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

CHARLES WALEN, an individual, et al., Plaintiffs, v. DOUG BURGUM, in his official capacity as Governor of the State of North Dakota, et al., Defendants, and MANDAN, HIDATSA AND ARIKARA NATION, et al., Intervenor-Defendants.	Civil No. 1:22-cv-00031

INTERVENOR-DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Pursuant to Fed. R. Civ. P. 56 and L. Civ. R. 7(A)(1) and (2), Intervenor-Defendants the Mandan, Hidatsa, and Arikara Nation, Lisa Finley-DeVille, and Cesareo Alvarez ("Tribal Defendants") respectfully submit this memorandum in support of their motion for summary judgment.

INTRODUCTION

The Court should grant Tribal Defendants' motion for summary judgment. The undisputed facts show that Plaintiffs lack standing to assert racial gerrymandering claims, that race did not predominate in the creation of Subdistrict 4A, and that regardless, the Voting Rights Act ("VRA") required the drawing of Subdistrict 4A.

First, Plaintiffs lack standing for several reasons. Neither Plaintiff has standing to bring a racial gerrymander claim because both Plaintiffs testified that the only harm they experience from the redistricting plan is that they now vote for one dedicated state representative rather than two at-large representatives. That is the only "equal protection" harm they assert, and they specifically deny having any other objection to the map. That is not a racial gerrymandering injury, nor is it a violation of any state or federal law. Moreover, neither Plaintiff has standing to challenge Subdistrict 9A as a racial gerrymander because neither reside in Subdistrict 9A. Moreover, the injury Plaintiffs do allege is not redressable because the North Dakota Constitution expressly permits subdistricts, which satisfy the one-person, one-vote requirement by providing equal representational strength. Thus, this Court could not prohibit the drawing of subdistricts—even if it concluded these particular subdistricts were infirm.

Second, Tribal Defendants should be granted summary judgment because the undisputed facts show that race did not predominate in the drawing of Subdistrict 4A. Instead, the facts show that adherence to the political boundaries of the MHA Nation, respecting it as a community of

interest with unique representational needs in the Legislature, and compliance with traditional districting principles like compactness explain the district's boundaries. No record evidence supports the conclusion that race predominated and subordinated traditional districting principles.

Third, the undisputed facts show that Section 2 of the VRA requires the creation of Subdistrict 4A. As Tribal Defendants' expert Dr. Collingwood establishes, all three *Gingles* preconditions are met. Voting in District 4 is starkly racially polarized and, in each of thirty-four tested elections, white voters vote as a bloc to defeat Native American voters' candidates of choice. That pattern is even clearer when there is a Native American candidate. Moreover, the undisputed testimony of Dr. McCool and Dr. Magargal demonstrates that the Senate Factors considered as part of the totality of the circumstances analysis establish that Native American voters suffer from the effects of discrimination that make them unequal participants in the political process. Plaintiffs have not disclosed any expert witness to rebut the testimony of Tribal Defendants' experts, offer no evidence to dispute the same, and do not dispute that Section 2 requires the creation of Subdistrict 4A. Instead, Plaintiffs wrongly contend that it is too late to determine Section 2's obligations. When a legislature correctly determines that a district must be drawn to comply with the VRA, there is no legal basis for diluting minority votes by invalidating that district, regardless of what evidence the legislature considered. By contrast, where a state *erroneously* determines that such a district is necessary, courts have nonetheless created a safe harbor against liability for racial gerrymandering so long as the state can demonstrate it had "good reasons" to believe the district was necessary. But the safe harbor provision is merely a shield against liability for good faith error—not a weapon wielded to dilute minority votes.

Fourth, the undisputed evidence shows that, in any event, the Legislature had good reasons to believe that maintaining two at-large house seats in District 4 would violate Section 2. The

Legislature heard substantial testimony of racially polarized voting, as well as white-preferred candidates prevailing in District 4 by winning white precincts while losing the Native American precincts to Native American-preferred candidates. This testimony provided a strong basis in evidence for the Legislature's decision to create Subdistrict 4A.

STATEMENT OF UNDISPUTED FACTS

I. The Legislative Redistricting Process

The North Dakota Constitution governs the State's redistricting process and requires the Legislature to redraw state legislative district boundaries after every decennial census. N.D. Const. art. IV, § 2. Each legislative district elects one senator and two representatives to the North Dakota Legislature. *Id.*; N.D. Cent. Code § 54-03-01.5(2). The Constitution authorizes the Legislature to "provide for the election of senators at large and representatives at large or from subdistricts from those districts." N.D. Const. art. IV, § 2; *see also* N.D. Cent. Code § 54-03-01.5(2).

Legislative redistricting for this cycle began in North Dakota following the 2020 U.S. Census. In 2021, the Legislature created the Legislative Council Redistricting Committee (the "Committee"), a subcommittee of the Legislature comprised of eight House representatives, including the Chairman, and eight senators, including the Vice Chairman. H.B. 1397, 67th Leg., Reg. Sess. (N.D. 2021). Pursuant to H.B. 1397, the Committee was required to enact districts that are "compact and contiguous," and "conform to all constitutional requirements with respect to population equality." *Id.* The Committee was authorized to "adopt additional constitutionally recognized redistricting guidelines and principles to implement in preparing a legislative redistricting plan for submission to the legislative assembly." *Id.*

The Committee was trained on impermissible racial gerrymandering and traditional redistricting principles, including preservation of political subdivision boundaries and

communities of interest. Ex. 1 at 10 (Redistricting History Memorandum); Ex. 2 at 14, 17, 18 (Legislative Council Presentation, Aug. 2021); Ex. 3 at 23-25, 36-39 (NCSL Presentation). The training covered the particulars of the law, including United States Supreme Court decisions *Shaw v. Reno*, 509 U.S. 630 (1993), Ex. 1 at 9 (Redistricting History Memorandum), Ex. 2 at 17 (Legislative Council Presentation, Aug. 2021); Ex. 3 at 23, (NCSL Presentation); and *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), Ex. 2 at 14 (Legislative Council Presentation, Aug. 2021). The Committee was even given a flowchart to use to determine whether its districts would survive an Equal Protection claim. Ex. 3 at 24 (NCSL Presentation). The training provided in September 2021 also addressed the Voting Rights Act, how to remedy past discrimination, when a remedy is sufficiently narrowly tailored, and what the *Gingles* preconditions and Senate Factors are. Ex. 4 (Legislative Council Presentation, Sept. 2021).

The Committee considered a variety of factors in enacting the 2021 plan, including population deviation, and the preservation of political boundaries, existing districts, and communities of interest. *See* Ex. 5 at 28-29 (Final Redistricting Committee Report). The Committee heard testimony from several individuals regarding "the growth of Native American populations in North Dakota" and the necessity of creating "subdistricts for Native American voters to comply with the federal Voting Rights Act and prevent dilution of votes cast by Native Americans." *Id*. at 29. The Committee further heard testimony about the "history of discrimination in North Dakota against Native Americans" and "a history of racial bloc voting [that] has prevented Native Americans from electing their candidates of choice." *Id*. The Committee heard about a previous VRA challenge seeking to establish a subdistrict in District 4, which was defeated because there was not a sufficiently large Native American population, and considered population data showing that, by contrast, in 2020, "the American Indian population[] on the Fort Berthold

Reservation . . . exceeded 4,145, the number required to constitute a majority of a House subdistrict with the ideal population size of 8,288." *Id*. The Committee explicitly considered whether the creation of a subdistrict in District 4 "might prevent a possible dilution of Native Americans' votes, provide communities of interest an opportunity to select their candidates of choice, and potentially stave off a court challenge to the redistricting map for which the committee had worked in an honest and transparent manner." *Id*. at 30.

II. Tribal Defendants

A. The Mandan, Hidatsa, and Arikara Nation

The Mandan, Hidatsa, and Arikara Nation ("MHA Nation"), also known as the Three Affiliated Tribes, is a federally recognized tribe located on the Fort Berthold Reservation. Ex. 6 ¶¶ 1-2 (Fox Decl.). The Reservation is located wholly within the state of North Dakota, 87 Fed. Reg. 4636 (Jan. 28, 2022), and is defined as "Indian Country" under 18 U.S.C. § 1151. MHA has over 17,000 enrolled members. *Id*. ¶ 3. MHA's principal governing body consists of a six-member Tribal Business Council and a Tribal Chairman. Three Affiliated Tribes of the Fort Berthold Reservation Const. art. III, §§ 1-2. MHA Nation is responsible for promoting and protecting the interests of its members as well as its own interests as a sovereign government. *Id.* art. VI, § 5; Ex. 6 ¶¶ 18-26 (Fox Decl.).

