UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

CASE NO: 1:22-CV-00031-CRH

Charles Walen, an individual; and Paul Henderson, an individual.

Plaintiffs,

vs.

DOUG BURGUM, in his official capacity as Governor of the State of North Dakota; MICHAEL HOWE in his official Capacity as Secretary of State of the State of North Dakota,

Defendants,

and

The Mandan, Hidatsa and Arikara Nation, Cesar Alvarez, and Lisa Deville

Defendant-Intervenors.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs Charles Walen and Paul Henderson submit this Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The North Dakota Legislative Assembly's creation of Subdistricts in Legislative Districts 4 and 9 are racial gerrymanders which violate the Equal Protection Clause of the 14th Amendment. The Assembly, through its Redistricting Committee (the "Committee"), selected Districts 4 and 9 because they contain the

Fort Berthold and Turtle Mountain Indian Reservations, respectively. The legislative record reveals the Committee subdivided Districts 4 and 9 in furtherance of the Voting Rights Act of 1965 ("VRA") by giving each Reservation its own single-member subdistrict.

By invoking the VRA to justify Committee's race-based districting, each subdistrict must be narrowly tailored to achieve a compelling government interest, which is accomplished by compliance with the three Gingles preconditions. Reviewing the legislative record, and applicable law, it is indisputable the Committee failed to satisfy the three Gingles preconditions before enacting the Subdistricts. Subdistricts 4A, 4B, 9A, and 9B are not narrowly tailored and, therefore, are racial gerrymanders that violate the Equal Protection Clause. Accordingly, Plaintiffs respectfully request an Order granting their Motion for Summary Judgment.

FACTS AND BACKGROUND

Under Article IV, Section 2 of the Constitution of North Dakota, the North Dakota Legislative Assembly must redraw the district boundaries of each legislative district following the public release of the decennial census. Each legislative district must be represented by one senator and two representatives. N.D. Const. Art. IV, § 2. During the 67th Legislative Assembly, Governor Burgum signed House Bill 1397 into law, which established an interim redistricting committee tasked with developing new legislative district maps. Doc. 19, #1. After the release of the 2020 Census results, Governor Burgum issued Executive Order 2021-17 on October 29, 2021. Doc. 19, #1. This Executive Order convened a special session of the Legislative Assembly for the purposes of "redistricting of government." Id.

The Committee held a preliminary meeting on July 29, 2021. Doc. 37 at 2. From the beginning, members of the Committee expressed an interest in creating legislative subdistricts for the North Dakota's Indian Reservations. The Committee's discussions about subdistricts focused

solely on race, the VRA, and the reservations. Specifically, the discussion about subdistricts for reservations stemmed from concerns of potential litigation from North Dakota's Tribes under Section 2 of the VRA.

After the preliminary meeting, the Committee held eight substantive redistricting hearings. At these hearings, the Committee discussed the implementation of the challenged Subdistricts.

I. AUGUST 26 REDISTRICTING COMMITTEE HEARING

At the Committee's first substantive meeting on August 26, there were multiple presentations regarding the VRA and the creation of the Subdistricts. See Ex. A at 8:22 - 25 (Transcript of August 26 Redistricting Committee Meeting). During the presentation of Ben Williams, a representative from the National Council of State Legislators, the discussion focused entirely on lawsuits under the VRA:

> [Ben Williams]: So I was also talked -- I was asked to speak a little bit more fully on the Voting Rights Act. So I created a -- few more slides here to give it a fuller sense. And, uh, the key sections of the Voting Rights Act that apply to redistricting are sections two, three, four, and five, with the most important one being section two. Um, and you can see the -- the titles of the, um, the brief description of what each of these sections do.
>
> So section two, uh, prohibits vote dilution of redistricting. Uh, what that means is that if there is a minority group that qualifies for protection under section two of the Voting Rights Act, the district -- a district needs to be drawn in such a way that that minority group has the opportunity to elect its candidate of choice.

Id. at 31:11 - 32:1. During the presentation, the concerns raised by Committee members were limited to the potential of a lawsuit if subdistricts were not created for the Reservations under the VRA:

> MR. NATHE: Thank you, Mr. Chairman. Thank, you, Ben. Uh, I did enjoy that, uh, conference out in Salt Lake and --
>
> MR. WILLIAMS: Wonderful.
>
> MR. NATHE: And one thing I -- I caught from, uh, for the four days was basically

> how do we stay out of court?
> . . .
> MR. NATHE: Because any of -- any ethnic group in -- in general, I mean is there a certain number we should be aware of to make sure --
>
> MR. WILLIAMS: Sure. So I mean it's any minority group that the test that's on the -- the next slide applies to. And I can get to this in a moment. But, uh, there's no exact threshold requirement. It's -- it requires just some analysis of the political makeup of the -- of the region in particular that that district is going to be in. And whether or not there is what's known as white crossover voting, so are white voters crossing over to vote with the minority candidate.
>
> And the exact threshold can vary. And states that have very high racial polarization, where the minority group and the white majority do not like each other at all, then you might need a much higher minority threshold than you would in, for example, um, the Atlanta metro area, where evidence has shown that over this past decade, what used to be very richly polarized, now white voters are crossing over and voting for the -- the -- the -- the black candidate of choice in these districts.
>
> So, uh, what's required by the Voting Rights act in those districts to create opportunity to elect. Because keep in mind, opportunity to elect doesn't mean win every single time. It just means you can win.

Id. at 33:1 - 7; 33:22 - 34:22. The Committee asked Mr. Williams and Legislative Council numerous questions on the issue of subdistricts:

> MR. SCHAUER: In those districts where it's heavily minority, is there pressure from the courts to break those districts down into subdivisions to make sure those mino- -- that minority populations is represented? Ex. A at 38:10 - 14.
>
> MR. SCHAUER: Thank you, Mr. Chairman. The question I have is how does the process work? Because right now, we're already being threatened to be sued. How does the lawsuit work? Ex. A at 127:8 - 11.
>
> MR. NATHE: Thank you, Mr. Chairman. Claire, when was the last time the state was sued? Id. at 128:13 - 14

As the transcripts for the August 26 meeting reveal, the Committee's intent for creating subdistricts was based entirely on race and the VRA. The Committee's intent is highlighted by the following exchange between Committee Vice Chairman Holmberg and Mr. Williams:

> MR. HOLMBERG: We of course in North Dakota have, uh, a number of reservations.

> MR. WILLIAMS: Sure.
>
> MR. HOLMBERG: And, uh, our ideal district, uh, if we use the current, uh, system, is 16,500 people roughly.
>
> MR. WILLIAMS: Mm-hmm.
>
> MR. HOLMBERG: Uh, and we hear that the native populations, you know, want to have representation. But our -- our reservations go from -- I think its uh, 8,500, uh, uh, which is pretty substantial part of our legislative district, down to one reservation that has 206.
>
> MR. WILLIAMS: Right.
>
> MR. HOLMBERG: Uh, and I would just wonder your observations about if we have districts that have a native population of 8,000 or 6,000, uh, how thin does the ice get if we decide not to do any subdistricting in those areas, as South Dakota has in two reservations. They have subdistricts in two legislative districts. How thin, if you're at 8,000, 9,000 people of a -- of a 16,000 district, is the ice getting pretty thin? And I would suggest maybe the 206 you might agree that, eh, not a big --
>
> MR. WILLIAMS: Sure. Uh, Vice Chairman Holmberg, I think that it just -- it depends on the exact analysis that's done on minority group political cohesion. Because you could imagine a situation for example where the, uh, the population of the reservation, maybe they're not as, us politically cohesive as you would expect.

Id. at 39:12 - 40:18.

