UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

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

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT

In their Responses, Defendants and Intervenors continue to assert the same misguided arguments without citing any evidence in the legislative record. The legislative record and the evidence set forth by Plaintiffs prove race was the Redistricting Committee's predominant consideration for subdividing Districts 4 and 9. As a result, the burden shifts to the Defendants to show the Committee met the Gingles preconditions. Because it is undisputed the Committee did not conduct a proper pre-enactment Gingles analysis, Defendants cannot meet their burden. Accordingly, Plaintiffs' summary judgment motion should be granted.

I. Race was the sole and predominant factor in creating the Subdistricts.

The undisputed evidence in this case proves race was the Committee's predominant

consideration in subdividing Districts 4 and 9. The legislative record is closed; and the transcripts of the redistricting hearings prove the Committee prioritized race over other traditional redistricting principles. In their Response, Defendants have failed to set forth any evidence the Committee considered race-neutral traditional redistricting principles as the predominant factor in creating the Subdistricts. Instead, Defendants have continued to misconstrue the evidence in an attempt to mislead the Court. Defendants cite statements in the legislative record which are unrelated to Districts 4 and 9 and do not support their argument. Defendants' attempts to misconstrue the evidentiary record and mislead the Court should be rejected.

Plaintiffs have set forth evidence establishing there is no genuine issue of material fact that race was the predominant factor in the creation of the Subdistricts. See City of Mt. Pleasant, Iowa v. Associated Elec. Co-op., Inc., 838 F.2d 268, 273 (8th Cir. 1988). Because Plaintiffs met their initial burden, the burden shifts to Defendants to set forth affirmative evidence and specific facts demonstrating a genuine dispute on the issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). When the burden shifts, Defendants may not rest on the allegations, but must set forth specific facts showing a genuine dispute of material fact exists. Fed. R. Civ. P. 56(c)(1). "If the non-moving party fails to produce such evidence, summary judgment is proper." Olson v. Pennzoil Co., 943 F.2d 881, 883 (8th Cir. 1991).

Defendants and Intervenors fail to present specific facts showing a genuine dispute of material fact exists regarding race as the predominant factor in the creation of the Subdistricts. Defendants summarily cite a list of exhibits contained in the Affidavit of Emily Thompson. See Doc. 20. As explained in Plaintiffs' Response to Defendants Motion for Summary Judgment, Defendants' citations to these exhibits are largely unrelated to Districts 4 and 9, and are not evidence of traditional redistricting principles. See Doc. 111. Defendants rely upon Exhibits E, O,

P, T, V, and X of Thompson's Affidavit. See Doc. 111 at 6-7. These Exhibits are written testimony from Representatives of the Spirit Lake and Standing Rock Tribes, and again are unrelated to Districts 4 and 9. As Defendants know, Spirit Lake is located in District 15 and Standing Rock is located in District 31. The written testimony of the Representatives from these Tribes does not relate to the Committee's decision to subdivide Districts 4 and 9.

Defendants' citations are a blatant misrepresentation of the legislative record. This is exemplified by Defendants' citations to Exhibit Y of Thompson's Affidavit, which is written testimony from Chairman Jamie Azure of the Turtle Mountain Tribe. Id. Chairman Azure's testimony demonstrates the Turtle Mountain Tribe opposed the creation of Subdistricts 9A and 9B as racial gerrymandering. See Doc. 20, #25 (stating the proposed Subdistrict containing the Turtle Mountain Reservation "is illegally drawn and we believe it will be struck down in court if it is adopted by the State Legislature."). Defendants' reliance on Chairman Azure's testimony to support their position is erroneous. If there was any evidence in the legislative record to support their argument, Defendants would undoubtedly bring it to the Court's attention. The fact they have not done so is an admission no such evidence exists.

The most fatal admission to Defendants' position is their argument that "[b]ecause of briefing page limitations, only a portion of the traditional race-neutral redistricting evidence considered by the Legislature has been provided by Defendants and Intervenors in their respective summary judgment briefing." Id. at 5. This argument is disingenuous considering Defendants' Memorandum in Response to Plaintiffs' Motion for Summary Judgment uses only 22 of the 40 pages allowed by the Local Rules. See Doc. 111. Similarly, the Intervenors' Response uses only 11 out of the 40 pages allowed by the local rules. See Doc. 113. Thus, Defendants and the Intervenors had an additional 47 pages they could have used to cite this abundance of alleged "race

neutral redistricting evidence." As the Eighth Circuit has noted, a district court is not "obligated to wade through and search the entire record" for evidence to bolster a party's claim. See Gilbert v. Des Moines Area Cmty. Coll., 495 F.3d 906, 915 (8th Cir, 2018); see also Earnest v. Garcia, 1999 ND 196, ¶ 10, 601 N.W.2d 260 (holding that judges, whether trial or appellate, are not ferrets, obligated to engage in unassisted searches of the record for evidence to support a litigant's position). Instead of citing to this alleged evidence in the legislative record supporting their position, Defendants ask the Court to simply take their word it exists. This proposition is a tacit admission there is no "race neutral redistricting evidence" in the legislative record.