The political borders of the Fort Berthold Reservation have important legal implications related to MHA's governing authority, including its power to enforce its Constitution and Tribal Code within its boundaries. *Id*. ¶ 8. Moreover, the Fort Berthold Reservation is a community of interest with shared economic, cultural, language, and other interests. *Id*. ¶¶ 19-26. MHA's unique status has implications for the ways its members access governmental services, including healthcare, emergency response services, education, and housing support. *Id*. ¶ 20. MHA's

members have a unique relationship with the Missouri River, and MHA and its members share common economic and regulatory interests arising from the Bakken Oil Formation, which has important reservoirs below the Fort Berthold Reservation. *Id*. ¶¶ 23-25. These shared interests, relationships, and concerns make Fort Berthold a unique community of interest. *Id*. ¶ 26.

To ensure its members have an equal opportunity to elect their candidates of choice to the North Dakota Legislature, the MHA Nation expended considerable time and effort during the redistricting process to advocate for legislative maps that comply with Section 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301. *Id*. ¶¶ 15-18. This effort was ultimately successful but is directly threatened by Plaintiffs' attempt to eliminate Subdistrict 4A. *Id*. ¶¶ 17-18. Indeed, the elimination of Subdistrict 4A, as sought by Plaintiffs, would unlawfully deprive members of the MHA Nation, including the individual Tribal Defendants, of the opportunity to elect their candidate of choice to the state House. *Id*. ¶ 27.

B. Lisa Finley-DeVille

Lisa Finley-DeVille is Native American and a citizen of MHA Nation. Ex. 7 ¶ 1(Finley-DeVille Decl.). Ms. Finley-DeVille resides on the Fort Berthold Reservation in the town of Mandaree, within Senate District 4 and House Subdistrict 4A. *Id*. ¶¶ 2-3. She has lived at her residence for twelve years and on the Fort Berthold Reservation for 47 years. *Id*. ¶ 2. She regularly votes in North Dakota elections, voted in 2022, and intends to vote in future elections. *Id*. ¶ 3.

In November 2022, Ms. Finley-DeVille was elected as the state representative for District 4A, defeating incumbent Representative Terry Jones by a margin of 69% to 31%. *Id*. ¶ 5; Ex. 8 at 1-2 (Collingwood Report). She had previously run for the state senate from District 4 in 2020, losing to Jordan Kannianen by a margin of 67.8% to 32.1%. Ex. 7 ¶ 7 (Finley-DeVille Decl.); Ex. 9 (2020 Election Results). The elimination of Subdistrict 4A, as sought by Plaintiffs, would deprive

Ms. Finley-DeVille of the district in which she has been elected to serve in the state house, as well as the opportunity to elect her candidate of choice to the state house. *Id*. ¶¶ 4, 7.

C. Cesareo Alvarez

Cesareo Alvarez is Native American and a citizen of MHA Nation. Ex. 10 ¶ 1 (Alvarez Decl.) Mr. Alvarez resides on the Fort Berthold Reservation, within state Senate District 4 and House Subdistrict 4A. *Id*. ¶¶ 1-3. He has lived at his current residence for the last seven years and on the Fort Berthold Reservation for twenty-five years. *Id*. ¶ 2 He regularly votes in North Dakota elections, voted in 2022, and intends to vote in future elections. *Id*. ¶ 3. Mr. Alvarez ran for the state house in District 4 in 2016 but placed fourth with 23.3% of the vote. Ex. 11 (2016 Election Results); Ex. 10 ¶ 5 (Alvarez Decl.). Eliminating Subdistrict 4A would deprive Mr. Alvarez of the opportunity to elect his candidate of choice to the state House. Ex. 10 ¶ 4 (Alvarez Decl.).

D. Tribal Defendants' Participation in the Legislative Redistricting Process

Throughout the redistricting process, the Committee received testimony from tribal leaders, tribal members, and experts regarding the need to provide a subdistrict for the MHA Nation. Chairman Mark N. Fox of the MHA Nation testified in person and in writing to the Committee. Ex. 12 (Fox Testimony, Sept. 23, 2021). He testified that the MHA Nation is a community of interest with "a distinct political status that legally distinguishes them from other minority populations." *Id.* at 2. He also testified in support of subdistricts before the Tribal and State Relations Committee, particularly emphasizing the unique economic interests and corresponding representational needs of Fort Berthold and the MHA Nation. *See* Ex. 13 at 31:13-35:7 (Aug. 31, 2021 Tribal and State Relations Comm. Hr'g Tr.).

Chairman Fox also presented detailed testimony to the Committee concerning the population numbers of the proposed subdistrict, the benefits to the MHA Nation of a subdistrict,

id., application of the *Gingles* factors to District 4 and the proposed subdistrict, and his personal experience of the "[p]roven history of bloc voting" that had prevented Native American candidates from being elected in races decided by the full District 4. Ex. 14 (Fox Testimony, Sept. 29, 2021).

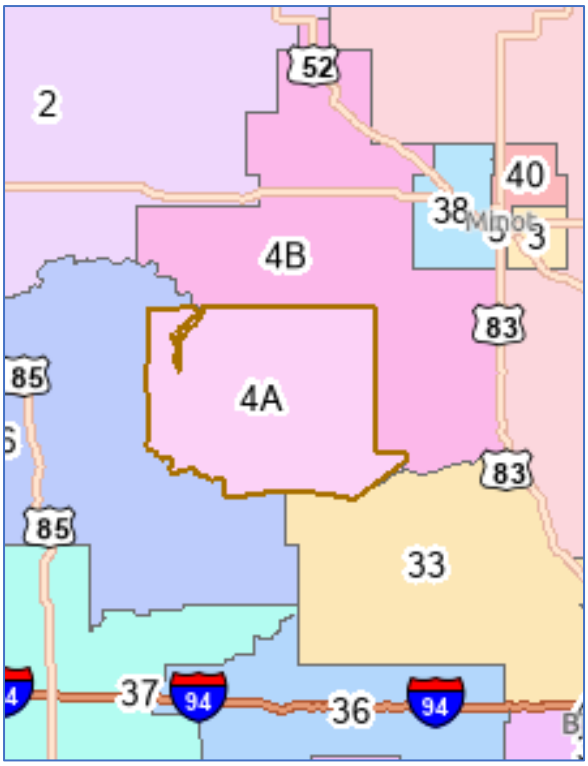
Tribal Defendant Lisa Finley-DeVille, an MHA citizen, also testified before the Committee, and provided detailed demographic information related to the MHA Nation Ex. 15 (Finley-DeVille Testimony). The Executive Director of North Dakota Native Vote, Nicole Donaghy, who is a descendant of the MHA people, advocated for the Committee "to adopt single-member House districts to prevent the dilution of Native American votes." Ex. 16 (Donaghy Testimony). She testified that "Tribes and tribal members in North Dakota have had to fight for the right to vote, whether by defeating voter I.D. laws, opposing district lines that dilute the Native American vote, or by demanding on reservation polling locations." *Id*. Rick Gion, director of North Dakota Voters First, also testified. Ex. 17 (Gion Testimony). He asked the Committee to consider subdistricts for the state house to improve representation for Native American voters, and to ensure everyone's vote matters by creating districts where "existing boundaries are respected, and communities of interest are represented." *Id.*

This testimony was consistent with the Legislature's prior treatment of the Fort Berthold Reservation as an important political subdivision and community of interest within the State. During the previous redistricting cycle in 2011, the Legislature split three counties in order to keep preserve the boundaries of the Fort Berthold Reservation and keep the Reservation intact. Ex. 1 at 6 (Redistricting History Memorandum).

III. Senate District 4 and House Subdistrict 4A

On November 11, 2021, Governor Burgum signed House Bill 1504 into law. Journal of the House – Special Session at 2306, 67th Leg. (N.D. Nov. 12, 2021). The enacted plan created two

House subdistricts, 4A and 4B, within Senate District 4. N.D. Cent. Code § 54-03-01.14. The boundaries of House Subdistrict 4A mirror the boundaries of the Fort Berthold Reservation, which is home to the MHA Nation. *Id.* § 54-03-01.14(4)(a) ("District 4A consists of those portions of Dunn County, McKenzie County, McLean County, Mercer County, Mountrail County, and Ward County within the Fort Berthold reservation."). The map is shown below.[1]



Subdistrict 4A has a Native American Voting Age Population ("VAP") of 67.2%, and "scores very high on measures of compactness." Ex. 8 at 3 (Collingwood Report). Voting in District 4 is racially polarized, with Native American voters cohesively preferring the same candidates for political office in District 4 while white voters cohesively prefer a different set of candidates. *Id.* at 1, 8-14. The evidence of racially polarized voting is particularly strong in races featuring Native American candidates. *Id.* at 1, 8, 12-13.

[1] N.D. Legislative Branch, 2023-2032 Legislative Districts, https://www.ndlegis.gov/districts/2023-2032.

