a performance analysis of the Enacted Plan to determine whether American Indian voters could elect a candidate of their choice in District 2 as drawn, nor did the Board ask him to do such an analysis. Mot. at 6 ("[F]ormal partisan performance analysis could not be completed on the maps considered by the Commission during the redistricting cycle . . . "); Jan. 31, 2023 Deposition of Rod Adair ("Adair Dep.") at 15:12-15 (attached as **Exhibit 14**) (stating "no one asked [him] for any performance data" and that he did not conduct any sort of performance analysis); *id.* at122:19-123:1 ("Q: . . . you did not do this analysis . . . I'm referring to any kind of election and performance analysis. A: No.").

36. District 2 in the Enacted Plan will not perform such that Plaintiffs living in District 2 have the ability to elect a candidate of their choice. Barreto Decl. at ¶ 17 (Ex. 3); *see also* Barreto Dep. at 124:10-25 (Ex. 8) ("Q: [W]hat is your definition of a majority-minority district . . . for Gingles 1. A: . . . generally, a district in which a majority of the eligible electorate is of the racial or ethnic minority group, ***and that they are able to have a reasonable chance to elect candidates of choice*** . . . ." (emphasis added)).

37. In the past 17 years, "American Indian candidates have run for office in D2 and despite gaining support from American Indian voters, they were unable to win because of bloc-voting by non-Hispanic, White voters who opposed American Indian candidates of choice." Barreto Decl. at ¶ 18 (Ex. 3). "Thus, despite their efforts to run for elected office, D2 has historically not performed for American Indian candidates of choice, and the new map does not strengthen American Indian voting enough to make this a VRA-compliant district." *Id.*

STANDARD OF REVIEW ON SUMMARY JUDGMENT

Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "When evaluating a motion for summary judgment, the court examines the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." *Mirzai v. N.M. Gen. Servs. Dep't*, No. CIV 06-219 JB/LAM, Mem'm Opinion and Order at 6 (D.N.M. Mar. 30, 2007) (Browning, J.) (citing *Sigmon v. CommunityCare HMO, Inc.*, 234 F.3d 1121, 1124-25 (10th Cir. 2000)).

STANDARD OF REVIEW ON SUMMARY JUDGMENT

Summary judgment is proper only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "When evaluating a motion for summary judgment, the court examines the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." *Mirzai v. N.M. Gen. Servs. Dep't*, No. CIV 06-219 JB/LAM, Mem'm Opinion and Order at 6 (D.N.M. Mar. 30, 2007) (Browning, J.) (citing *Sigmon v. CommunityCare HMO, Inc.*, 234 F.3d 1121, 1124-25 (10th Cir. 2000)).

ARGUMENT

I. Defendants Are Not Entitled to Summary Judgment as to the First *Gingles* Precondition

Section 2 of the Voting Rights Act prohibits any "standard, practice, or procedure … imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color …" 52 U.S.C. § 10301(a). "American Indians were specifically included within the coverage of § 2 by

amendments to the Act in 1975 to include language minorities . . . ." *Cuthair v. Montezuma-Cortez, Colo. Sch. Dist. No. RE-1*, 7 F. Supp. 2d 1152, 1165 (D. Colo. 1998).

Liability under Section 2 of the VRA is established

> . . . if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301(b).

Vote dilution claims under the VRA relating to redistricting are evaluated under the framework set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986); *see generally Allen v. Milligan*, 143 S. Ct. 1487, 1502-04 (2023). Specifically, to prove a Section 2 violation, plaintiffs must satisfy three preconditions, the first of which is that the "minority group must be sufficient large and [geographically] compact to constitute a majority in a reasonably configured district." *Milligan*, 143 S. Ct. at 1503. A district is considered reasonably configured if it comports with traditional districting criteria, such as compactness and contiguity. *Id.* The purpose behind this precondition is "to establish that the minority has the potential to elect a representative of its own choice in some single-member district." *Growe v. Emison*, 507 U.S. 25, 40 (1993), quoted with approval in *Milligan*, 143 S. Ct. at 1503. Plaintiffs must also prove the second precondition (cohesion in voting of the minority group) and the third precondition (white bloc voting that usually prevents the minority group from electing candidates of their preference. *Gingles*, *supra*. If plaintiffs prove these preconditions, then they must prove by a "totality of the circumstances" that the political process is not equally open to minority voters. *Milligan*, *supra*.

A. A vote dilution claim under Section 2 of the VRA may be brought by plaintiffs whose racial group is a majority in the challenged district.