Mr. Williams advised the Committee that if it created subdistricts for the Reservations based on the VRA, a proper legal analysis must be conducted pursuant to Thornburg v. Gingles, 478 U.S. 30 (1986). Id. at 34:25 - 37:2. Mr. Williams then walked through each Gingles precondition: 1) the minority group's ability to constitute a majority; 2) the minority group's political cohesion; and 3) the existence of majority bloc voting. Id. Mr. Williams told the Committee that, to meet the Gingles preconditions, specific studies must be conducted by an expert:

> MR. WILLIAMS: So there's a couple different methodologies that can be used. Uh, one of them is known as a racially, uh, racial block voting analysis. Uh, this can be done by political scientists. Uh, there are consultants who do this service. There's not a ton of them, but they do exists.
>
> And, uh, what they do is they run regression on election results tied to voting precincts, cross compare that with the data on, uh, race in those precincts, and then try to figure out -- because obviously when election results are reported, they don't report, you know, who voted which way. But you can sort of get back to some top line demographic information about who most likely voted in a particular direction based on what precinct they voted in.
>
> And so, there -- there are these analyses that are conducted. And, um, some states choose to do this where they get this information and they have an exact data set, uh, that shows, okay, in this particular region of the state, um, roughly 90 percent of the minority population votes, uh, for one party, and the white population around them votes entirely for another party.

Id. at 42:23 - 43:21. Reviewing the legislative record, the Committee never hired an expert or conducted the studies or analyses described by Williams.

II. SEPTEMBER 8 REDISTRICTING COMMITTEE HEARING

The Committee's next meeting was on September 8, and in consideration of the Subdistricts, the Committee's discussion started with testimony from interested parties, including Rick Gion from North Dakota Voters First. Gion advocated for subdividing the Reservations. Ex. B at 94:11 - 113:15 (Transcript of September 8 Redistricting Committee Meeting). Again, the Committee's questions were focused s on race and the VRA:

> SENATOR HOLMBERG: -- and you've talked about the native [American] populations, would your group be critical of a legislature that would subdivide reservation A and not reservation B because reservation B gave us clear messages that they really don't want that? Id. at 96:2 - 96:7.
>
> REPRESENTATIVE NATHE: Thank you, Mr. Chairman. So when you talk about better representation, do you have any information that shows in the past that anybody from these reservations haven't had a chance to run? Because it seems to me they've [Native Americans] had as much chance to run as anybody else. Id. at 100:2 - 8.
>
> SENATOR POOLMAN: I just have one question, and maybe you just need to help

me wrap my head around this. I am fully supportive if the reservations want to have subdivided districts. I am fully supportive of that. Id. at 102:11 - 15.

REPRESENTATIVE NATHE: So, Rick, I want to go back. Senator Oban talked about a chance to win. If we go to subdistricts, they have a better chance to win. Are you saying right now if a Native American ran in, say, District 31 in Standing Rock, they have less of a chance now than if we subdivide? Id. at 105:19 - 25.

REPRESENTATIVE SCHAUER: But a question for Ms. Ness, and I'm just trying to get a handle on this. If race is the reason to subdivide a district, then what mandates are there to make sure that a candidate is of that race? Id. at 112:15 - 19.

Along with the questions to Mr. Gion, the Committee debated the purpose of the subdistricts:

SENATOR OBAN: Mr. Chairman, but it's not about electing a Native American per se. It could be a white person who is also living on Standing Rock who chooses to run, who might identify more what those issue are within Standing Rock's -- you know, so I think we get -- and I find it easy to do too. I have to like remind myself this isn't about electing a Native American per se. This is about making sure that, if its about a split population and half of that population lives within the borders of a tribal nation, do they have the opportunity to have a candidate of their choosing run and potentially not win but to be able to run and have a chance of winning based on the outcomes of historical elections.

REPRESENTATIVE NATHE: Mr. Chairman, I'm going to debate Senator Oban for a second.

CHAIRMAN DEVLIN: I understand that, Representative.

REPRESENTATIVE NATHE: So it kind of goes back to what I said earlier. So are you saying right now they [Native Americans] don't have a chance to win whether it's Native American or a white person on -- you're saying right now, under the current system, they do not have -- so somebody in 31 --

. . .

SENATOR OBAN: Mr. Chairman and Representative Nathe, their vote would be diluted depending on how much more of their district is encompassed by communities that would not share the same interest as those on a tribal nation.

Id. at 106:20 - 108:8.

Reviewing the transcripts from September 8, the Committee's discussion focused entirely on the Reservations, and the VRA. In the transcript, Race was not just the predominant factor, it

was the only factor discussed by the Committee. The Committee discussed no other factors or reasons for creating subdistricts. Id. at 1:1 - 121:19. The Committee also never discussed the creation of subdistricts for any districts other than those containing a Reservation. Id.

III. SEPTEMBER 15 REDISTRICTING COMMITTEE HEARING

On September 15, the Committee held its next redistricting hearing. The Committee heard testimony from tribal representatives in support of the challenged subdistricts, including Chairman Mike Faith of the Standing Rock Sioux Tribe. Although interested parties may request the drawing of a majority-minority district, the United Stated Supreme Court has held this testimony is not part of the Gingles preconditions or relevant to the legal analysis. Abbott v. Perez, 138 S.Ct. 2305, 2334 (2018) (Explaining that one group's demands for subdistricts is insufficient, as a group's demands alone cannot be enough to satisfy the Gingles preconditions).

Throughout the hearing, Committee Members asked questions of the tribal representatives:

> REPRESENTATIVE MONSON: Beyond that, I guess -- so what do you think would be different if you had a Native representative in District 31 if it was subdivided? Do you think the results from the legislature as a whole would be significantly different? Ex. C at 38:22 - 39:2. (Transcript of September 15th Redistricting Committee Meeting)

> SENATOR SORVAAG: So you're for any Native American, no matter what party they would represent you would support? Id. at 68:1 - 3.

The Committee also continued their discussion and debate over subdistricts, which was again limited to issues of race and the VRA:

> VICE CHAIRMAN HOLMBERG: First of all, this Committee is very sensitive to our duties under the Voting Rights act. We know that. We get that. There are things we have to do, and there are things we can do. And we certainly will take care of the have to do, I believe, but there are also, within that particular legislative, there are certain thresholds; and I don't have them in front of me. I mean, if you have a district that has 50 percent -- if you subdivided a district and the Native population was 50 percent, that's pretty easy to argue. When you get down to 23 percent, that's less arguable. So in other words, we know what -- I believe what we should do, but there are thresholds that we also have to consider.

Id. at 64:16 - 65:6. The "thresholds" referenced by the Vice Chairman are the Gingles preconditions. There was no requirement for the Committee to analyze the Gingles preconditions unless the VRA was invoked. Reviewing the transcripts, the Committee's sole focus continued to be the creation of subdistricts under the VRA, which is inherently race based. This point was exemplified by Senator Erin Oban, who asserted vote dilution was occurring on Reservations:

> [SENATOR OBAN]: If you can't see how Sioux County's vote is diluted by having this all be at-large, then I'm not confident you understand numbers generally. That is what the concept is. If you take away partisanship, if you take away, you know, the fact that our friends are serving, and they might feel like the folks on Standing Rock are being critical of our current friends, if you take away all of that, you can still see that in two of the three races, the person who won the entire district, still won that sub-district. It did change the outcome in one.
> . . .
> It doesn't always change the results, but it certainly dilutes the vote of Sioux County [Standing Rock].

Id. at 79:11 - 22; 80:2 - 4. To be clear, the Committee did not subdivide Sioux County or the Standing Rock Reservation because it lacked a sufficient Native American population.

The Committee's discussion at the September 15 hearing focused on race and the requirements of the VRA. There was no discussion about subdistricts in any legislative district outside of the Reservations, and there was no discussion or mention of any alternative reasons for creating the subdistricts. Ex. C at 1:1 - 148:25.