Within District 4 as a whole, white bloc voting prevents Native American voters from electing their candidate of choice in 34 out of 34 electoral contests, a 100% block rate. *Id.* at 14-21. Subdistrict 4A overcomes this white bloc voting, with election results showing that within Subdistrict 4A's boundaries, Native American voters are able to elect their candidate of choice in 97% of electoral contests. *Id*. Representative Finley-DeVille was elected to the Legislature representing Subdistrict 4A in the November 2022 election. *Id*. at 1.

During the 2021 Redistricting Process, Chairman Fox testified about the existence of racially polarized voting in District 4. Specifically, he testified that "[A] [p]roven history of bloc voting occurred on the Fort Berthold Reservation in the city of Parshall, e.g. Parshall School Board . . . Additional examples include two other tribal members running for the State House in 2020 and 2016, respectively. Both candidates . . . easily won the precincts on the reservation but lost in the overall election." Ex. 18 at 35 (McCool Report). Ms. Finley-DeVille also testified to her personal experiences with white bloc voting in District 4. Ex. 15 (Finley-DeVille Testimony).

IV. Native American Voters' Opportunity to Elect State House Candidates

Tribal Defendants' experts present comprehensive and undisputed evidence related to the factors identified by the U.S. Senate that bear on Native American voters' opportunity to elect candidates of their choice in District 4. *See* Ex. 8 (Collingwood Report); Ex. 18 (McCool Report); Ex. 19 (Magargal Report). Examining 196 written sources, dozens of interviews and a large volume of U.S. Census data, Tribal Defendants' expert Dr. Daniel McCool comprehensively analyzes the extent to which the Senate factors are present in North Dakota and the Fort Berthold Indian Reservation and how the Legislature's configuration of its districts affect those factors. *See* Ex. 18 at 5 (McCool Report). Dr. McCool concludes that while the presence of the Senate factors, "have characterized the relationship between Native Americans and the state of North Dakota for

an extended period of time," the "creation of Sub-District 4A on the Fort Berthold Reservation is a stark exception . . . it was clearly a response by the legislature to provide members of the MHA Nation with an equal opportunity to elect candidates of their choice." *Id*. at 82.

Using quantitative socioeconomic methods from the 2017-2021 five-year American Community Survey to compare data between the American Indian and Alaska Native ("AIAN") and White population for Senate Factor five, Tribal Defendants' expert Dr. Kate Magargal concludes that there are "systemic" race-based disparities between Native American and White populations. *See* Ex. 19 at 1-3 (Magargal Report). And Dr. Loren Collingwood uses quantitative analysis to demonstrate that elections in District 4 are racially polarized. *See* Ex. 8 (Collingwood Report). Plaintiffs have not disclosed any expert testimony or evidence to rebut these findings.

IV. Plaintiffs Charles Walen and Paul Henderson

A. Charles Walen

Charles Walen is a resident of New Town, in Mountrail County North Dakota. Ex. 20 at 14:24-15:2 (Walen Dep.). He resides in Legislative District 4 and Subdistrict 4A. *Id*. at 15:16-23. Mr. Walen is a member of the North Dakota Republican Party and serves as the District Chair for District 4 as well as the Northwest Regional Chair. *Id.* at 16:13-17:8. He initiated this lawsuit in coordination with other members of the Republican Party in District 4, including former Republican House Representative for District 4 Terry Jones, current Republican State Senator for District 4 Jordan Kannianen, current Republican Representative for House District 4B Clayton Fegley, and Republican Party member Jay Sandstrom. *Id.* at 13:2-23, 18:14-19:9, 21:10-22:5. Both during and after the legislative redistricting process, Mr. Walen discussed with these individuals the potential for legal action to preserve District 4 as a two-member at-large House district in the event the Legislature adopted subdistricts for District 4. *Id.* at 13:2-23, 18:14-19:9, 21:10-22:5,

29:11-32:10. In coordination with this group, Mr. Walen was selected as a plaintiff to challenge Legislative Subdistrict 4A. *Id.* at 13:2-23, 18:14-19:9, 21:10-22:5. Mr. Walen testified that the only unequal treatment he has suffered under the challenged plan is that he is now represented by just one person elected from House District 4A instead of by two Republicans elected from House District 4. *Id.* at 23:4-24:5. He identified no other harm imposed as a result of the plan. *Id.*

B. Paul Henderson

Paul Henderson resides near Glen Isle Township, North Dakota in Cavalier County. Ex. 21 at 12:10-18; 13:22-14:3 (Henderson Dep.). He is a member of the Republican Party and served as the party Chairman for District 10 for approximately nine years. *Id.* at 13:1-9. Mr. Henderson currently resides in Senate District 9 and Subdistrict 9B. *Id.* 27:24-28:1. He was recruited to be a plaintiff by former Republican Representative for District 4, Terry Jones. *Id*. 25:12-26:20. Mr. Henderson testified that his only objection to the challenged plan is that he votes to elect just one House representative whereas voters in other Districts vote to elect two House representatives. *Id.* at 28:3-29:6. He further testified that the redistricting plan does not impact him in any way other than that he casts a ballot for just one House Representative. *Id.* at 29:11-17.

PROCEDURAL HISTORY

Plaintiffs filed this suit on February 16, 2022, alleging that the Legislative Assembly created Subdistricts 4A and 9A "solely on the basis of race and for the purpose of complying with the Voting Rights Act of 1965." Compl. ¶ 3, ECF 1. Plaintiffs subsequently moved for a preliminary injunction on March 4, 2022, seeking to prevent Defendants from holding elections under the enacted plan. Mem. in Supp. of Mot. for Prelim. Inj., ECF 12. On March 30, 2022, the MHA Nation and individual voters Ms. Finley-DeVille and Mr. Alvarez moved to intervene to defend the Legislative Assembly's enactment of Subdistrict 4A. Mot. to Intervene, ECF 16.

This Court denied Plaintiffs' motion for a preliminary injunction on the grounds that Plaintiffs were unlikely to succeed on the merits of their claim that race predominated in the drawing of the Subdistricts. Order at 8, ECF 37. The Court also questioned whether Plaintiffs had demonstrated the requisite injury necessary to sustain their claim, noting that Plaintiffs did not allege any harm based on racial discrimination, but rather complained solely of the loss of multimember house representation. *Id*. at 8-9.

LEGAL STANDARD

"Summary judgment is proper if 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *R.A.D. Servs. LLC v. State Farm Fire & Cas. Co.*, -- F. 4th --, 2023 WL 1875088 at *3 (8th Cir. Feb. 10, 2023) (quoting Fed. R. Civ. P. 56(a)). To defeat summary judgment, "the nonmovant must do more than simply show that there is some metaphysical doubt as to the material facts, and must come forward with specific facts showing that there is a genuine issue for trial." *Id*. (quoting *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc)). "At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotation marks omitted).

ARGUMENT

I. Plaintiffs Lack Standing

Standing "is, at its core, a constitutionally mandated prerequisite for federal jurisdiction and an essential and unchanging part of the case-or-controversy requirement of Article III."

Mausolf v. Babbitt, 85 F.3d 1295, 1301 (8th Cir. 1996) (internal quotation marks omitted). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "To establish Article III standing, a party invoking federal jurisdiction must show (1) that the plaintiff suffered an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) that a favorable decision will likely redress the injury." *Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 997 (8th Cir. 2022).

A. Plaintiffs Have Not Shown Any Cognizable Injury

Neither Plaintiff has offered any evidence of injury tied to their claim of racial gerrymandering. The "nature of the harms that underlie a racial gerrymandering claim . . . are personal. They include being 'personally subjected to a racial classification," as well as being represented by a legislator who believes his 'primary obligation is to represent only the members of a particular racial group." *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015) (quoting *Shaw*, 509 U.S. at 648). Both Plaintiffs testified that the only harm they suffered as a result of the plan was that they now vote for a single subdistrict House member instead of two at-large House members. Ex. 21 at 28:5-29:17 (Henderson Dep.); Ex. 20 (Walen Dep.) 23:4-24:1. Both have disclaimed any other injury arising from the challenged plan, with Mr. Walen testifying that the "sole reason" he would like the subdistrict removed is to allow him two representatives in the House. *Id*. Because neither Plaintiff actually asserts an injury based on racial classification, they lack standing to bring a racial gerrymandering claim.

Furthermore, Plaintiff Henderson lacks standing to challenge either Subdistrict 4A or Subdistrict 9A.[2] "[A] plaintiff who alleges that he is the object of a racial gerrymander—a drawing

[2] The Court cannot proceed on the merits claims unless it first determines that it has jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)). Although Tribal Defendants intervened solely for the purpose of defending Subdistrict 4A, the court's subject

of district lines on the basis of race—has standing to assert only that his own district has been so gerrymandered." *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018). Thus, "[a] plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, 'assert[s] only a generalized grievance against governmental conduct of which he or she does not approve.'" *Id.* (quoting *United States v. Hays*, 515 U.S. 737, 744–745 (1995)). A plaintiff who lives outside the district being challenged therefore "lacks standing absent specific evidence that he personally has been subjected to a racial classification." *Shaw v. Hunt*, 517 U.S. 899, 904 (1996).