Defendants argue that there is a "bright line" rule that Plaintiffs cannot meet the first *Gingles* precondition, if – from a purely numerical perspective – they are unable to draw more majority-minority districts than in the Enacted Plan. Mot. at 15-16. In essence, Defendants argue that there is no possibility of a Section 2 vote dilution claim if a plaintiff cannot create an "additional" majority-minority district in terms of population in an illustrative map compared to the challenged map. There is no such "bright line" rule. Indeed, the overwhelming precedent is to the contrary, as several courts have found that a plaintiff can challenge a plan that contains a majority minority district that does not perform for voters of color, if they produce an illustrative plan that contains a majority minority district that performs for voters of color.

Although the Tenth Circuit has not addressed the issue, those courts that have done so have consistently rejected the sort of "bright line" rule posited by Defendants. The starting point is the Supreme Court's unequivocal statement that, "it may be possible for a citizen voting-age majority to lack real electoral opportunity." *LULAC v. Perry*, 548 U.S. 399, 428 (2006). Accordingly, courts have ruled that a vote dilution claim may be asserted where the minority population constitutes a majority of the challenged district. As the Fifth Circuit explained, "[u]impeachable authority from our circuit has rejected any *per se* rule that a racial minority that is a majority in a political subdivision cannot experience vote dilution." *Monroe v. City of Woodville, Miss.,* 881 F. 2d 1327, 1333 (5th Cir. 1989). Other courts have reached the same conclusion. *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F. 3d 924, 934 (8th Cir. 2018) (rejecting proposition that "a racial minority cannot prevail on a section 2 claim when it constitutes a bare numerical majority within the district."); *Pope v. Cnty. of Albany*, 687 F. 3d 565, 575 n.8 (2d Cir. 2012) ("the law allows plaintiffs to challenge legislatively created bare majority-minority districts

on the ground the they do not present the 'real electoral opportunity' protected by Section 2"); *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1041-42 (D.C. Cir. 2003) (assumes that plaintiffs met *Gingles* 1 by alleging that decrease of Black VAP from 68.7% to 62.3% in one ward deprived Black voters of an effective voting majority); *cf. Meek v. Metro Dade Cnty*., 908 F.2d 1540, 1546 (11th Cir. 1990) (no dispute as to *Gingles* 1, where Blacks and Latinos constituted over 50% of the registered voters in the enacted plan); *Perez v. Abbott*, 253 F. Supp. 3d 864, 879 (W.D. Tex. 2017) ("[T]he Court rejects Defendants' bright-line rule that any HCVAP-majority district is by definition a Latino opportunity district.").

This principle extends to at-large systems and single-member districts alike. *LULAC*, *Kingman*, and *Pope* all involved challenges to districts. Indeed, with respect to a proposed county supervisors districting plan in which all five districts were majority Black in total population, but where "blacks would have exceedingly slim [voter-registration] majorities in some of these districts and minorities in others," the Fifth Circuit held that "[t] he mere existence of a black population majority does not preclude a finding of dilution." *Moore v. Leflore Cnty. Bd. of Election Comm'rs*, 502 F.2d 621, 624 (5th Cir. 1974).[2]

[2] *Smith v. Brunswick County VA Bd. of Supervisors*, 984 F.2d 1393, 1400-01 (4th Cir. 1993), relied upon by Defendants (Mot. at 16-17), does not expressly erect the "bright line" rule espoused by Defendants. Rather, in *Smith,* decided after a full trial on the merits, the Court rejected what it called the "novel theory" resting on "a subdivision of the voting group protected by the Act." *Id.* at 1400. There, Black plaintiffs challenged five districts, four of which were numerically majority Black, and three of which were 60% Black voters. Further, the proofs showed that Black voters went to the polls in proportionately greater numbers than did white voters. Plaintiffs' argument was that, because white voters voted monolithically, and 20% of Black voters crossed over to join white voters, the competing groups were (1) all white voters and the 20% Black voters and (2) the remaining 80% Black voters. In the context of that precise trial record and that precise argument, the Court held that the plaintiffs' claims "finds no support in the law," and that "[i]f the voting group of [a minority] have the numbers necessary to win and members of the group are allowed equal access to the polls, it cannot be rationally maintained that the vote is diluted." *Id*. at 1401.