IV. SEPTEMBER 22 REDISTRICTING COMMITTEE HEARING

On September 22, Claire Ness from Legislative Council presented the legal requirements for complying with the VRA:

> [MS. NESS]: So the general rule is, under the 14th Amendment, that race may not be the predominant factor when you're creating a particular district. That means you can't say that you're creating a district because of race.
> . . .
> And race also -- there is an exception to the general rule, which is that race can be a predominant factor if the district is drawn to narrowly -- to be narrowly tailored

> to achieve a compelling state interest. And this is a test called strict scrutiny. It's used in a lot of different ways by the courts in the country.
> . . .
> So courts have said, in this particular contest, there are two -- at least two compelling state interests. So if you're going to use race as a predominant factor, you can do so for these two compelling state interests. One would be complying with Section 2 of the federal Voting Rights Act, and the other is to remedy past discrimination.
> . . .
> And if you want to comply with that particular provision of the Voting Rights Act, that could be a compelling state interest if you have direct evidence that the votes of the minority members would be diluted if you did not have a majority-minority district. So if you did not draw your district in a way that provided for a majority of a racial minority in a district.
> . . .
> And to show that a plan is narrowly tailored to complying with the Voting Rights Act, **the state needs to show that it has good reason to think that all of the Gingles preconditions have been met**.

Ex. D at 9:21 - 12:22 (Transcript of September 22nd Redistricting Committee Meeting) (*emphasis added*). If the VRA was not the Committee's reason for enacting the challenged Subdistricts, a presentation on compliance with the VRA's legal requirements would not have been necessary. Moreover, Ness told the Committee the Gingles preconditions must be met to enact the challenged Subdistricts. The legislative record is void of any analysis by the Committee or the Assembly satisfying the Gingles preconditions.

The Committee asked Ness several questions regarding the Gingles preconditions during her presentation:

> SENATOR HOLMBERG: If one is looking at the American Indian population 18 and over, do you balance that against the other population 18 and over? In other words, do you use the same metric when you're measuring them? Id. at 14:22 - 15:1.

> [REPRESENTATIVE NATHE]: So what constitutes votes as a bloc? You know, we made this map back in -- the current map back in 2011. There's two districts I know with reservations in it that were represented by the other side of the aisle for at least half of that five, six years . . . So, I mean, is that a bloc because of a sudden, the wrong side of the aisle is being elected in that district? Id. at 21:1 - 11.

> SENATOR KLEIN: Should this not have been a discussion years ago? And I thought we've made a lot of attempts to bring the reservation population into -- I mean we fund the roads. We -- we look to them to them with -- as just regular citizens. But why now that we to have -- is there more pressure on this voting rights and why would we even have this discussion at this point? Id. at 22:24 - 23:7.
>
> REPRESENTATIVE MONSON: So really what I'm hearing is you're saying there's one district that might -- or one reservation that might qualify by the Gingles Act for a subdistrict. The other ones probably don't make it because they aren't even close to half. Correct? Is that what I heard you say? Id. at 25:17 - 23.
>
> REPRESENTATIVE NATHE: So Claire, help me understand. I'm just confused what trips the Gingles preconditions. So we're looking at a subdistrict and in some of the discussions, all of a sudden, we have -- say we have 9000 Native Americans, and we have 8000 non -- whites -- say whites. Well, doesn't that trip the Gingles the other way? I mean, isn't that discriminating against, you know, the other way? Id. at 28:27 - 25.

Reviewing these questions, it is evident the only factor considered by the Committee is the race of the Reservations in creation of the challenged Subdistricts. At the end of her presentation, Ness emphasized the importance of the Gingles preconditions:

> [MS. NESS]: If you did create a subdistrict and the Gingles preconditions were not met, you could have a racial majority member or anybody, really, bring a lawsuit saying race was used as the predominant factor, improperly. So I don't think that the -- I'll leave it at that.

Id. at 29:20 - 25.

V. SEPTEMBER 23 REDISTRICTING COMMITTEE HEARING

During the September 23 hearing, there was little discussion about Subdistricts, but Vice Chairman Holmberg expressed his conclusion that the Subdistricts should be enacted:

> [SENATOR HOLMBERG]: We do have a question regarding subdivisions. I would look at two districts which have native populations. One of them, District 9, has 9278 American Indian population. And then Fort Berthold has 8350 people living on the reservation itself. And I think that we would make a mistake as a legislature not recognizing what the courts have said, which is if you have a population beyond a certain amount, a percentage, then subdividing is the direction that Voting Rights Act Title 2 of Section 2, whatever it is, would mandate. And you have all received, I'm sure, from folks saying that if you don't subdivide, you're a racist. And I've seen it. And then I've had people who have said, if you divide it,

you're racist. So we lose no matter what we do.

Ex. E at 47:7 - 24 (Transcript of September 23rd Redistricting Committee Meeting). Vice Chairman Holmberg's comments reflect the Committee's focus on enacting subdistricts only in legislative districts containing a reservation.

Other than the brief comments by Vice Chairman Holmberg, the Committee did not discuss or analyze the challenged subdistricts or the VRA at the September 23 hearing.

VI. SEPTEMBER 28 REDISTRICTING COMMITTEE HEARING

On September 28, the Committee held a lengthy discussion about enacting the challenged Subdistricts. The Committee focused on Districts 4 and 9 because "the populations of the reservations…lend itself to either legislative action or, at some other point, court action." Ex. F at 21:7 – 9 (Transcript of September 18th Redistricting Committee Meeting). Vice Chairman Holmberg summarized the only criteria considered by the Committee:

> [SENATOR HOLMBERG]: The threshold – the ideal population for a subdistricted district is 8,453. And if you recall, the other day we were told that Fort Berthold has, in the county, in Rolette County, 9,278 Native Americans identified, and in the Turtle Mountain Reservation there is – oh excuse me. Excuse me. In Fort Berthold there is 8,350 Native Americans. So it would lend itself, I believe, those two falling under the requirements of the Voting Rights Act.

Id. at 21:18 – 22:1. Reviewing the transcript from September 28, the Committee analyzed only one factor, the populations of the Reservations in Districts 4 and 9. In response to Vice Chairman Holmberg's comments on population, the following exchange occurred:

> REPRESENTATIVE SCHAUER: And just to be clear on this, this is numbers driven. This is what we have to do following the Voting Rights Act. Is that correct?:
>
> SENATOR HOLMBERG: That is my understanding.

Id. at 23:14 – 18. Aside from stating the populations of each Reservation in Districts 4 and 9, the Committee did not discuss or analyze any of the other Gingles preconditions.

After determining the populations of the Fort Berthold and Turtle Mountain Reservations were allegedly adequate for subdistricts, Vice Chairman Holmberg made the first motion to subdivide Districts 4 and 9 pursuant to the requirements of the VRA:

> SENATOR HOLMBERG: We've -- we've had numerous discussions about the Voting Rights Act, the -- the Gingles reality, and when you look at the populations of the reservations, it -- it does lend itself to either legislative action or, at some other point, court action.
>
> If you recall, back in 2001, the Court weighed in and then weighed out. There was a lawsuit that there should be subdistricts, and the case was dismissed because the population of that area did not rise to the level where the Court felt it necessitated, under the Voting Rights Act, a subdistrict, but today our populations in two areas, two reservations, appear to meet that threshold. The threshold -- the ideal population for a subdistricted district is 8,453. And if you recall, the other day we were told that Fort Berthold has, in the county, in Rolette County, 9,278 Native Americans identified, and in the Turtle Mountain Reservation there is -- oh, excuse me. Excuse me. In Fort Berthold there is 8,350 Native Americans. So it would lend itself, I believe, those two falling under the requirements of the Voting Rights Act.
>
> And I am not a fan of subdistricts, but sometimes you do have to respect reality. And we can ignore this issue and allow someone else to be in the driver's seat, or we can do it ourselves.
>
> What I would suggest, so that we -- we all are attune to what we're doing, I would suggest a motion to subdivide those two districts, and then tomorrow morning come in with alternative plans as to how that would be or could be accomplished. If you recall, I -- I read the -- some of the other populations, and they just don't rise to the 8,453-person level.
>
> **So, Mr. Chairman, I would move that we subdivide what is District 9 on this particular map and District 4 under the provisions of the Voting Rights Act.**

Id. at 21:4-22:17 (*emphasis added*). There can be no more obvious indication to demonstrate the Committee invoked the VRA to justify its race-based districting, than the Vice-Chairman of the Redistricting Committee stating during the motion to subdivide the districts that it was being done "under the provisions of the Voting Rights Act." Id.