Plaintiff Henderson lives in Subdistrict 9B. Ex. 21 at 27:24-28:2 (Henderson Dep.). While the complaint alleges that Subdistricts 4A and 9A were drawn predominantly based on race to create majority-Native American districts, Mr. Henderson does not live in those Subdistricts and has not made any allegation or provided any evidence that the borders of Subdistrict 9B were drawn predominantly based on race, nor that he was included in Subdistrict 9B on account of his race. Because Mr. Henderson has offered no evidence that he has suffered any race-based classification or harm from being placed in subdistrict 9B, he lacks standing to bring a racial gerrymandering claim as to any other district.

Finally, under North Dakota law, Plaintiffs do not have a right to multimember representation in the North Dakota House. Rather, House subdistricts are explicitly authorized by both the North Dakota Constitution and by statute. *See* N.D. Const. art. IV, § 2; N.D. Cent. Code Ann. § 54-03-01.5(2) ("Representatives may be elected at large or from subdistricts."). Because

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matter jurisdiction "may be raised by a party, or by a court on its own initiative, at any stage of the litigation." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006). The Tribal Defendants thus raise that Plaintiffs lack standing to challenge either Subdistrict. Moreover, the Tribal Defendants note that Plaintiffs' challenge to Subdistrict 9A may become moot if the plaintiffs in *Turtle Mountain v. Howe*, No. 3:22-cv-00022, prevail in their Section 2 challenge. That case is scheduled for trial in June, and if plaintiffs in that case succeed, the challenged subdistrict will no longer exist.

the creation of subdistricts is entirely within the discretion of the Legislature, Plaintiffs have not alleged any legally protected interest. *See Noem v. Haaland*, 41 F.4th 1013, 1018 (8th Cir. 2022) (finding plaintiff lacked standing to sue the federal government to vindicate right to shoot off fireworks at Mount Rushmore because "[n]obody has a right to shoot off fireworks on someone else's land, whether it be a neighbor; an area business; or as is the case here, a national park"). *See also Barhoumi v. Obama*, 234 F. Supp. 3d 84, 86 (D.D.C. 2017) ("an interest is not 'legally protected' or cognizable for the purpose of establishing standing when its asserted legal source—whether constitutional, statutory, common law or otherwise—does not apply or does not exist."); *Arjay Assocs., Inc. v. Bush*, 891 F.2d 894, 898 (Fed. Cir. 1989) ("We hold that appellants lack standing because the injury they assert is to a nonexistent right); *Kuntz v. Dep't of Justice*, No. 1:16-cv-70, 2020 WL 6322858 at *6 (D.N.D. Mar. 6, 2020) (applying *Barhoumi* and *Arjay* in finding plaintiff lacked standing where the interest asserted had no basis in constitutional, statutory, or case law), *report and recommendation adopted* 2020 WL 6324341 (D.N.D. Mar. 24, 2020). Plaintiffs' suit is in essence an effort to bootstrap a challenge to North Dakota's state laws authorizing subdistricts into a racial gerrymandering claim, but by their own testimony Plaintiffs do not suffer from the constitutional harms necessary to give them standing in federal court.

B. Plaintiffs' Injury Is Not Redressable by the Relief Requested

Even to the extent Plaintiffs' purported injury is traceable to the challenged subdistricts, it is not redressable by this Court because Plaintiffs have failed to challenge the North Dakota constitutional and statutory provisions explicitly authorizing the creation of subdistricts.[3] *See*

[3] Nor would such a challenge succeed. Subdistricts do not violate the one-person, one-vote principle—the ratio of voters to representatives is the same in a subdistrict as it is in an at-large district. *See White v. Regester*, 412 U.S. 755, 765 (1973) ("Plainly, under our cases, multimember districts are not per se unconstitutional, nor are they necessarily unconstitutional when used in

Arizonans for Fair Elections v. Hobbs, 454 F. Supp. 3d 910 (D. Ariz. 2020) (finding claim unredressable where plaintiffs failed to challenge the state laws governing the state action they sought to enjoin). As such, nothing prevents either the Legislature or this Court from placing Plaintiffs into lawfully drawn subdistricts in any remedial plan.

Redressability "requires us to examine the 'causal connection between the alleged injury and the judicial relief requested." *Sch. of the Ozarks*, 41 F.4th at 1001 (quoting *Allen v. Wright*, 468 U.S. 737, 753 n. 19 (1984). Plaintiffs must demonstrate that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561. "If, however, a favorable judicial decision would not require the defendant to redress the plaintiff's claimed injury, the plaintiff cannot demonstrate redressability." *M.S. v. Brown*, 902 F.3d 1076, 1073 (9th Cir. 2018). Thus, even if the court "assume[s] for the sake of the analysis," *Sch. of the Ozarks*, 41 F.4th at 1001, that Plaintiffs have a right to multimember representation—they do not—Plaintiffs must nonetheless demonstrate that "the requested relief would eliminate" their harm. *Id*.

Particularly with respect to District 4, Plaintiffs have not demonstrated that the relief requested—enjoining Defendants from implementing the Subdistricts as enacted by the 2021 Legislature—is likely to further their interest in multimember representation. If the Court finds the challenged plan unlawful, it must provide the Legislature the opportunity to enact a remedial plan, or alternatively order a remedial plan be put in place. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (holding that courts should "afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure"). Because there is no dispute that Subdistrict 4A is necessary to comply with the VRA, *see generally* Pls.' Mem. in Support of Mot.

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combination with single-member districts in other parts of the State."); *see also Larios v. Perdue*, 306 F. Supp. 2d 1190, 1208 (N.D. Ga. 2003).

for Summ. J., ECF 99, it is substantially likely that any remedial plan will require the creation of a subdistrict in District 4. Plaintiffs cannot claim it is likely that either the Legislature or this Court will remedy their alleged harm by unlawfully denying Native voters in District 4 the opportunity to elect candidates of their choice to the House.[4] As such, Plaintiffs have failed to demonstrate how the vindication of their claim would redress their alleged injury rather simply ensure its continuation. *See e.g.*, *Noem*, 41 F.4th at 1017-18 (finding claim nonredressable where relief requested would not make it "easier[] for [plaintiff] to remedy its claimed injury.").

II. Race Did Not Predominate in the Drawing of Subdistrict District 4A

The undisputed facts show that race did not predominate the Legislature's drawing of Subdistrict 4A. To succeed on a racial gerrymandering claim, a plaintiff must establish that race was not "simply . . . 'a motivation for the drawing of a majority-minority district,' but 'the *predominant factor*.'" *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (quoting *Bush v. Vera*, 517 U.S. 952, 959 (1996) (emphasis in original); *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999)); *see also Miller v. Johnson*, 515 U.S. 900, 916 (1995) (holding that plaintiffs in a racial gerrymandering case must prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."). In other words, "[p]laintiffs must show that a facially neutral law 'is unexplainable on grounds other than race.'" *Easley*, 532 U.S. at 241–42 (quoting *Hunt*, 526 U.S. at 546); *see also Harvell v. Blytheville Sch. Dist. No. 5*, 126 F.3d 1038, 1041 (8th Cir. 1997) ("Where traditional districting principles such as . . . respect for political subdivisions or communities with actual shared interests have not been subordinated to race, there is no equal protection violation.").

[4] This is particularly so given that such a plan would almost certainly draw a legal challenge compelling a subdistrict be drawn.

The evidentiary burden on Plaintiffs is a "'demanding one,'" and it requires more than bare allegations that the Legislature considered the racial composition of the challenged district or that it acted in response to concerns about potential litigation. Order at 5, ECF 37 (quoting *Easley*, 532 U.S. at 241); *Cooper v. Harris*, 581 U.S. 285, 292 (2017); *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015). The Supreme Court has consistently emphasized that a legislature "'must have discretion to exercise the political judgment necessary to balance competing interests,' and courts must 'exercise *extraordinary caution* in adjudicating claims that a State has drawn district lines on the basis of race.'" *Easley*, 532 U.S. at 242 (quoting *Miller*, 515 U.S. at 916) (emphasis in original). "[T]hose who claim that a legislature has improperly used race as a criterion, in order, for example, to create a majority-minority district, must show at a minimum that the 'legislature subordinated traditional race-neutral districting principles . . . to racial considerations.'" *Id.* at 241 (quoting *Miller*, 515 U.S. at 916). In making their showing, Plaintiffs must put forth "either 'circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose.'" Order at 5, ECF 37 (quoting *Miller*, 515 U.S. at 916). The undisputed evidence confirms that race did not predominate in drawing Subdistrict 4A.