Contrary to Defendants' argument, nothing in Supreme Court jurisprudence suggests otherwise, or in any way undercuts *LULAC*s observation that even a majority minority district may lack electoral opportunity for purposes of the VRA. The Court in *Gingles* emphasized that the "reason that a minority group making such a challenge must show" that it can constitute a reasonably compact majority in *a* single-member district," 478 U.S. at 51 n.16 (emphasis added), was to demonstrate that they "possess the *potential* to elect representatives in the absence of the challenged structure. . . ." *Id.* (emphasis in the original).

Growe v. Emison, 507 U.S. 25, 40 (1993), simply reaffirms this concept – in the context of determining whether to apply *Gingles* to a single-member scheme, that the first *Gingles* precondition "is needed to establish that the minority has the potential to elect a representative of its own choice in single-member district." As noted above, the Court most recently reiterated this in *Milligan*. Neither of those decisions even hints at a rule that prohibits pursuit of a Section 2 claim if the challenged district is numerically majority-minority.

Bartlett v. Strickland, 556 U.S. 1 (2009), heavily relied on by Defendants in their Motion, involved a fundamentally different issue. There, the plaintiffs attempted to meet the first *Gingles* precondition by creating an illustrative district where Black voters made up less than 50 percent but could, with white crossover voters' voters, elect representatives of their choice. *Id.* at 6. The Supreme Court rejected that argument. *Id.* at 12-13. Its holding barring a claim on the ground that the minority population is too small in no way suggests a *per se* rule barring a claim on the ground that the minority population is too large. Such a rule would nullify the Court's statement four years earlier in *LULAC*, which, like the *Bartlett* plurality opinion, was authored by Justice Kennedy.

Similarly, *Cooper v. Harris*, 581 U.S. 285 (2017), does not support Defendants' position. There the issue was whether the State could justify a racial gerrymander because it believed it was compelled to create a numerical majority-minority district to comply with Section 2 of the VRA. In rejecting the State's defense, the Court said nothing about *Gingles* 1 illustrative districts, but rather held that a Section 2 plaintiff would have been unable to meet the *third Gingles* precondition, because the district had been "extraordinarily safe" for Black-preferred candidates. 581 U.S. at 302-303.

Finally, although *Johnson v. DeGrandy*, 512 U.S. 997 (1994), did not reach this issue, if anything, it provides additional support to reject Defendants' attempt to create a new rule. There, as noted by Defendants, Mot. at 14, the Court observed that "the first *Gingles* precondition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Id.* at 2655. However, the Court noted that the district court had found that *Gingles* 1 had been met because each of the illustrative districts exceeded 64 percent Hispanic, and noted that there was a dispute between the parties "about the sufficiency of these super-majorities to allow Hispanics to elect representatives of their choice" in all of the districts. *Id.* The Court did not resolve the dispute because it decided the case on other grounds. *Id*. at 1656-57. Far from providing Defendants with the "harmonizing" as to their proposed "bright line" rule that they posit, *DeGrandy* appears to recognize that in the appropriate case, performance of the illustrative district compared to non-performance of the enacted plan's district, even if both are numerically majority-minority, may support a Section 2 claim.

B. Plaintiffs Have Raised a Triable Issue as to Whether the Enacted Plan's District 2 Provides Them with an Equal Opportunity to Participate in the Political Process.

Plaintiffs have adduced sufficient facts in the record to support the conclusion that District 2 of the Enacted Plan does not provide Plaintiffs with "the potential to elect a representative of [their] choice." *Milligan*, 143 S. Ct. at 1503.

Although the Enacted Plan has the appearance of creating a bare majority American Indian district in District 2, there is abundant record evidence that the district was configured in a way so as to prevent that majority from electing candidates of their choice.

Plaintiffs' expert, Dr. Barreto, opined as follows:

> According to the 2020 Census, in the adopted District 2 (D2) the American Indian voting age population is 52%, but this district only has the appearance of a majority American Indian district. Lower voter registration and voter turnout rates caused by historic discrimination reveal that this district would not perform to elect American Indian preferred candidates. Indeed, among actual votes cast, D2 is not majority-American Indian. What's more, San Juan County crafted their map in such a way to include some of the most polarized voting precincts which bloc vote against American Indian candidate of preference. These factors dilute the American Indian vote by keeping it only slightly above majority population status in a district where American Indian voters turnout at lower rates and will not be able to elect a candidate of choice. This is very clear evidence of vote dilution.