Following the Motion, Chairman Devlin opened the floor for discussion and several legislators voiced their opposition:

> [REPRESENTATIVE HEADLAND]: Senator Holmberg, would if be fair to say that we really don't know if the Court would weigh in, or we really don't know how they would respond? You know, I have some issues with subdivisions and

> dividing them based upon race, so I – I just don't think I can support the proposal to subdivide. Id. at 23:22 - 24:2.
>
> [REPRESENTATIVE JONES]: And so I disagree that the Supreme Court is going to come and force this on us. I would be ashamed to be in a legislature that take this step which will definitely disenfranchise – well, you've got 40 percent in the A district that's going to not be able to have two representatives that want to have that, and you're going to have the entire B district that's going to only be able to have one representative because they are now a subdistrict with only one representative. Id. at 32:9 – 18.

Despite the Vice Chairman's motion, there was no analysis by the Committee of statistics on racial bloc voting, voting history, election returns, or expert reports for Districts 4 and 9. Rather, questions asked by the Committee to Legislative Council reveal a lack of understanding of what the VRA requires:

> REPRESENTATIVE LEFOR: Thank you, Mr. Chairman. I guess I'd ask this question of Counsel. We're talking about the Voting Rights Act. How many states have enacted this already, and what – are you aware of court cases that you would cite to the Committee and what the result was? Id. at 42:14 – 18.

Id. at 42:14 – 18. In response to Representative Lefor's request for information regarding how the VRA has been applied by federal courts, Chairman Devlin suspended the pending motion:

> CHAIRMAN DEVLIN: So would the Committee rather wait until all the legal staff have time? I mean, we have to deal with this today or tomorrow morning, so -- or else we take the vote up or down. Take your choice. Chairman's looking for direction.
> ...
> We'll ask Council staff to bring some legal research in the morning before we vote on this. Okay?

Id. at 43:7 – 20.

The transcript from September 28, demonstrates a proper Gingles analysis was not undertaken by the Committee. The Committee focused solely on race and chose the two Reservations with an adequate population to create a subdistrict. There was no analysis by Committee of the minority group's political cohesion or the existence of bloc voting in Districts 4

and 9.

VII. SEPTEMBER 29 REDISTRICTING COMMITTEE MEETING

On September 29, the Redistricting Committee held their final substantive meeting. Ex. G at 6:16 – 9:9 (Transcript of September 29th Redistricting Committee Meeting). The Committee asked multiple questions reflecting the Committee's fixation on race and the populations of the reservations:

> [REPRESENTATIVE SCHAUER]: So how does this Committee legally put fair ahead of the actual numbers, which is – which are the legal guidelines that we have on the census process? Id. at 9:21 – 23.

> [SENATOR KLEIN]: Do we – are we inviting – my concern is we're inviting the courts to come in and not only meddle – well, yeah, they're meddling with what – the opportunity that we have set forth here, but is fairness going to be one of their criteria? . . . They're going to be saying, we don't care that you have done a great job. We see that there's 9,000 or 8,000 or whatever, and – and you are disenfranchising that under the Voting Act of – I guess we've been hearing from Counsel on a lot of these issues. Id. at 12:19 – 13:6.

The Committee also received legal guidance from Legislative Council on the application of the VRA. Id. 16:11 – 17:5. Legislative Council's legal guidance consisted of an explanation of Supreme Court cases on the VRA and the Gingles preconditions:

> Then I also just picked a few of the cases that are some of the most cited cases in this Voting Rights Act of litigation. I have a little bit of background on the *Thornburg v. Gingles* case, which is that one that we refer to all the time about the *Gingles* preconditions . . . So even though if they had a single-member districts, there was a very, very lengthy and detailed statistical analysis . . . And again, these cases go on for years, and they do have a lot of statistical analysis.

Id. at 17:20 – 18:25. For context, on the day the Committee was set to vote on a motion to enact the challenged Subdistricts, Legislative Council presented on the seminal case governing VRA, Gingles. The fact that the Committee was being advised about the Gingles preconditions on the day of the vote establishes a proper analysis of the Gingles preconditions was not undertaken by the Committee.

Following Legislative Council's presentation, the Committee again debated the challenged Subdistricts. During the debate, Senator Brad Bekkedahl asked Legislative Council if a lawsuit could be commenced if the Subdistricts were enacted without a proper Gingles analysis. Id. at 28:2 – 8. Legislative Council advised a lawsuit was possible:

> MS. NESS: Mr. Chairman, senator Bekkedahl, and Members of the Committee. Yes, there are always – in these cases, both sides can bring lawsuits, and that goes back to the discussion we had a couple of meetings ago about somebody claiming that race was the predominant factor in a decision when the *Gingles* preconditions were not met, and there was not a compelling state interest to use race as the predominant factor.

Id. at 28:11 – 17. Following Legislative Council's statement, Senator Bekkedahl expressed his concern:

> SENATOR BEKKEDAHL: Hey, Mr. Chairman. So most of the time when I deal with issues like this, I try to go to the facts, and we've obviously talked about the *Gingles* case a lot, and appreciate Legislative Council's research on that. But the three criteria that I think we're dealing with, Number 1 is "A minority group must demonstrate it is large and compact enough to constitute a majority in a single-member district." I believe that we've made that perfectly clear, at least in two of the issues before us, so I think that – that is active in this case. Secondly, "A minority group must demonstrate it is politically cohesive." If you subscribe to the fact that these Tribes have tribal governments, they're a sovereign nation, obviously I think that points to political cohesiveness to some degree. The third one is, "A minority group must demonstrate the majority group votes sufficiently as a group to defeat the minority group's preferred candidate." That's the one that I'm not sure. I think that's open to interpretation.
>
> . . .
>
> So I guess my take Mr. Chairman, is I believe we have Number 1 and Number 2. Two of the Gingles are very evident in this case for a decision. I think it's up to everybody to make an interpretation on that third part of that.

Id. at 34:15 – 35:21.

Immediately following Senator Bekkedahl's concerns that the Committee had not satisfied the Gingles preconditions, Representative David Monson admitted to racially gerrymandering Districts 4 and 9:

> [REPRESENTATIVE MONSON]: Now, we have – we have kept the reservations

> whole, giving them a big advantage in that, and a lot of their residents in that district that we have created or drawn at this point, they are Indian Americans. They are not on the reservation per se, but they're in the same district as the reservation. So we – at the hesitation of using the word "gerrymander," we have not gerrymandered. We have actually, I think, gerrymandered to give them every opportunity to get as many Indian Americans into that district and give them the advantage, especially when we keep the reservations whole. So would the courts look at that and say, you've – you've given them every opportunity to put up their own candidate? And They've actually got over half of the population within a district in some cases that are Indian Americans that could vote for them if they wanted.
>
> . . .
>
> I mean, I'm not thinking these should be color-blind. I mean, I don't – I don't think that race should be a factor, and I don't think we've made it a factor until they have asked for the reservations to be included, but – so have we not given them every opportunity by keeping them as cohesive as we can at this point?

Id. 36:24 – 38:8.