Contrary to Defendants' contentions, the legislative record is replete with evidence of the Committee's focus on race and the Voting Rights Act ("VRA"). Chairman Devlin, Vice Chairman Holmberg, and other members of the Committee continuously invoked race and the VRA to justify the challenged Subdistricts. Plaintiffs cited the legislative record extensively to demonstrate this point. See Doc. 98 at 3-21, 26-28, and 31; see also Doc. 114 at 2, 5-16, 18-22, 26-28; Doc. 115 at 4-5, 7, 9-13, 16, 18. Plaintiffs presented direct statements from the Chairman, Vice Chairman, and nearly every other Committee Member showing race predominated the drawing of the challenged Subdistricts. Plaintiffs also presented significant circumstantial evidence showing race predominated. See Doc. 98 at 22. The legislative record shows the Committee chose to subdivide Districts 4 and 9 because each District contains a sufficient number of Native American voters on the Reservation. This focus on race required the Committee to ensure Districts 4 and 9 are narrowly tailored to achieve a compelling government interest. Cooper v. Harris, 581 U.S. 285, 292 (2017)

Like their misrepresentations of the legislative record, Defendants efforts to distinguish controlling Supreme Court precedent is also misguided. Defendants argue Cooper "does not control here." Doc. 111 at 8. To support this contention, Defendants argue that "a brief review of

the *Cooper* Appendix showing the shapes of the non-compact and non-contiguous challenged districts prove *Cooper* does not assist the Plaintiffs contention in this case." Id. Defendants misunderstand the holding in Cooper. The Cooper Court did not focus on the shape of the districts in question, it focused on the legislature's intent. 581 U.S. at 308. As the Court explained, "a trial court has a formidable task: it must make a sensitive inquiry into all . . . **direct evidence of intent**." Id. (*emphasis added*). As a result, the Cooper Court relied on statements made by the co-chairmen of the North Carolina Redistricting Committee to find race predominated the drawing of the challenged districts; not the shape of the districts. Id. at 299-300. The Supreme Court rejected the argument that a district's compact or contiguous shape proves a legislature prioritized traditional redistricting principles. See Bethune-Hill v. Virginia State Bd. of Elections, 580 U.S. 178, 189 (2017) (stating "[t]he Equal Protection Clause does not prohibit misshapen district; it prohibits unjustified racial classifications."). The Court explained "race may predominate even when a reapportionment plan respects traditional principles . . . if race was the criterion that, in the State's view, could not be compromised, and race-neutral consideration came into play only after the race-based decision has been made." Id. As a result, Defendants' argument that the shape of Districts 4 and 9 distinguish this case from Cooper must be rejected.

II. Defendants have not met their burden of proving the challenged Subdistricts are narrowly tailored to achieve a compelling government interest.

Because the legislative record establishes race was the Committee's predominant consideration in creation of the Subdistricts, the burden shifts to the Defendants to prove the Subdistricts are narrowly tailored to achieve a compelling government interest. Cooper, 581 U.S. at 292. Defendants have failed to present any evidence in the record that the Committee or Legislature met the second and third prongs of the Gingles preconditions. Accordingly, Plaintiffs' summary judgment motion should be granted.

The Supreme Court held 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). "To have a strong basis in evidence . . . the State must carefully evaluate whether a plaintiff could establish the *Gingles* preconditions – including effective white bloc-voting – in a new district created without those measures." Cooper, 581 U.S. at 304.

There is no genuine dispute that the Committee failed to conduct a proper Gingles analysis. Defendants argue:

> Plaintiffs present the Court essentially with a false dichotomy. They argue that anytime a legislative redistricting decision is made, even in part on the basis of complying with the VRA, or avoiding a VRA claim, the legislature must have performed a *Gingles* analysis in advance, and if that has not occurred, strict scrutiny cannot be met.

Doc. 111 at 9. Defendants misinterpret the law. The Supreme Court has been clear: "when a State invokes § 2 [of the VRA] 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." Wisconsin Legislature v. Wisconsin Elections Commission, 142 S. Ct. 1245, 1247 (2022). That "strong basis in evidence" requirement is only met if a legislature conducts a pre-enactment Gingles analysis. Cooper, 581 U.S. at 304. Defendants erroneously argue that a "pre-enactment analysis when invoking the VRA is not the controlling legal standard." Doc. 111 at 9. Defendants are simply incorrect.