PSOF ¶ 36; *see also id.*, Barreto Dep. at 124:10-25 ("Q: [W]hat is your definition of a majority-minority district . . . for Gingles 1. A: . . . generally, a district in which a majority of the eligible electorate is of the racial or ethnic minority group, ***and that they are able to have a reasonable chance to elect candidates of choice*** . . . ." (emphasis added)).

There is no substantial evidence to the contrary on this issue – let alone a dispute of material fact. Defendants admit that the Enacted Plan, creating the appearance of a majority-American Indian District 2, did *not* undergo a performance analysis before it was adopted to determine if the

American Indian voters could elect a candidate of their choice in that district. Mot. at 6 ("[F]ormal partisan performance analysis could not be completed on the maps considered by the Commission during the redistricting cycle . . . "). Mr. Adair, who drew the Enacted Plan, confirmed that "no one asked [him] for any performance data" and that he did not conduct any sort of performance analysis. PSOF ¶ 35.

The remaining contrary evidence posited by Defendants is insufficient to provide a basis for summary judgment on this issue. That District 2 has elected American Indian individuals to office a handful of times since 1982, Mot. at 8, 16, is based entirely on elections from two decades ago or longer and obscures the reality that in the past 17 years (when the last American Indian candidate was elected), "American Indian candidates have run for office in D2 and despite gaining support from American Indian voters, they were unable to win because of bloc-voting by non-Hispanic, White voters who opposed American Indian candidates of choice." PSOF ¶ 37, Barreto Decl. at ¶ 18. "Thus, despite their efforts to run for elected office, D2 has historically not performed for American Indian candidates of choice, and the new map does not strengthen American Indian voting enough to make this a VRA-compliant district." *Id.* As explained in Plaintiffs' recently filed Motion in Limine Regarding Defendants' Untimely and Irrelevant Production of Pre-2010 Census Redistricting Evidence, ECF 108, redistricting data for San Juan County prior to 2010 is irrelevant. *See U.S. v. Charleston County, S.C.*, 365 F.3d 341, 350 (4th Cir. 2004) (finding electoral results from older elections "of marginal relevance to whether minorities currently enjoy equal access to the electoral process" and that "recent elections are the most probative in determining vote dilution."); *Luna v. Cnty of Kern,* 291 F.Supp.3d 1088, 1133 (E.D. Cal. 2018) (finding reelection of a candidate of color "roughly two decades ago" to be of little relevance that did not detract from court's finding of lack of electoral success based upon

more recent elections); *Rodriguez v. Harris Cnty., Tex.,* 964 F. Supp. 2d 686, 759 (S.D. Tex. 2013) ("Temporally, recent elections are more probative than elections in the distant past.").

C. There are more than sufficient facts in dispute to withstand summary judgment on the first *Gingles* precondition

Plaintiffs' illustrative plan for District 2 demonstrates that it is possible to draw a majority-minority district that is reasonably configured, thereby meeting the first *Gingles* precondition. *Sanchez v. Colorado*, 97 F.3d 1303, 1310 (10th Cir. 1996) (plaintiffs have to provide "no more" than an alternative majority-minority map to satisfy *Gingles* 1).

i. Plaintiffs' Illustrative Plans Meet the Numerosity Requirement, and Unlike the Enacted Plan, Have Two Performing Districts.

Dr. Rush used 2020 Decennial Census data to draw the two demonstrative maps, both of which create two majority American Indian voting-age population districts in Districts 1 and 2. POSF ¶ 22, and as Dr. Barreto found, perform for Navajo voters. In Demonstrative Map 1, the American Indian VAP is 74.45 percent for District 1 and 66.19 percent for District 2. POSF ¶ 25.[3] In Demonstrative Map 2, the American Indian VAP is 74.01 percent for District 1 and 66.41 percent for District 2. *Id.* Dr. Barreto's analysis of Dr. Rush's maps confirmed both Demonstrative Maps perform as majority-minority districts. POSF ¶ 23.

[3] Although the Motion looks at citizen voting age population ("CVAP") in describing the size of the minority population, *see* Mot. at 9, 18, utilizing VAP is appropriate if there is not otherwise a significant non-citizen population among the relevant group. *See, e.g.*, *Barnett v. City of Chicago*, 141 F.3d 699, 705 (7th Cir.1998) (stating that VAP should apply where "noncitizens [are] not a significant part of the relevant population"). "VAP can provide reliable race estimates because the county has a very small non-citizen population." POSF ¶ 32, Barreto Decl. at ¶ 26 n. 18. Dr. Barreto utilized the 2021 American Community Survey (ACS) report to determine that only 2 percent of the population in San Juan County is non-citizen and among the American Indian population in the county, there are "just 24 non-citizen adults which accounts for 0.068%, less than one-tenth of one percent of their total VAP." *Id*. Furthermore, Defendant's expert Mr. Bryan testified that the American Indian citizen population is close to 100 percent in San Juan County. POSF ¶ 32. Thus, among the Native American population in San Juan County, there is not a significant non-citizen population, rendering VAP an appropriate metric for gauging numerosity.