Representative Monson's comments reflect the Committee's process as a whole. The Committee focused on race by invoking the VRA and conducted no Gingles analysis. After Representative Monson's gerrymandering admission, Vice Chairman Holmberg motioned for a vote on subdividing Districts 4 and 9. Id. at 39:2 – 10. The Committee voted 10 to 6 to approve the challenged Subdistricts. Id. at 40:5 – 41:15. The Committee never voted or considered approving subdistricts for any of the other 45 Legislative Districts.

The Committee's hearing concluded with the Committee approving the final proposed redistricting maps. Id. at 146:19 - 148:15. Districts 4 and 9 were subdivided in such a way that each Reservation was contained in a single-member Subdistrict. Id. at 104:22 - 115:14. District 4 was subdivided into District 4A and 4B, with Subdistrict 4A following the exact boundaries of the Forth Berthold Reservation. See Doc. 12, #1. Similarly, District 9 was subdivided into Subdistricts 9A and 9B. Again, Subdistrict 9A was designed to largely follow the boundaries of the Turtle Mountain Reservation. Id.

Upon approval of the final redistricting maps, the maps were sent to the House of

Representatives for discussion and passage.

VIII. NOVEMBER 9 HOUSE OF REPRESENTATIVES FLOOR SESSION

On November 9, the special redistricting session convened to approve the Committee's final redistricting plan. During the House debate, Representative Jones moved to divide the vote on the final redistricting plan. Ex. H at 2:2 - 3:15. Representative Jones' division required a separate vote solely on the Subdistricts before voting to approve the final redistricting plan. Id. During his division request, Representative Jones explained to the House that the Committee had failed to conduct a proper Gingles analysis:

> [REPRESENTATIVE JONES]: The only way to prove a Section 2 violation in redistricting is to show the continuing effect of racial animus . . . The continuing effect of racial animus has to be proven by a regression study, commonly called a polarization study. If somebody wants to ask for a deviation from out constitutional voting systems, they have to go through a polarization study to establish the racial animus and that racial animus is consistently depriving a specific group of people that have similar voting interests from being able to elect the representation that they desire.
>
> In all of the information I can gather, and all the interaction I've had with the redistricting committee, no one has presented a polarization study that would justify the deviations from our constitutional election process.
>
> There has to be sufficient bloc voting issues established and other voting patterns that there is justification for that deviation . . . If we leave subdistricts in this as it's proposed, we will be guilty of racial gerrymandering . . . Because you cannot implement subdistricts, which is a pretty radical thing, which deviates from our constitutional voting system, unless you have the justification to do so.

Id. at 5:5 - 7:5.

In response to Representative Jones' concerns about the Committee's failure to conduct a proper Gingles analysis, Chairman Devlin explained to the entire House of Representatives that the Redistricting Committee created the Subdistricts because it was a requirement of the VRA:

> CHAIRMAN DEVLIN: So the committee put it [the subdistricts] in because it is settled federal law. The Voting Act was passed by Congress and signed by the President of the United States.

> . . .
> **We are putting in the subdistricts because that is a requirement of the Voting Rights Act.**
> . . .
> I'm not going to stand here and tell you to ignore federal law. I care too much about this country to do that. I am firmly convinced that we have no choice under the federal law and the constitution.

Id. at 17:16 - 18:23. (*emphasis added*). Together with the Chairman, other members of the Committee invoked the VRA as the basis for the creation of the challenged Subdistricts:

> [REPRESENTATIVE SCHAUER]: The Equal Protection clause of the 14th Amendment and the Voting Rights Act, Section 2, prohibits vote dilution, which happens when minority voters are dispersed or cracked among districts so that they are ineffective as a voting bloc. We may not like it for whatever reason. But it is the law . . . Let's learn from South Dakota's mistake. Let's put our state in the best possible position to defend itself if we are sued. Let's do what is right both legally and in support of our tribal friends who are also North Dakotans. Id. at 11:8 - 19.

> [REPRESENTATIVE NATHE]: The districts meet the criteria as set by the voters rights act as we did it. We had a lot of discussions. It meets the Gingles requirements. We discussed that probably all morning one day. So we have gone through this very, very thoroughly. Id. at 29:12 - 17.

Despite Representative Nathe's argument that the Committee satisfied the Gingles preconditions, no evidence supports his contention. In fact, later in the House discussion, Representative Nathe admitted that the Committee had not conducted a proper Gingles analysis:

> REPRESENTATIVE HOVERSON: Thank you, Mr. Speaker, Representative Nathe. As you heard it described, the polarization study, which is supposed to reveal racial animus as well as the consistent voting record that Representative Jones just spoke about, did your committee conduct those at all?
> . . .
> REPRESENTATIVE NATHE: Mr. Speaker, Representative Hoverson, **we did not**.

Id. at 45:6 - 16. (*emphasis added*). Other House members expressed concerns about the Committee's failure to conduct any studies or statistical analyses on the Gingles preconditions:

> [REPRESENTATIVE D. RUBY]: And that Section 2 prohibits two types of discrimination: voter denial and voter dilution. And I don't see that that's in any of these. There's no proof of it. There were no studies done, as was previously mentioned. Id. at 40:11 - 16.

> [REPRESENTATIVE JONES]: Those studies cost between 25 and $30,000. And what it does is it looks into the voting in that particular district and area to establish whether there is racial animus that is affecting the outcomes of elections. And, as near as I can tell in everything that I've seen and heard, that study was never done. Id. 44:1 - 7.

Despite the Committee's invocation of the VRA and its admission that no polarization or bloc voting studies were conducted to meet the required Gingles preconditions, the House voted narrowly to approve the Subdistricts. Id. at 62:19 - 22. The House then voted to approve the entire redistricting plan, which was then moved to the Senate for final passage. Id. at 81:25 - 82:2.

IX. NOVEMBER 11 SENATE FLOOR SESSION

The Senate debated the final passage of the Committee's redistricting plan on November 11. At the outset of the hearing, Senator Richard Marcellais of District 9 brought a floor amendment to remove the Subdistricts from the final map. Ex. I at 10:1 - 7 (Transcript of the November 11th Senate Floor Session). Senator Marcellais, a Democrat and enrolled member of the Turtle Mountain Tribe, explained the tribe opposed the challenged Subdistricts:

> SENATOR MARCELLAIS: Mr. President, members of the Senate, this proposed amendment would change District 9A and 9B to District 9. The amendment would honor the request of the Turtle Mountain and Spirit Lake Tribal Nations as a legislative district that includes both tribal nations.
> . . .
> There are some concerns about redistricting. Committees proposed District 9A and 9B that encompasses the Turtle Mountain Reservation. The redistricting committee's proposed district would dilute the Native American vote, would not provide our tribal members with the ability to elect the candidates of their choice.
> . . .
> If you look at the proposed maps for the District 9A and 9B, statistics show 81 percent Native American . . . So the current redistricting bill would be packing, not the recommended amendment.

Id. at 10:1 - 11:9. Thus, although the Committee fashioned the Subdistricts as favorable to North Dakota's tribes, Turtle Mountain opposed the challenged Subdistricts because they feared it would dilute the Native vote. Id.

In addition to Senator Marcellais' concerns, Senator Jordan Kannianen of District 4 argued the Committee had not met the Gingles preconditions:

> SENATOR KANNIANEN: Well, Mr. President, the redistricting committee heard about the Thornburg v. Gingles Supreme Court case from 1986 when it comes to determining what preconditions need to be met, what factors needs to be considered in establishing these types of subdistricts.
>
> Now the preconditions -- first, there are three preconditions. And, if all three of those are met, then there are other factors to also consider.
> . . .
> And the third [precondition] is that the majority group votes sufficient as a bloc. So, in other words, the non-Natives in the district vote sufficient as a bloc themselves to still -- as it says, "usually" defeat the minority's preferred candidate despite their bloc voting.
>
> Now, this third precondition, the big concern I have is that the Committee -- I didn't see, as the senator from District 3 mentioned, the polarization studies. This third precondition is not met.
> . . .
> And my contention simply is that all three preconditions in the Gingles case have not been met for either District 4 nor District 9. And it seems pretty clear that applying subdistricts to District 9 will have actually an adverse effect to the Native majority to the benefit of the non-Native majority. I don't think that's what we really want or the route we should be going either.