Subdistrict 4A follows traditional, race-neutral redistricting principles, as this Court found. *See* Order at 6, ECF 37. Subdistrict 4A is compact, contiguous, respects the political boundaries MHA Nation, and preserves the Fort Berthold Reservation as a community of interest. *Id.*; *see also Miller*, 515 U.S. at 916 (finding that compactness, contiguity, and respect for political subdivisions and communities of interest are traditional redistricting principles). The drawing of Subdistrict 4A is "consistent with preserving 'political subdivisions [and] communities defined by actual shared interests.'" Order at 6 (quoting *Miller*, 515 U.S. at 916). Preservation of political boundaries and communities of interest are traditional redistricting principles, which the North Dakota Legislature

has consistently applied, including in 2021. Ex. 5 at 21-23 (Final Redistricting Committee Report) (describing the Legislature's commitment to preserving political subdivisions during previous redistricting processes); *id.* at 28-30 (listing preservation of political subdivisions, communities of interest, and Reservations as considerations during the 2021 process).

Subdistrict 4A follows the political, not racial, boundaries of the MHA Nation. *See* Ex. 6 ¶ 7-10 (Fox Decl.); N.D. Cent. Code § 54-03-01.14. MHA Nation is a sovereign nation, governed by a constitution and tribal code, that maintains government-to-government relationships with the United States, State of North Dakota, local governments, and other Native Nations. *See, e.g.*, Three Affiliated Tribes of the Fort Berthold Reservation Const. art. VI (describing the powers of the MHA Nation and its Tribal Business Council); 88 Fed. Reg. 2112 (Jan. 12, 2023) (noting that the MHA Nation is "recognized to have the immunities and privileges available to federally recognized Indian Tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations, and obligations of such Indian Tribes").

The boundaries of the Fort Berthold Reservation represent the jurisdictional and political boundaries of the MHA Nation. *See* Ex. 6 ¶ 7-8 (Fox Decl.); Three Affiliated Tribes of the Fort Berthold Reservation Const. art. I; Act of March 2, 1891, 26 Stat. 1032; Act of June 1, 1910, 36 Stat. 455; Executive Order of June 17, 1892; *City of New Town v. United States*, 454 F.2d 121, 127 (8th Cir. 1972) (confirming the political boundaries of the Fort Berthold Reservation); *Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation*, 27 F.3d 1294, 1297 (8th Cir. 1994) (same); *United States v. Bear*, 844 F.3d 981, 983 (8th Cir. 2016) (affirming *New Town* and *Duncan Energy*); 18 U.S.C. § 1151 (defining Indian Country). These borders distinguish the Reservation from counties and other political boundaries within the State. *See United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021) ("Long ago we described Indian tribes as 'distinct,

independent political communities' exercising sovereign authority."). The MHA Nation, through the Tribal Business Council and Tribal Court, has the authority to enforce the Tribal Code and adjudicate civil disputes arising from events within the Fort Berthold Reservation. *See* Three Affiliated Tribes of the Fort Berthold Reservation Const. art. I (Jurisdiction), III (Governing Body), VI (Powers); Tribal Code of the Three Affiliated Tribes of the Fort Berthold Reservation, Title I (establishing the MHA Nation Tribal Court). Its members enjoy a distinct political status that includes the right to vote in tribal elections and participate in certain tribally and federally operated programs. *See, e.g.*, Ex. 6 ¶ 9-10 (Fox Decl.); Three Affiliated Tribes of the Fort Berthold Reservation Const. art. IV, § 2(a). Following the political boundaries of the MHA Nation is consistent with the traditional redistricting principle of preserving political boundaries.

Respecting the boundaries of the Fort Berthold Reservation is also consistent with preserving the MHA Nation as a community of interest. Order at 6, ECF 37; Ex. 6 ¶ 19-26 (Fox Decl.); Ex. 12 (Fox Testimony, Sept. 23, 2021); Ex. 15 (Finley-DeVille Testimony); Ex. 16 (Donaghy Testimony). MHA Citizens living on the Fort Berthold Reservation share common economic, cultural, language, demographic, and social interests that are distinct from the surrounding populations. Ex. 6 ¶ 19-22 (Fox Decl.). MHA Tribal Members are likewise unified by their unique relationship with the United States government and their status as citizens of the United States and North Dakota, as well as citizens of the MHA Nation, which impacts the ways in which Tribal Members access certain government services, including healthcare, emergency response services, education, and housing support. *Id.* ¶ 20. These shared interests give rise to common needs when it comes to social services and other governmental programs and objectives of Tribal, Federal, State, and local governments. *Id.* ¶ 22. MHA Citizens living on the Fort Berthold Reservation likewise share a common relationship with the Missouri River that is unique from

residents in surrounding areas. *Id.* ¶¶ 23-24. The Missouri River is critical to the MHA Nation for subsistence, transportation, economy, culture, and religious practices. *Id.* ¶¶ 23-24. U.S. Dep't of Int., Office of the Solicitor, M-37073, Opinion Regarding the Status of Mineral Ownership Underlying the Missouri River Within the Boundaries of the Fort Berthold Reservation (North Dakota) (2022). Residents of the Fort Berthold Reservation are further united in their economic and regulatory interests due to the significant reservoirs of the Bakken Oil Formation located beneath the Reservation. Ex. 6 ¶ 25 (Fox Decl.). Given the significant common interests shared by MHA Citizens and residents of the Fort Berthold Reservation, the drawing of Subdistrict 4A to mirror the Reservation's borders aligns with the goal of respecting communities of interest. Subdistrict 4A is also contiguous, highly compact, and deviates less than one percent from the ideal subdistrict population. *See* Order at 6, ECF 37 (finding Subdistrict 4A "facially compact and contiguous"); Ex. 8 at 3 (Collingwood Report) ("[Subdistrict 4A] scores very high on measures of compactness."). Plaintiffs do not dispute any of this evidence.

As such, the undisputed facts demonstrate that race did not predominate in creating Subdistrict 4A. Rather, the Legislature drew the Subdistrict to align with the sovereign boundaries of the MHA Nation, respecting the Tribe's political boundaries and preserving the Reservation as a community of interest. The result is a compact and contiguous district with an almost perfect population count. The Legislature's awareness of race in this process does not undermine these conclusions. The Court should grant Tribal Defendants' motion for summary judgment.

III. Subdistrict 4A is Narrowly Tailored to Serve the State's Compelling Interest in Complying with Section 2 of the VRA

Even if Plaintiffs could show that race predominated in drawing Subdistrict 4A—they cannot—the enactment of Subdistrict 4A is nonetheless constitutional. A redistricting plan that "expressly distinguishes among citizens because of their race" complies with the Fourteenth

Amendment so long as it is "narrowly tailored to further a compelling governmental interest." *Shaw*, 509 U.S. at 643. Compliance with Section 2 of the VRA is a compelling interest. *See Cooper v. Harris*, 581 U.S. 285, 292 (2017). And the undisputed evidence demonstrates that Subdistrict 4A is necessary to comply with Section 2. Thus, Subdistrict 4A is narrowly tailored to accomplish the State's compelling interest in meeting its statutory requirements.

Although Plaintiffs have not put forward any evidence to dispute that Section 2 requires the creation of Subdistrict 4A, they nonetheless demand that the Court dismantle the district and dilute the votes of Native voters in District 4. In so doing, Plaintiffs misconstrue Supreme Court precedent creating a safe harbor for states that engage in race-based districting in a mistaken but good faith attempt to comply with the VRA. *See Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015) (finding that narrow tailoring "does not demand that a State's actions *actually be necessary* to achieve a compelling state interest in order to be constitutionally valid" but rather only that "they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance.") (emphasis added). Where, as here, the challenged district *is* actually necessary to comply with the VRA, the safe harbor provision simply does not apply. Regardless, even if the safe harbor test applied to districts that *are* necessary to comply with the VRA, the undisputed evidence demonstrates that the Legislature had good reason to believe Subdistrict 4A was necessary to comply with Section 2.

A. Subdistrict 4A Is Necessary to Comply with Section 2 of the VRA

Subdistrict 4A is necessary to comply with Section 2 of the VRA. Section 2 "prohibits any 'standard, practice, or procedure' that 'results in a denial or abridgement of the right ... to vote on account of race.'" *Cooper*, 581 U.S. at 292 (alteration in original) (citing 52 U.S.C. § 10301(a)). By the mid-1980s, the Supreme Court had "long recognized that multimember districts and at-

large voting schemes may "'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population'" in violation of Section 2 of the VRA. *Thornburg v. Gingles*, 478 U.S. 30, 47-48 (1986); *see also Cooper*, 581 U.S. at 292 ("We have construed [Section 2's] ban to extend to vote dilution brought about . . . by the 'dispersal of [a group's members] into districts in which they constitute an ineffective minority of voters.'") (citing *Gingles*, 478 US at 46) (second alteration in original).