Defendants argue that Plaintiffs have not established the precise percentage of American Indian population necessary for District 2 to be VRA-compliant. Mot. at 23. However, the *Gingles* 1 precondition contains no such requirement. Proof of the specific contours of a super-majority is not required in the first *Gingles* precondition. *Bone Shirt v. Hazeltine*, 461 F. 3d 1011, 1019 & n.6 (8th Cir. 2006) ("at the initial stage of the *Gingles* precondition analysis, the plaintiffs are only required to produce a *potentially* viable and stable solution") (emphasis in original); *Dickinson v. Ind. State Election Bd.*, 933 F.2d 497, 503 (7th Cir. 1991). Plaintiffs have clearly done so.

ii. Plaintiffs' Illustrative Plans Are Reasonably Configured In Accordance With Traditional Districting Principles.

A district is reasonably configured for purposes of *Gingles* 1 "if it comports with traditional districting criteria, such as being contiguous and reasonably compact." *Milligan*, 143 S. Ct. at 1503. There is "no absolute measure of compactness . . . only relative measures." *Sanchez*, 97 F.3d at 1314 n.16. There are ample facts in the record to support that Plaintiffs have easily met this standard. Using Defendants' own stated redistricting criteria of a) population equality; b) maintenance of precinct boundaries; c) compactness and contiguity, with an attempt to preserve communities of interest; and d) maintenance of protected minority voting strength, *see* PSOF ¶ 26, Plaintiffs' expert Dr. Rush was easily able to draw two hypothetical VRA-compliant maps that were "reasonably compact." PSOF ¶ 29. Both Demonstrative Maps equalize population between districts with a deviation of less than five percent. PSOF ¶ 27. Both are contiguous, do not split precincts, and consider communities of interest including Navajo Nation Chapters and all geographies defined by the Census Bureau. PSOF ¶ 28. Furthermore, under two accepted mathematical measures of geographic compactness (known respectively as the Reock score and the Polsby-Popper score), the Demonstrative Maps are actually *more* geographically compact than the Enacted Plan. PSOF ¶ 29.

Defendants' own *Gingles* 1 expert, Mr. Bryan, does not dispute these conclusions, concluding that each of the Demonstrative Maps provide reasonable compactness, PSOF ¶ 29, are contiguous, and do not split precincts. *See* PSOF ¶ 28 ("[E]ach district of each plan drawn . . . is drawn with contiguous [precinct] geography and no split [precinct] geography."). Specifically as to compactness, Mr. Bryan finds that Plaintiffs' proposed plans are either identically compact or more compact than the Enacted Plan under both mathematical measures. *See* PSOF ¶ 29 (concluding that "[Rush] Demonstration Plan 1 and Demonstration Plan 2 are slightly more compact [than the Enacted Plan]," that "[t]he Navajo Nation plan is identically compact [with the Enacted Plan]," and that "[a]ll plans are reasonably compact").

Faced with this overwhelming evidence, Defendants rely on two arguments that ignore the record evidence and misconstrue the controlling law. The first, based wholly on a misconstruction of *LULAC v. Perry*, 548 U.S. 399, 430-35 (2006) (Mot. 24-25), is that Plaintiffs' maps "force together two distinct Navajo communities that have disparate interests . . ." Mot. at 25. First, the record evidence—sufficient to raise a triable issue of fact—is that Plaintiffs' experts did consider and respect communities of interest. Defendants' expert conceded that all three of Plaintiffs' demonstrative maps "**respect[] some existing communities of interest.**" PSOF ¶ 31. This is sufficient in itself to raise a triable fact.

Beyond that, Defendants' argument is based on a faulty premise that any sort of combining of different geographically separated members of the same demographic group somehow violates *Gingles* 1. The *LULAC* Court's discussion relating to the combining of "distant, disparate communities" quoted by Defendants, Mot. at 24-25, was not directed at a plaintiff's compliance with *Gingles* 1 and based on a set of facts – proven at trial – a universe away from those here. In fact, the Court found that plaintiffs in *LULAC* had met *Gingles* 1 as to the district in question.