Id. at 27:3 - 31:25. Other members of the Senate also questioned the Committee's lack of a Gingles analysis:

> [SENATOR HOGUE]: But I share the concerns of the senator from District 4 and the senator from Mandan. I don't think the Gingles criteria have been met. And the senator from District 4 is flat out right that it hasn't been met in District 9 at all. The history of the minority's ability to elect candidates of their choice is a relevant consideration. And the Gingles is a U.S. Constitution case that was decided in 1986. And the Voting Rights Act gives permissive authorization . . . You may create a racially divided district if all three of these elements are met. And I'm sorry, in District 9, they're just not met. And we all know that.

Id. at 37:24 - 38:15.

Following the floor debate, the Senate narrowly voted to approve the challenged Subdistricts and passed the Committee's proposed redistricting plan. Id. at 45:7 - 20. The

redistricting plan was singed into law by Governor Burgum on November 12, 2021. Doc. 37 at 2.

LAW AND ARGUMENT

I. Summary Judgment Standard.

Rule 56(a) of the Federal Rules of Civil Procedure provides:

> "A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought. The court shall grant summary judgment 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). The United States Supreme Court found that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). The mere presence of a disputed fact alone will not defeat a motion for summary judgment; there must be a genuine issue of material fact. Torgerson v. City of Rochester, 643 F.3d 1031, 1052 (8th Cir. 2011) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 347-248 (1986)) (*emphasis added*). In order for an issue of fact to be material, it must clearly "affect the outcome of the suit under the governing law." Liberty Lobby, Inc. 477 U.S. at 248.

In bringing a motion for summary judgment, the movant must identify portions of the evidentiary record that demonstrate the absence of a genuine issue of fact. RSA 1 Ltd. P'ship v. Paramount Software Associates, Inc., 793 F.3d 903, 906 (8th Cir. 2015). However, "the burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325. If the moving party demonstrates an absence of evidence to support the nonmoving party's case, the burden shifts to the nonmoving party to bring forth "specific facts showing there is a genuine

issue for trial." Id. at 324. In doing so, the nonmoving party "may not simply rely upon the pleadings or on unsupported conclusory allegations." Martin Constr., Inc. v. Concrete Strategies, LLC, 2016 WL 4218591 (D.N.D. 2016). Rather, the nonmoving party "must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact." Id.

When determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Celotex, 477 U.S. at 334. The key inquiry, however, is "[w]hether the evidence presents sufficient disagreements to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Axelson v. Watson, 999 F.3d 541, 546 (8th Cir. 2021). Where reasonable minds cannot differ regarding a lack of disputed material facts, summary judgment must be granted. Liberty Lobby, 477 U.S. at 251.

II. Summary Judgment is appropriate because the challenged Subdistricts are not narrowly tailored to achieve a compelling state interest and therefore constitute a racial gerrymander in violation of the Equal Protection Clause of the 14th Amendment.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, §1. The United States Supreme Court has found that the central purpose of the Fourteenth Amendment is to "prevent the State from purposefully discriminating between individuals on the basis of race." Shaw v. Reno, 509 U.S. 630, 642 (1993). Thus, the Equal Protection Clause limits racial gerrymandering in legislative redistricting plans. Cooper v. Harris, 137 S.Ct. 1455, 1463 (2017). That is, it prevents a State, absent sufficient justification, from "separating its citizens into different voting districts on the basis of race." Id. (citing Bethune-Hill v. Virginia State Bd. of Elections, 137 S.Ct. 788, 797 (2017)).

In a claim for racial gerrymandering, the burden is on the plaintiff to show that "race was a predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." Id. (citing Miller v. Johnson, 515 U.S. 900, 916 (1995)). This burden is met where a plaintiff demonstrates a state invoked the VRA to justify its race-based districting. See Wisconsin Legislature v. Wisconsin Elections Comm'n, 142 S.Ct. 1245, 1249 (2022). The Supreme Court has found that when a state invokes § 2 of the VRA to justify race-based districting, the state must show the redistricting plan is narrowly tailored to achieve a compelling state interest. Cooper, 581 U.S. at 292. "Said otherwise, the State must establish that it had 'good reasons' to think it would transgress the Act if it did not draw race-based district lines." Id. at 293.

If a plaintiff establishes the state relied on the VRA to justify its race-based districting, the configuration of the district must withstand strict scrutiny. Id. at 292. That is, the burden shifts to the state to show the majority-minority district is narrowly tailored to achieve a compelling government interest. Wisconsin Legislature, 142 S.Ct. at 1248; Cooper, 581 U.S. at 292. The Supreme Court has ruled that a race-based redistricting plan is only narrowly tailored if a legislature has a "strong basis in evidence" to believe the use of racial criteria is required to comply with the VRA. Alabama Black Legis. Caucus v. Alabama, 575 U.S. 254, 278 (2015). In order to have a strong basis in evidence to justify racial classifications, a legislature must satisfy three preconditions enacted by the Supreme Court in Gingles. Those preconditions are:

> 1) the minority Group must be sufficiently large and geographically compact to constitute a majority in some reasonably configured district;
> 2) the minority group must be politically cohesive; and
> 3) the districts majority population must vote sufficiently as a "bloc" to usually defeat the minority's preferred candidate.

Cooper, 137 S.Ct. at 1470 (citing Gingles, 478 U.S. at 50-51). The Supreme Court has concluded that "unless these points are established, there neither has been a wrong nor can there be a remedy." Growe v. Emison, 507 U.S. 25, 40-41 (1993).

For example, In Cooper, the State of North Carolina invoked the VRA in its creation of a majority-minority district. Id. at 299. There, the evidentiary record demonstrated that North Carolina's Legislature intentionally created several majority African American districts in reliance on the VRA. Id. As the Supreme Court noted, the State's Legislature was honest about this fact:

> Senator Rucho and Representative Lewis were not coy in expressing that goal. They repeatedly told their colleagues that District 1 had to be majority-minority, so as to comply with the VRA. During a Senate debate, for example, Rucho explained that District 1 "must include a sufficient number of African–Americans" to make it "a majority black district." App. 689–690. Similarly, Lewis informed the House and Senate redistricting committees that the district must have "a majority black voting age population.

Id. According to the Court, because North Carolina invoked the VRA to justify its race-based districting, the State was required to meet the strict scrutiny requirements of the Equal Protection Clause. Id. at 301.

Similarly, in Wisconsin Legislature, 142 S.Ct. 1245, Wisconsin's Governor vetoed the redistricting maps proposed by the Wisconsin's Legislature. Id. at 1247. Instead, the Governor proposed his own map, which included one additional majority-black district. Id. The Governor argued this additional majority-minority district was needed to comply with the VRA. Id. The State's Legislature appealed to the Wisconsin Supreme Court, arguing the Governor's map constituted racial gerrymandering. Id. at 1247. On appeal, the Wisconsin Supreme Court found, and the United States Supreme Court agreed, that the Governor's invocation of the VRA to justify the additional majority-black district triggered strict scrutiny. Id. at 1249. According to the United States Supreme Court:

> We said in *Cooper* that when a State invokes § 2 to justify race-based districting, 'it must show (to meet the 'narrow tailoring' requirement) that it had 'a strong basis in evidence' for concluding that the statute required its action.' The Wisconsin Supreme Court concluded that the Governor's intentional addition of a seventh majority-black district triggered the Equal Protection Clause and that Cooper's strict-scrutiny test must accordingly be satisfied. Accepting those conclusions, we hold that the court erred in its efforts to apply Cooper's understanding of what the Equal Protection Clause requires.