In *Gingles*, the Supreme Court "identified . . . three threshold conditions for proving vote dilution under § 2." *Cooper* 581 U.S. at 301. "First, a minority group must be sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district. Second, the minority group must be politically cohesive. And third, a district's white majority must vote [ ] sufficiently as a bloc to usually defeat the minority's preferred candidate." *Id*. at 301-02 (internal citations and quotation marks omitted) (alteration in original). If all three preconditions are met, courts consider whether "the totality of the circumstances indicates minority voters had less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1021 (8th Cir. 2006); *see also LULAC v. Perry*, 548 U.S. 399, 436 (2006).

Here, the undisputed evidence demonstrates that all three *Gingles* preconditions are met, and that the totality of the circumstances indicates that without Subdistrict 4A, Native voters will be denied equal opportunity to participate in the political process and to elect their candidates of choice to the North Dakota House. As such, Section 2 required the creation of Subdistrict 4A—a conclusion that Plaintiffs do not dispute. *See generally* Pls.' Mem. in Support of Mot. for Summ. J., ECF 99; *see also* Ex. 23 at 117-18 (Prelim. Inj. Hr'g Tr. Vol. 2).

1. Subdistrict 4A Satisfies the *Gingles* Preconditions

The undisputed evidence demonstrates that all three of the *Gingles* preconditions are met. The existence of Subdistrict 4A is itself sufficient to establish that the first *Gingles* prong is met, because it demonstrates that the Native American population on the Fort Berthold Reservation is "sufficiently large and geographically compact" to constitute a majority in single-member district. *Gingles*, 478 U.S. at 50.[5] As noted in the expert report of Dr. Collingwood, Subdistrict 4A has a Native American Voting Age Population ("VAP") of 67.2%, and "scores very high on measures of compactness." *See* Ex. 8 at 3 (Collingwood Report). Dr. Collingwood used two "common measures . . . the Reock and Polsby-Popper scores" to evaluate the compactness of Subdistrict 4A. *Id*. According to Dr. Collingwood's analysis, "District 4A has a Reock score of .45 and a Polsby-Popper score of .57," which "reflect a very compact district." *Id*. Subdistrict 4A is also objectively compact because it is essentially a rectangle, is contiguous, and respects the political boundaries of the Fort Berthold Reservation. *See* N.D. Cent. Code § 54-03-01.14; *see also* Order at 6, ECF 37 (finding Subdistrict 4A "facially compact and contiguous.").

Further analysis of the demographics and voting patterns in District 4 clearly establishes that the second and third *Gingles* prongs are also met. *See generally* Ex. 8 (Collingwood Report). The undisputed expert report of Dr. Collingwood demonstrates that voting in District 4 is racially polarized—that Native and non-Native voters in District 4 vote cohesively within their respective racial groups and consistently support different candidates. *See id.* at 8-14. In the races analyzed, Native voters supported the Native candidate of choice at rates ranging from 54.7 to 97.8 percent,

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[5] Typically, a plaintiff challenging a redistricting plan under Section 2 satisfies *Gingles* 1 by submitting a demonstrative plan demonstrating that a majority district can be drawn. *See, e.g., Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1018 (8th Cir. 2006). The Tribal Defendants here are in the posture of defending the Legislature's enactment as required by the VRA. Thus, the enacted Subdistrict 4A itself serves to demonstrate that *Gingles* prong 1 is satisfied.

with support generally over 80 percent. *Id.* Similarly, non-Natives opposed the Native candidate of choice at rates ranging from 58.6 to 88.2 percent, with opposition generally over 70 percent. *Id.*

Dr. Collingwood's analysis also demonstrates that polarization increases in races featuring Native American candidates running against white candidates, indicating that the polarization is driven by race and not merely by partisan preference. *See, e.g.*, Ex. 8 at 13 (Collingwood Report). For example, in the 2016 race for State Representative 4, Native voters overwhelmingly supported the Native American candidate, Plaintiff Alvarez, over the white Democrat. *Id.* White voters, however, were more than twice as likely to support the white Democrat over Mr. Alvarez. *Id*.

Finally, Dr. Collingwood's undisputed analysis demonstrates that "whites vote[d] as a bloc to block Native Americans from electing their candidates of choice at the full District 4 in 34 of the 34 contests" examined, spanning 2014 to 2022. *Id.* at 14-21. A 100% block rate for Native American candidates of choice in 34 elections over the course of the past six election cycles is more than sufficient to establish that the white majority in District 4 "typically votes in a bloc to defeat the minority candidate." *Bone Shirt*, 461 F.3d at 1020. And Dr. Collingwood's report confirms that Subdistrict 4A is a performing majority-minority district from which Native voters could elect a candidate of choice. Ex. 8 at 14-21 (Collingwood Report). In the 34 elections analyzed by Dr. Collingwood, the Native candidate of choice wins in all but one of the races in Subdistrict 4A. *Id.* And indeed, in 2022 Native voters in Subdistrict 4A were able to elect their candidate of choice, Plaintiff Finley-DeVille, to the House. *Id*. at 2-3. This race is particularly probative because it is the only endogenous election held in Subdistrict 4A, and it featured a Native American candidate. *See Bone Shirt*, 461 F.3d at 1020-21 ("Endogenous and interracial elections are the best indicators of whether the white majority usually defeats the minority candidate."); *see also id.* at 1021 (noting that "[t]he more recent the election, the higher its probative value.").

2. Under the Totality of the Circumstances, Subdistrict 4A Is Necessary to Allow Native Voters Equal Opportunity to Elect Candidates to the North Dakota House

Once it has been shown that the three *Gingles* preconditions are met, the Court must proceed to consider whether, under the totality of the circumstances, the Native American voters have an equal opportunity to participate in the political process. *Bone Shirt*, 461 F.3d at 1018. In so doing, "courts should consider the … inexhaustive, objective factors" in the Senate Committee report that accompanied the 1982 amendment to the Voting Rights Act" *Bone Shirt*, 461 F.3d at 1021. These factors include:

(1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
(2) the extent to which voting in the elections of the state or political subdivision is racially polarized;
(3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
(4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
(5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
(6) whether political campaigns have been characterized by overt or subtle racial appeals;
(7) the extent to which members of the minority group have been elected to public office in the jurisdiction;
(8) whether there is a significant lack of response from elected officials to the needs of the minority group; and
(9) whether the policy underlying the jurisdiction's use of the current boundaries is tenuous.

Bone Shirt, 461 F.3d at 1021-22.

Defendant-Intervenors' Senate Factor expert reports and analysis are conclusive and undisputed in this matter. Plaintiffs have not produced any evidence, expert or otherwise, to dispute the presence of a strong majority of the Senate factors in North Dakota.

i. There is a long history of official and de facto discrimination against MHA tribal members

Senate Factor 1 considers "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process." S. REP. No. 417, at 28-29, U.S. Code Cong. & Admin. News 1982, pp. 206–207. Dr. McCool's report walks through the shameful historical and contemporary discrimination experienced by MHA tribal members and other Native Americans in North Dakota. Ex. 18 at 7-12 (McCool Report). This includes the MHA Nation's significant loss of its homeland, and North Dakota's restriction against voting by Native Americans who were not "civilized persons of Indian descent" and who had not "severed their tribal relations two years next preceding such election." *Id.* at 12. "Native Americans are the only group of citizens in U.S. history who were required to give up their home, their language, and their culture as a prerequisite to the right to vote." *Id*.

Moreover, Dr. McCool discuss many recent court cases where MHA tribal members and other Native Americans in North Dakota had their right to vote infringed. Ex. 18 at 23-33 (McCool Report). Up until 2007, for example, the Parshall School District on the Fort Berthold Reservation operated an at-large school board election plan that diluted the Native American voting strength, which was only remedied once legal action was threatened. Ex. 18 at 24 (McCool Report). In another example, under the *Brakebill v. Jaeger* line of cases (1:16-cv-008; 1:18-cv-222), this Court considered challenges filed by tribes and tribal members against a state law that discriminated against tribal members by requiring voters to present an ID displaying a residential street address in order to vote, despite the fact that many tribal members lacked residential street addresses. The tribal plaintiffs successfully settled the case with the State, and the State was required to allow tribally issued ID's and other tribal documents as a valid form of voting identification. Ex. 18 at

24-28 (McCool Report). Terry Jones, former House Representative for District 4, voted in favor of the State's residential address requirement. Ex. 22 at 17:23-18:13 (Prelim. Inj. Hr'g Tr. Vol. 1).