Rather, the Court's discussion was directed at the *enacted* plan, which Texas asserted had cured any VRA problem with the creation of a majority Latino district that stretched from Austin to the Gulf of Mexico. *See id.* at 432-35. In this extraordinary context, supported by trial evidence, the Court ruled that the "practical consequence of drawing a district to cover two distant, disparate communities is that one or both groups will be unable to achieve their political goals," and rendered the district noncompact. *Id.* at 434. *LULAC*'s discussion of compactness in that context has no bearing on this case.

Finally, Defendants argue that "the Enacted Plan does a better job of preserving the core of the districts and preserving communities of interest than any of Plaintiffs' proposed maps." As the Supreme Court recently explained, "[T]his Court has never held that a State's adherence to a previously used districting plan can defeat a Section 2 claim. If that were the rule, a State could immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan." *Milligan*, 143 S. Ct. at 1505. And, even were it so that the enacted plans were "better" at core retention and preserving communities of interest – and, at worst, there is a dispute of fact on those issues – this Court does "not have to conduct a 'beauty contest[]' between plaintiffs' maps and the State's." *Id.* (citations omitted).

D. Plaintiffs are not seeking "maximization" of their political strength

Contrary to Defendants' argument, Mot. at 21 -22, there is no "maximization" issue raised by Plaintiffs' case. While the first *Gingles* precondition cannot be read "in effect to define dilution as a failure to maximize in the face of bloc voting. . . . ," *DeGrandy*, 512 U.S. at 1016, by that, the Court meant that Section 2 should not be used to increase the number of districts to the maximum that voters of color could achieve because "one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast." *Id.* at 1017 (providing an example of a hypothetical in which voters of color comprise 51% of the VAP and seek to increase their

representation to seven out of 10 districts). Here, Plaintiffs, who comprise approximately 40% of the VAP in San Juan County, merely seek two performing American Indian districts out of five. That is hardly "maximization."

E. Defendants' "proportionality" defense is irrelevant to its *Gingles* 1 motion, and to this case.

Defendants insert a self-styled "totality of the circumstances" argument into its motion, arguing that, because American Indians "have a majority of voting age population in two of five commission districts," a Section 2 claim is not actionable. Mot. at 24. Defendants are wrong both legally and factually.

First proportionality is a defense only under narrow circumstances: "where, in spite of continuing discrimination and racial bloc voting, minority voters form ***effective voting majorities*** in a number of districts roughly proportional to the minority voter' respective shares in the voting-age population. *DeGrandy*, 512 U.S. at 1000 (emphasis added). Even then, proportionality is not an absolute safe harbor. *Harvell v. Blytheville Sch. Dist. No.* 5, 71 F. 3d 1382, 1388 (8th Cir. 1995). "[T]he white majority has not right under Section 2 to ensure that a minority group has absolutely no opportunity to achieve greater than proportional representation in any given race." *Id.* at 1389.

In any event, as demonstrated throughout this brief, the relief Plaintiffs seek would grant them no more than the potential to obtain their proportional share – 40% – of the district seats. Further, there is, at a minimum, a triable issue of fact as to whether the Enacted Plan gives them that opportunity.

F. Defendants' Discretion in Redistricting Does Not Permit Them to Discriminate.

Finally, Defendants argue that the Board has broad discretion to draw its district lines. Mot. at 20-21. This discretion, however, is constrained by the VRA. Although the VRA does not require

the Board to "maximize" minority voting strength, it does require the creation of additional effective majority-minority districts when proof of the *Gingles* preconditions and the totality of the circumstances so dictate. That this entails consideration of race does not, as Defendants, argue violate Equal Protection. Rather, as the Supreme Court recently explained, "For the last four decades, this Court and the lower federal courts have repeatedly applied the effects test of § 2 as interpreted in *Gingles* and, under certain circumstances, have authorized race-based redistricting as a remedy for state districting maps that violate § 2. . . . We are not persuaded . . . that § 2 as interpreted in *Gingles* exceeds the remedial authority of Congress." *Milligan*, 143 S. Ct. at 1517.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court deny Defendants' Motion for Summary Judgment on *Gingles* 1.

Dated: July 25, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of July 2023, I filed the foregoing via the CM/ECF electronic filing system, causing a copy of the same to be served on all counsel of record.

/s/ Leon Howard
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