Id. Thus, the Supreme Court affirmed its previous holding in Cooper that a state's reliance on the VRA to justify race-based districting creates a duty upon the state to show the at-issue district is narrowly tailored to achieve a compelling government interest. Id.

a. The Legislative Assembly created the challenged Subdistricts solely to comply with the VRA.

The critical issue for the Court's consideration is whether the Legislative Assembly invoked the VRA as a predominant factor in creating the Subdistricts in Districts 4 and 9, thus establishing separating voters into different districts on the basis of race. The Legislative record unequivocally establishes the Committee invoked the VRA to justify its drawing of Subdistricts 4A, 4B, 9A, and 9B, thus triggering the strict scrutiny requirements of the Equal Protection Clause.

In this case, the legislative record affirmatively establishes the challenged Subdistricts were created solely to comply with the VRA. The legislative record is replete with members of the Committee, including Chairman Devlin, invoking the VRA to justify the enactment of Subdistricts. While explaining the purpose of the Subdistricts on the House floor, Chairman Devlin was clear:

> So the committee put it [the subdistricts] in because it is settled federal law. The Voting Act was passed by Congress and signed by the President of the United States.
>
> . . .
>
> **We are putting in the subdistricts because that is a requirement of the Voting Rights Act.**
>
> . . .
>
> I'm not going to stand here and tell you to ignore federal law. I care too much about this country to do that. I am firmly convinced that we have no choice under the federal law and the constitution.

Ex. H at 17:16 - 18:23 (*emphasis added*). This invocation of the VRA by the Chairman, on its own, triggers the Equal Protection Clause's strict scrutiny requirements. Cooper, 581 U.S. at 292. Still, the legislative record plainly shows the Committee shared Chairman Devlin's reasoning. While making a motion to approve the Subdistricts, Committee Vice Chairman Holmberg invoked the VRA as the basis for creation of the Subdistricts:

> [SENATOR HOLMBERG]: So, Mr. Chairman, I would move that we subdivide what is District 9 on this particular map and District 4 **under the provisions of the Voting Rights Act**.

Ex. F at 22:14 - 17 (*emphasis added*). The Motion made by the Vice Chairman would eventually be approved by the Committee. See Ex. G 40:5 – 41:15.

In addition to the Chairman and Vice Chairman, other members of the Committee repeatedly expressed reliance on the VRA to enact the Subdistricts:

> REPRESENTATIVE SCHAUER: And just to be clear on this, this is numbers driven. This is what we have to do following the Voting Right Act. Ex. G at 23:14 - 17.

> [REPRESENTATIVE NATHE]: The districts meet the criteria as set by the voters rights act as we did it. We had a lot of discussions. It meets the Gingles requirements. We discussed that probably all morning one day. So we have gone through this very, very thoroughly. Id. at 29:12 - 17.

> [REPRESENTATIVE SCHAUER]: The Equal Protection clause of the 14th Amendment and the Voting Rights Act, Section 2, prohibits vote dilution, which happens when minority voters are dispersed or cracked among districts so that they are ineffective as a voting bloc. We may not like it for whatever reason. But it is the law . . . Let's learn from South Dakota's mistake. Let's put our state in the best possible position to defend itself if we are sued. Let's do what is right both legally and in support of our tribal friends who are also North Dakotans. Ex. H at 11:8 - 19.

> REPRESENTATIVE LEFOR: Thank you, Mr. Chairman. I guess I'd ask this question of Counsel. We're talking about the Voting Rights Act. How many states have enacted this already, and what -- are you aware of court cases that you cite to the Committee and what the result was? Id. at 42:12 - 18.

> [REPRESENTATIVE MONSON]: Now, we have – we have kept the reservations whole, giving them a big advantage in that, and a lot of their residents in that district that we have created or drawn at this point, they are Indian Americans. They are not on the reservation per se, but they're in the same district as the reservation. So we – at the hesitation of using the word "gerrymander," we have not gerrymandered. We have actually, I think, gerrymandered to give them every opportunity to get as many Indian Americans into that district and give them the advantage, especially when we keep the reservations whole. So would the courts look at that and say, you've – you've given them every opportunity to put up their own candidate? Ex. H at 36:24 - 37:13.

The legislative record is clear. The Committee, and the Legislative Assembly, created the Subdistricts under the erroneous guise of complying with the VRA. This fact is established by the Chairman, Vice Chairman, and members of the Committee's own statements. Any argument to the contrary defies to the overwhelming evidence contained in the legislative record.

There is no genuine question of fact that the State invoked the VRA to justify its creation of the challenged Subdistricts. As a result, the burden is on the State to establish the Subdistricts are narrowly tailored to achieve a compelling government interest as required by Gingles.

b. The challenged Subdistricts are not narrowly tailored to achieve a compelling government interest.

Because the State invoked the VRA to justify creating the Subdistricts, Defendants must now prove the State met the Gingles preconditions to justify the use of race was narrowly tailored to serve a compelling government interest. See Cooper, 137 S.Ct. at 1464. Because the legislative record is void of any meaningful Gingles analysis, there is no evidence the Defendants can rely on to prove the Subdistricts are narrowly tailored to achieve a compelling government interest. Accordingly, there are no genuine questions of material fact and summary judgment is appropriate.

A legislature's compliance with the VRA may be a compelling interest. Shaw v. Hunt, 517 U.S. 899, 915-916 (1996). Undoubtedly, a State has an interest in seeking to comply with a law aimed at remedying past voting discrimination. City of Richmond v. J.A. Croson Co., 488 U.S.

469. 490 (1989). Yet, race-based redistricting is only "narrowly tailored" if a legislature has "a strong basis in evidence" to believe the use of racial criteria is required to comply with the VRA. Alabama Black Legislative Caucus, 575 U.S. at 278. In order to have a strong basis in evidence, a State must conduct a "pre-enactment analysis with justifiable conclusions" of what the VRA demands before classifying individuals based on race. Abbott, 138 S.Ct. at 2335.

A legislature has a strong basis in evidence to justify race-based districting only if it satisfies the three preconditions enacted by the Supreme Court in Gingles, 478 U.S. at 50-51. The Supreme Court ruled all three Gingles preconditions must be satisfied before the creation of a race-based district. Wisconsin Legislature, 142 S.Ct. at 1250 (holding that a state may not "adopt a racial gerrymander that the State does not, **at the time of imposition**, judge necessary under a proper interpretation of the VRA.") (*emphasis added*). That is, a state cannot retroactively justify a racial gerrymander with a Gingles analysis conducted after a district's creation. Id.; see also Growe, 507 U.S. at 42 (stating Section 2 does not assume the existence of racial bloc voting; the state must prove it).

In order to satisfy the Gingles preconditions, a legislature must conduct a functional and statistical analysis for all three factors. A proper Gingles analysis must consider "a statistical and non-statistical evaluation of the voting behavior and election results in the relevant elections." Missouri State Conference of the Nat'l Ass'n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist., 201 F. Supp. 3d 1006, 1041 (E.D. Mo. 2016). Moreover, "[n]o mathematical formula or simple doctrinal test is available . . . the inquiry therefore focuses on statistical evidence to discern the way voters voted." Shirt v. Hazeltine, 336 F. Supp. 2d. 976, 1010 (S.D. Dist. Ct. 2004). The Eighth Circuit explained, "[t]he surest indication of race conscious politics is a pattern of racially polarized voting extending over time." Buckanaga v. Sisseton Indep. Sch. Dist., No.

54-5, S. Dakota, 804 F.2d 469, 473 (8th Cir. 1986). Thus, the Gingles factors are not met unless a proper statistical analysis has been conducted. See Sanchez v. State of Colo., 97 F.3d 1303 (10th Cir. 1996) (stating the heart of each inquiry requires a searching look into the statistical evidence to discern the way voters voted).