In their Response, Defendants finally admit the Committee did not consider the statistical studies or expert reports that are required to meet the Gingles preconditions. Id. at 11 ("The legislature considered and sufficiently analyzed the challenged Subdistricts under the *Gingles* preconditions . . . **even if it did not arrive at such conclusion [sic] through expert statistical**

analyses.") (*emphasis added*). This admission by Defendants is fatal to their defense. The Supreme Court found statistical analyses are required to meet the Gingles preconditions. See Growe v. Emison, 507 U.S. 25, 41-42 (1993); see also Buckanaga v. Sisseton Indep. Sch. Dist., No. 54-5, S. Dakota, 804 F.2d 469, 473 (8th Cir. 1986).

In an attempt to prove the Committee met the Gingles preconditions through means other than statistical analysis of election results, Defendants cite several quotes from legislators. However, none of Defendants' citations establish the second and third Gingles preconditions were met. For example, Defendants cite a statement from Representative Pollert in which he does not even discuss the Gingles preconditions. See Doc. 111 at 13. They also cite to Chairman Devlin's speech on the House floor in which he alleges the Subdistricts are required to comply with the VRA, but he never discusses the Gingles preconditions. Id. at 13-14. Shockingly, Defendants cite a statement from Representative Nathe in which he admits the Committee did not consider any studies or statistics to meet the Gingles preconditions. See Id. at 15 (stating "we did not" when asked if the Committee conducted a racial polarization study). Even more puzzling is Defendants' reliance on a statement from Senator Kannianen in which he proclaims the Gingles preconditions were not met:

> 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 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 or 9.

Doc. 111 at 17. None of Defendants' citations to the legislative record show the Committee satisfied the Gingles preconditions, but instead prove the Gingles preconditions were **not** met.

Defendants have not set forth any evidence to meet their burden of establishing the Committee conducted a proper Gingles analysis. There is no evidence in the record that the Committee analyzed racial bloc voting in Districts 4 and 9. There is no evidence the Committee

analyzed whether Native Americans are politically cohesive in Districts 4 and 9. There is no evidence the Committee considered voting patterns or previous election results in Districts 4 and 9. These considerations are required to meet the Gingles preconditions. 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). This point is best exemplified by Intervenors misguided attempts to introduce a *post hoc* expert report containing a statistical analysis of the Gingles preconditions. See Doc 100, #10. While Dr. Hood's report is not proper evidence in this case, it is an example of the type of pre-enactment evidence the Committee needed to consider to satisfy the Gingles preconditions, but did not.

Because Defendants cannot identify any evidence in the legislative record showing the Committee conducted a proper pre-enactment Gingles analysis, they have not met their burden of proving the challenged Subdistricts are narrowly tailored to achieve a compelling government interest and summary judgment is appropriate.

III. The Gingles preconditions cannot be satisfied using *post hoc* expert reports.

With the understanding that the legislative record is void of any Gingles analysis, Defendants and the Intervenors have attempted to backfill the record with numerous *post hoc* expert reports. According to the Intervenors, "[p]ut simply, this Court does not need to inquire into the information available to the legislature at the time redistricting plan was enacted because Tribal Defendants have proven . . . that the VRA requires District 4A." Doc. 113 at 2. The Intervenors fail to cite any legal authority to support such a novel and illogical argument. The Intervenors' argument is contrary to controlling Supreme Court precedent.

The Supreme Court held that a court's inquiry in a racial gerrymandering claim is solely to examine the evidence considered by legislature "at the time of imposition" of a challenged district.

Wisconsin Legislature, 142 S.Ct. at 1250. That is, the "inquiry concerns the actual considerations that provided the essential basis for the lines drawn, **not *post hoc* justifications the legislature in theory could have used but in reality did not**." Bethune-Hill, 580 U.S. at 189-190. Thus, "the Supreme Court concluded that the state's evidentiary burden for strict scrutiny can be met only by using evidence it actually considered at the time of redistricting; after-the-fact justification does not count." Alabama Legislative Black Caucus v. Alabama, 231 F. Supp. 3d 1026, 1358 (M.D. Ala. 2017) (citing Shaw v. Hunt, 517 U.S. 899, 910 (1996)).