Dr. McCool's undisputed analysis concludes, "In sum, there is a long history of official and de facto discrimination in elections that has affected the ability of Native Americans to vote and have an equal opportunity to elect candidates of their choice." Ex. 18 at 33 (McCool Report).

ii. Voting in North Dakota is racially polarized

The second Senate factor evaluates the extent of racially polarized voting in the district and is conclusively shown by Dr. Collingwood's analysis, *see supra*, Part III.A.1. Racially polarized voting is also evident to the MHA tribal members who Dr. McCool interviewed, and to MHA Nation Chairman Mark Fox, who testified before the Committee in 2021 that "[A] proven history of bloc voting occurred on the Fort Berthold Reservation in the city of Parshall, e.g. Parshall School Board . . . Additional examples include two other tribal members running for state House in 2020 and 2016 respectively. Both candidates, Thomasina Mandan and Cesareo Alvarez easily won the precincts on the reservation but lost in the overall election." *Id*. at 35. The undisputed expert reports overwhelmingly prove the existence of racially polarized voting in District 4.

iii. Voting practices and procedures have had a discriminatory effect on Native American voters

Senate Factor 3 evaluates the extent to which the state or political subdivision has used voting practices or procedures that may enhance the opportunity for discrimination against the minority group. Most notably, Dr. McCool addresses how, with respect to MHA, the use of at-large voting for the Legislature has historically diluted Native American's voting strength. *Id*. at 39-41. He also reviews the large body of evidence of racially polarized voting available to the Legislature when it adopted Subdistrict 4A in 2021. *Id*. This Court has also previously found discrimination in voting against Native voters in North Dakota. In *Brakebill v. Jaeger*, No. 1:16-

cv-008, 2016 WL 7118548 (D.N.D. Aug. 1, 2016), this Court examined the state's voter ID law and found it "undisputed that the more severe conditions in which Native Americans live translates to disproportionate burdens when it comes to complying with the new voter ID laws." *Id*. at *4. The Court found that Native American voters in North Dakota faced substantially greater hurdles than white voters on a host of measures, including possession of voter ID, driver licenses, documents necessary to obtain a voter ID, access to transportation, and proximity to driver licenses sites. *Id*. The Court noted that "[t]he record reveals that North Dakota poll workers turned away many Native Americans because their driver's licenses, non-driver ID, or tribal ID's did not disclose their current residential addresses." *Id*. at *7. Noting that the "undisputed evidence in the record clearly establishes that the Native American population in North Dakota bears a severe burden under the [then-extant] version" of the voter ID law, this Court concluded that the law likely violated the Fourteenth Amendment and granted a preliminary injunction, *id*. at *10.

iv. There are significant socio-economic differences between Anglos and Native Americans

Native Americans on the Fort Berthold Reservation bear the effects of past discriminatory treatment in areas such as employment, education and income, all of which hinder their ability to participate in the political process per Senate Factor 5. Regarding this Senate Factor, Dr. McCool's report looks at disparities in income/poverty, education, health care, and internet access to conclude that, "The dismal statistics cited for the Senate Factor 5 analysis in this report help explain why voter turnout has been so low among Native Americans. Ex. 18 at 58 (McCool Report) (citation omitted).

Further, the expert report of Dr. Kate Magargal relies primarily on American Community Survey data to evaluate the differences between Native American and White residents of McKenzie, Dunn, McLean and Mountrail counties in the areas of income, poverty, educational

attainment, computer ownership and internet access, home ownership, health insurance coverage, and employment. *See generally* Exhibit 19 (Magargal Report). Dr. Magargal concludes that the Native American population is at a statistically significant socioeconomic disadvantage compared to Whites in almost every evaluated criteria—systemic, race-based disparities—hindering their ability to participate in the political process. Ex. 19 at 14 (Magargal Report).

v. Native Americans have lacked electoral success

Senate Factor 7 is the extent to which members of the minority group have been elected to public office in the jurisdiction. Although constituting 5.7 percent of the State's population, Dr. McCool's report notes that there are only two Native Americans serving in the state House. One of those Native American representatives is Plaintiff Finley-DeVille, who was elected in 2022 to represent Subdistrict 4A. Ex. 18 at 60-61 (McCool Report). Given Dr. Collingwood's analysis—showing a 100% block rate by white voters in the full District 4—it is clear Rep. Finley-DeVille would not be in the state House but for the creation of Subdistrict 4A. Indeed, Rep. Finley-DeVille lost her race for Senate in District 4 in 2020—demonstrating the importance of the subdistrict. Ex. 7 at ¶¶ 6-7 (Finley-DeVille Decl.). So too did two other Native American candidates—Mr. Alvarez in his 2016, and Ms. Mandan in 2020. *Id.* ¶ 6; Ex. 10 ¶ 5 (Alvarez Decl.). At the local level, none of the six counties that the Fort Berthold Reservation touches has a Native American county commissioner, clerk, auditor or county judge. *Id.* at 64.

vi. State officials have generally been unresponsive to the needs of Native Americans

Senate Factor 8 evaluates whether there a significant lack of response from elected officials to the needs of the minority group. The undisputed evidence shows that this factor is present with respect to the Legislature. During the redistricting process, the Committee refused calls from Tribes to hold meetings on or near reservations to allow for increased tribal member input. Ex. 18

at 69-71 (McCool Report). In the state Senate's debate over the creation of Subdistrict 4A, Senator Oley Larson opposed the subdistrict, stating, "Indians have their own sovereign nation constitution . . . You cannot come to another nation's country and say okay I want representation even though I have my own constitution and my own sovereign nation . . . we're going to give representation to an individual to represent individuals that do not follow the Constitution of the United States . . ." Ex. 18 at 72 (McCool Report). Dr. McCool also describes in detail the conflict over the Dakota Access Pipeline and the state legislation that derived from the conflict, to the detriment of the Native Americans, as well as interviews with MHA tribal members expressing that state and local governments are not responsive to their needs. Ex. 18 at 72-76 (McCool Report).

vii. Subdistricts 4A complies with all traditional redistricting principles and complies with Section 2 of the VRA

Senate Factor 9 turns on whether the policy underlying the jurisdiction's use of the current boundaries is tenuous. In the posture of this case, the focus is on whether the failure to adopt Subdistrict 4A would have been tenuous. In light of all the factors described above, that is clearly the case. That tenuousness can also be seen in the testimony of those who opposed the creation of Subdistrict 4A, such as Senator Larson's professed view that Native Americans should not have representation in the North Dakota Legislature because they have their own sovereign governments. *See supra*, Part III.A.2.vi. Had Senator Larsen prevailed, his view would have provided a particularly tenuous rationale for maintaining multimember representation in District 4. By contrast, the creation of Subdistrict 4A is not a tenuous policy, because it complies with traditional redistricting principles. *See supra*, Part II. Dr. McCool's undisputed conclusion with respect to tenuousness states, "The new district complies with all normal procedures of a redistricting process and was created in response to a request from constituents. In contrast, the

failure to create District 4A would have exhibited the traits of a tenuous policy . . .” Ex. 18 at 81 (McCool Report).

* * *

Subdistrict 4A is indisputably necessary—and thus narrowly tailored—to ensure the North Dakota State Legislative map complies with Section 2 of the VRA. Because compliance with the VRA is a compelling state interest, Subdistrict 4A survives strict scrutiny even if the Court finds that race predominated in the drawing of the subdistrict.

B. The Court Should Reject Plaintiffs’ Attempt to Weaponize the “Good Reasons” Safe Harbor

Plaintiffs do not dispute that the *Gingles* preconditions are satisfied or that the totality of the circumstances require the drawing of Subdistrict 4A. *See generally* Pls.’ Mem. in Support of Mot. for Summ. J., ECF 99. They have disclosed no expert witness to dispute Dr. Collingwood’s conclusion that *Gingles* prongs two and three are satisfied with respect to District 4, nor to rebut the opinions of Dr. McCool and Dr. Magargal regarding the Senate Factors. Indeed, at the preliminary injunction hearing, Plaintiffs’ counsel remarked that “Dr. Collingwood’s report, that racial polarization study, is exactly the type of evidence that the legislature needs to rely on to support this.” Ex. 23 at 118 (Prelim. Inj. Hr’g Tr. Vol. 2). Instead, Plaintiffs merely contend it is too late to consider whether the *Gingles* preconditions are satisfied. *See id*. at 117 (“This is a sufficiency of the evidence case. What was presented to the legislature at the time?”); *see also* Pls.’ Mem. in Support of Mot. for Summ. J., ECF 99. In their view, if the Legislature did not gather sufficient evidence regarding the *Gingles* preconditions before passage—even if the Legislature ultimately was *correct* about the VRA’s application—then the map is an unconstitutional racial gerrymander. *See id*. That is not the law.