In Growe, a group of voters brought suit against the Minnesota Secretary of State alleging the State's congressional map violated Section 2 of the VRA. 507 U.S. at 27. Agreeing with the plaintiffs, the three-judge panel of the federal district court adopted its own plan which contained a "super" majority-minority district in the City of Minneapolis. Id. at 31. The Secretary of State appealed to the Supreme Court alleging the three-judge panel failed to conduct a proper Gingles analysis prior to enacting its own redistricting plan. Id. The Supreme Court struck down the district court's map. Id. at 41-42. According to the Court, the lower court's reliance on its own "judicial experience, as well as the results of past elections" was not a proper analysis of Gingles. Id. at 38. In reversing the lower court, the Supreme Court noted that "the record simply contains no statistical evidence of minority political cohesion (whether of one or several minority groups) or of majority bloc voting in Minneapolis." Id. at 41.

In Abbott, the Supreme Court rejected Texas's justification for intentionally drawing district boundaries to encompass a larger number of Latinos into House District 90. 138 S.Ct. at 2334. The state offered two justifications for its drawing of the district: 1) such a drawing was requested by a minority group; and 2) the State analyzed election primary results from two elections years, and concluded it was required to do so. Id. Again, the Court rejected such evidence as insufficient. Id. According to the Court, "Texas has pointed to no actual 'legislative inquiry' that would establish the need for its manipulation of the racial makeup of the district. Id. at 2335. The Court also highlighted the type of evidence Texas needed to satisfy the Gingles preconditions:

> By contrast, where we have accepted a State's 'good reasons' for using race in drawing district lines, the State made a strong showing of a pre-enactment analysis with justifiable conclusions. In *Bethune–Hill*, the State established that the primary mapdrawer 'discussed the district with incumbents from other majority-minority districts, ... considered turnout rates, the results of the recent contested primary and general elections,' and the district's large prison population. The State established that it had performed a 'functional analysis,' and acted to achieve an 'informed bipartisan consensus.' Texas's showing here is not equivalent.

Id. (quoting Bethune-Hill, 137 S.Ct. at 1471) (citations omitted).

In this case, the legislative record is undisputed. The Committee did not conduct a functional Gingles analysis establishing the second and third Gingles preconditions. No redistricting experts were retained or testified regarding the challenged Subdistricts. No statistical analyses on past elections in Districts 4 and 9 were performed which would demonstrate political cohesion or the existence majority bloc voting. The Committee did not conduct any racial polarization studies. The Committee failed to analyze any election returns for either District. Further, the Committee did not consider any race neutral alternatives for Districts 4 and 9. In an exchange on the House floor, Committee Member Nathe admitted no functional analysis had been done:

> REPRESENTATIVE HOVERSON: Thank you, Mr. Speaker, Representative Nathe. As you heard it described, the polarization study, which is supposed to reveal racial animus as well as the consistent voting record that Representative Jones just spoke about, did your committee conduct those at all?
> . . .
> REPRESENTATIVE NATHE: Mr. Speaker, Representative Hoverson, **we did not**.

Ex. H at 45:6 - 16. (*emphasis added*). Representative Nathe's admission is fatal.

Based on the legislative record, it is unclear what evidence, if any, led the Committee to believe the three Gingles preconditions had been satisfied. However, making such a determination is not on Plaintiffs; this burden lies solely with Defendants. See Wisconsin Legislature, 142 S.Ct. at 1248. In order to survive Plaintiffs' Motion for Summary Judgment, Defendants must set forth

competent evidence from the legislative record showing the Committee conducted a functional and statistical analysis of the Gingles preconditions. Defendants know full well that no such evidence exists. Defendants are in possession of the entire legislative record - all the facts, testimony, and evidence in this case - through the transcripts from the redistricting process. Defendants must present to this Court evidence in the legislative record showing the Committee satisfied the Gingles preconditions. Because Defendants cannot do so, Plaintiffs are entitled to summary judgment.

In a misguided effort to show the challenged Subdistrict are narrowly tailored, Defendants will likely point to a recent report written by their expert, Dr. Trey Hood. In his report, Dr. Hood reaches certain conclusions about Districts 4 and 9 after reviewing evidence and conducting his own statistical analyses. See Ex. J (Defendants' Expert Report). The problem with Dr. Hood's report is that it was not available to the Redistricting Committee or the Legislative Assembly before the challenged Subdistricts were created. The very fact that Defendants have retained an expert in this action to conduct a Gingles analysis is a clear admission no such analysis exists in the legislative record. If it did, Defendants would unquestionably bring it to the attention of the Court. Because Dr. Hood's analysis was created after the redistricting process and was never considered by the Committee, it is irrelevant to this case. Wisconsin Legislature, 142 S.Ct. at 1250.

Simply put, the Committee failed to conduct a functional analysis of the Gingles preconditions. As a result, the challenged Subdistricts are not narrowly tailored, and constitute racial gerrymanders in violation of the Equal Protection Clause. Wisconsin Legislature, 142 S.Ct. at 1250-51. Summary judgment is appropriate.

III. Because Plaintiffs are entitled to Summary Judgement, the Court must permanently enjoin Subdistricts 4A, 4B, 9A, and 9B.

As established herein, the Subdistricts are racial gerrymanders which were created in violation of the Equal Protection Clause. As a result, the Equal Protection rights of over 30,000 North Dakota voters are currently being violated in Districts 4 and 9. The Court must permanently enjoin the Subdistricts.

The Supreme Court has held that "redistricting is primarily the duty and responsibility of the State." Perry v. Perez, 565 U.S. 388, 392 (2012). However, district courts have inherent authority to remedy constitutional violations, including redrawing or revising state-enacted redistricting maps. See North Carolina v. Covington, 138 S.Ct. 2548, 2554 (2018) (finding a district court did not abuse its discretion in appointing a special master, rather than the state, to redraw gerrymandered voting districts); see also Upham v. Seamon, 456 U.S. 37, 39 (1982) (explaining that although a court must defer to legislative judgments on reapportionment as much as possible, it is forbidden to do so when the legislative plan would not meet the special standards of population equality and racial fairness that are applicable to court-ordered plans). This is especially true where "a court may need to make only minor or obvious adjustments to the state's existing districts" in order to remedy a constitutional violation. Perry, 565 U.S. at 392.

In this case, the Subdistricts can be permanently enjoined without impacting the boundaries of any other legislative district. The Subdistricts are nothing more than a line that follows the boundaries of each Reservation. Removing the Subdistrict dividing-line does not change the current population or makeup of either District or impact any of the traditional redistricting principles, such as compactness, contiguity, or respect for political subdivision borders. Put simply, permanently enjoining the Subdistricts would not require the Court to redraw any District boundaries, it would merely remove an unconstitutional boundary separating each Subdistrict on

the basis of race. As such, Plaintiffs respectfully request the Court permanently enjoin the Subdistricts by returning Districts 4 and 9 to a multimember contiguous districts.

Moreover, Plaintiffs respectfully request an Order from the Court awarding their attorney's fees and reasonable costs pursuant to 42 U.S.C. § 1988. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) (a prevailing plaintiff in a civil rights action "should ordinarily recover an attorney's fees unless special circumstances would render such an award unjust."); Kimbrough v. Arkansas Activities Ass'n, 574 F.2d 423 (8th Cir. 1978) (holding a prevailing party should recover attorney's fees unless special circumstances would render such an award unjust). Should the present Motion be granted, Plaintiff's will submit a separate motion for attorney fees pursuant to N.D.R.Civ.P. 54(d).

CONCLUSION

The challenged Subdistricts perpetuate a clear racial gerrymander that is not narrowly tailored to serve a compelling government interest. The legislative record unequivocally shows the Committee invoked compliance with the VRA to justify the Subdistricts. The record further shows the Committee never conducted a functional or statistical analysis of the Gingles preconditions. As a result, there is no question of fact, and Plaintiffs request that the Court grant their Motion for Summary Judgment.

Respectfully submitted this 28th day of February, 2023.

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