Compliance with Section 2 is a compelling justification regardless of *when* the VRA obligation is established. Thus, a district drawn based on race satisfies strict scrutiny so long as it is, in fact, necessary to comply with the VRA. *See supra*, Part III.A. Alternatively, if a race-based district is *not* necessary to comply with the VRA, a state can nonetheless escape liability for racial gerrymandering if it can show that at the time the district was drawn the state had "good reasons" to believe that the district *was* necessary to comply with the VRA. *Cooper*, 581 U.S. at 292-93; *see also Ala. Legislative Black Caucus*, 575 U.S. at 278 ("This standard . . . does not demand that a State's actions *actually* be necessary to achieve a compelling state interest in order to be constitutionally valid . . . [as] legislators may have a strong basis in evidence to use racial classifications in order to comply with [the VRA] . . . even if a court does not find that the actions were *necessary* for . . . compliance.") (internal citations omitted) (emphasis added). The only thing that changes based upon when the evidence is presented is the burden of proof a state (or intervening defendants) must meet in proffering the VRA as a defense to a racial gerrymandering lawsuit—after the fact the state must prove the district was actually necessary; before the fact it must only prove that "good reason" existed to draw the district. The "good reasons" standard serves as a shield for a state that mistakenly, but in good faith, believes a VRA district is necessary—it provides "breathing room" for a state caught between the Fourteenth Amendment and the VRA. It is not a sword to be used to dismantle a district that all parties agree is necessary to comply with the Section 2. As such, it does not apply here.

Indeed, the history of the safe harbor standard illustrates why Plaintiffs attempt to apply it here is inapposite. The safe harbor standard arose in the context of Section 5 of the VRA. Under Section 5, covered jurisdictions were required to demonstrate that any electoral change including redistricting, would not bring about retrogression in respect to racial minorities' "ability . . . to

elect their preferred candidates of choice." *Ala. Legislative Black Caucus*, 575 U.S. at 279 (finding that the relevant question under Section 5 is "to what extent must we preserve existing minority percentages in order to maintain the minority's opportunity to elect the candidate of its choice"). Because covered jurisdictions were necessarily obligated to engage in race-based redistricting to ensure their changes did not run afoul of Section 5, while also not running afoul of the Fourteenth Amendment's prohibition on excessive reliance on race without sufficient justification, a covered jurisdiction risked falling into "a trap . . . condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under § 5 should the legislature place a few too few." *Id*. at 278.

To "harmonize these conflicting demands," *Abbott v. Perez*, 138 S. Ct. 2305, 2309 (2018), the Supreme Court created the safe harbor test, which has since been applied in the context of Section 2, *see Cooper*, 581 U.S. at 301. Under this standard, a state that *cannot* prove that the VRA applied will nonetheless not be found liable for unconstitutional racial gerrymandering if "it had 'good reasons' to think that it would transgress the Act if it did *not* draw race-based district lines" *Cooper*, 581 U.S. at 293. This ensures that states have "breathing room to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed." *Id.*

Here, no such "breathing room" is necessary because the Tribal Defendants have met their burden to prove—and Plaintiffs have offered no evidence to dispute—that Subdistrict 4A is required under Section 2. There is no need to afford the Legislature grace because the Legislature did not err—it is not defending an unnecessarily race-conscious district on the basis of its own good faith attempts to comply with its statutory obligations. *Cf. Miller v. Johnson*, 515 U.S. 900, 916 (1995) (acknowledging the "presumption of good faith that must be accorded legislative enactments" particularly when evaluating the sensitive question whether states have relied

improperly on race in drawing district lines). Regardless, by meeting the substantially higher burden of *proving* that Subdistrict 4A is required by the VRA, Tribal Defendants have confirmed that the Legislature had "good reason" to enact the district, even if the Court finds they did so predominantly on the basis of race. *Cf. Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 194 (2017) (noting that legislative inquiry gives benefit of "good reasons" standard which "does not require the State to show that its action was 'actually . . . necessary' to avoid a statutory violation").

The position advanced by Plaintiffs would yield nonsensical outcomes if accepted. First, it would uphold as constitutional race-based districts *not* required by the VRA while simultaneously invalidating as unconstitutional race-based districts that *are* required by the VRA. Second, it would place court enforcement of voters' personal rights under the VRA at the whim of the Legislature's studiousness (or lack thereof) in predicting VRA requirements. Third, it would require the Court to order a remedy for the racial gerrymandering claim that itself violates federal law. By contrast, preserving districts that are in fact required by the VRA, while holding states accountable for unnecessary race-based districting that does not have a sufficient basis in evidence, balances states' competing interests while ensuring the rights of minority citizens are protected regardless of a legislature's diligence in complying with Section 2.

C. The Legislature Had Good Reason to Believe Section 2 Requires Subdistrict 4A

Even if the safe harbor test applied to this circumstance, where the Legislature acting in good faith *correctly* determined that the VRA required the creation of Subdistrict 4A, the undisputed evidence demonstrates that the Legislature had good reason for its actions. "If a State has good reason to think that all the 'Gingles preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district." *Cooper*, 581 U.S. at 302. Here,

the Legislature had before it extensive and reliable information demonstrating that each of the *Gingles* preconditions was indeed met with respect to the population of Fort Berthold.

First, in trainings provided to the Committee on August 26, 2021, and on September 22, 2021, experts discussed *Thornburg v. Gingles*, the requirements of Section 2, and how members of the Committee could identify when the *Gingles* conditions were present. Ex. 2 at 15-17 (Legislative Council Presentation, Aug. 2021); Ex. 4 at 5, 7 (Legislative Council Presentation, Sept. 2021). The September training noted that the Voting Rights Act may under some circumstances require the creation of single-member districts and directed the Committee to "[l]ook to the *Gingles* Preconditions" to determine "if there is direct evidence the votes of members of a racial minority would be diluted without a majority-minority district." Ex. 4 at 5, 8 (Legislative Council Presentation, Sept. 2021).

After receiving these trainings but before deciding to propose a map including the Fort Berthold subdistrict to the full Legislature, the Committee heard and considered information that clearly established the presence of each of the three *Gingles* preconditions. *See* Ex. 12 (Fox Testimony, Sept. 23, 2021); Ex. 14 (Fox Testimony, Sept. 29, 2021); Ex. 15 (Finley-DeVille Testimony); Ex. 17 (Gion Testimony); Ex. 1 (Redistricting History Memorandum); Ex. 2 (Legislative Council Presentation, Aug. 2021); Ex. 3 (NCSL Presentation); Ex. 4 (Legislative Council Presentation, Sept. 2021).

Chairman Fox provided testimony to the Committee on two separate occasions in which he detailed the *Gingles* preconditions' application to a potential MHA subdistrict. On September 23, 2021, Chairman Fox explained to the Committee that the "legislature could easily draw a new single-member House district in our area that would have a Native Citizen Voting Age Population of 67%." Ex. 12 at 2 (Fox Testimony, Sept. 23, 2021). He also submitted a map of the proposed

subdistricts and accompanying table illustrating this point. *Id.* In his September 29, 2021 testimony, Chairman Fox further underscored that "the Committee is aware already from the 2020 Census that the number of tribal members on the Fort Berthold Reservation is sufficiently numerous and compact to form a majority in a single-member district, and that a sub-district following the lines of the reservation would form a perfectly populated sub-district." Ex. 14 at 1 (Fox Testimony, Sept. 29, 2021). As such, the Committee received and considered evidence demonstrating that a subdistrict containing the MHA reservation would comply with the first *Gingles* prong. *See. Gingles*, 478 U.S. at 50 ("First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.").

Chairman Fox also provided testimony regarding the presence of racially polarized and bloc voting in District 4 as a whole. Ex. 14 (Fox Testimony, Sept. 29, 2021). He explained that there was "ample evidence of voting history in District 4 to show that tribal member candidates and tribal member candidates of choice are routinely outvoted by the majority vote in the district." *Id.* He cited his own experience in running for a school board position within District 4, as well as that of two other MHA members who had run for office, received widespread support from precincts within Fort Berthold, but lost their elections due to bloc voting by non-Native voters living outside the reservation. *Id*. The Committee also heard similar testimony from other witnesses. *See* Ex. 15 (Finley-DeVille Testimony); Ex. 16 (Donaghy Testimony). This testimony provided the Legislature with "good reason" to find that voting was politically cohesive in District 4 and that white bloc voting prevented Native voters from electing their candidates of choice. *See Abbott,* 138 S. Ct. at 2332.

The substantive testimony regarding Subdistrict 4A, together with the undisputed evidence that Subdistrict 4A is, in fact, required by the VRA, establish that not only did the members of the Committee have sufficient basis to conclude that the VRA requires the creation of Subdistrict 4A, but that the failure to draw such a subdistrict would actually violate the VRA. As such, even assuming race predominated in the drawing of Subdistrict 4A, the district would nonetheless withstand strict scrutiny. And regardless of the Legislature's intent in creating Subdistrict 4A, Plaintiffs are not entitled to a remedy that itself violates federal law by diluting Native votes and denies them the opportunity to elect candidates of their choice.

CONCLUSION

For the forgoing reasons, the Court should grant Tribal Defendants' Motion for Summary Judgment and dismiss Plaintiffs' claims with prejudice.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing was served on all counsel of record via the Court's CM/ECF system.

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