In Shaw, the Supreme Court expressly rejected the use of *post hoc* expert reports to justify race-based districting. There, the state argued its race-based districting was necessary to remedy past discrimination. Id. The State presented two *post hoc* expert reports which alleged a long history of discrimination in the challenged districts. Id. The three- judge court dismissed the expert reports because they were not available to the legislature at the time the challenged districts were drawn. Id. The Supreme Court affirmed this holding:

> Obviously these reports, both dated March 1994, were not before the General Assembly when it enacted Chapter 7. And there is little to suggest that the legislature considered the historical events and social science data that the reports recount, beyond what individual members may have recalled from personal experience. We certainly cannot say on the basis of these reports the District Court's findings on this point were clearly erroneous.

Id.

In their Response, the Intervenors included an uncited table (Figure 1) which they claim supports their argument. However, even the table cited by the Intervenors states a "district is a racial gerrymander in violation of the Equal Protection Clause" if a "[s]tate lacked a strong basis in evidence **pre-enactment** to conclude [the] *Gingles* factors [were] present." See Doc. 113 at 6 (Figure 1, Scenario 4). The Intervenors own table proves the fallacy in their argument that this Court "need not inquire into the information available to the legislature at the time the redistricting

plan was enacted".

Under the Intervenors' misguided and unsupported interpretation of the law, a state would be allowed to enact racially based districts without considering any evidence, let alone Gingles evidence, prior to enactment. If challenged, a state would simply need to come up with some *post hoc* opinions to justify its decisions. Such an argument would allow states to racially gerrymander voting districts without any evidence or analysis. A state would simply need to subsequently justify its decision by hiring an expert. This standard is contrary to legal precedent and common sense.

The Intervenors' and Defendants' attempt to backfill the legislative record with *post hoc* expert reports must be rejected in accordance with Supreme Court precedent.

IV. This Court has the authority to enjoin the challenged Subdistricts.

Defendants and Intervenors argue the Court cannot enjoin the challenged Subdistricts because it would violate the VRA. See Doc. 111 at 20; see also Doc. 113 at 8. What both parties ignore is that the Supreme Court routinely enjoins or strikes down racially gerrymandered districts. See Cooper, 581 U.S. at 322-323 (affirming district court's finding that challenged districts constitute racial gerrymanders); see also Wisconsin Legislature, 142 S.Ct. 145 (striking down racially-drawn majority minority district because State failed to present a strong basis in evidence); North Carolina v. Covington, 138 S.Ct. 2548 (2018) (affirming district court's order enjoining racially gerrymandered districts); Shaw, 517 U.S. 899 (striking down race-based districts which were not narrowly tailored to achieve a compelling government interest). The argument that this Court is without authority to remedy an unconstitutional racial gerrymander is without merit.

Defendants erroneously argue that, because North Dakota's Constitution permits subdistricts, this Court cannot remedy the racially gerrymandered Subdistricts in this case. See Doc. 111 at 21. This argument defies logic. Under Defendants' theory, a state could racially

gerrymander any voting district without judicial recourse as long as a state's constitution permits single-member representation. Defendants fail to cite any legal authority for such an illogical position. The Equal Protection Clause's prohibition of racial gerrymandering applies on a state level and overrules any conflicting state law provisions, including a state's constitution. Cooper v. Aaron, 358 U.S. 1 (1958) (holding the Fourteenth Amendment is the "supreme law of the land" and preempts any conflicting state laws). Defendants' argument on this point fails.

Further, three-judge courts routinely grant summary judgment in racial gerrymandering cases. See Montiel v. Davis, 215 F. Supp. 2d 1279 (S.D. Ala. 2002) (granting defendant's motion for summary judgment on a racial gerrymandering claim); see also Anne Harding v. County of Dallas, Texas, 948 F.3d 302 (5th Cir. 2020) (affirming district court's order granting summary judgment on a racial gerrymandering claim); Robertson v. Bartels, 148 F.Supp.2d 443 (D.N.J. 2001) (granting Defendant's motion for summary judgment on a racial gerrymandering claim); Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000) (affirming district court's order granting summary judgment on a racial gerrymandering claim). The record in this case is complete and before the Court. There is no need for a trial in this action. Plaintiffs' summary judgment motion should be granted because there are no genuine issues of material fact in dispute.

V. Plaintiffs have standing to challenge the drawing of Districts 4 and 9.

Defendants and Intervenors argue Plaintiffs lack standing. In support of this argument, both parties claim Plaintiffs have only challenged Subdistricts 4A and 9A. However, Plaintiffs' Complaint is clear: "Plaintiffs request that this Court declare that Subdistricts 4A and 4B, and 9A and 9B are racial gerrymanders in violations of the Equal Protection Clause of the Fourteenth Amendment." Doc. 1 at 9. It is undisputed that Plaintiff Walen lives in Subdistrict 4A and Plaintiff Henderson lives in Subdistrict 9B. The boundaries of their Subdistricts were drawn on the basis of

race. The Supreme Court held that when a plaintiff resides in a racially gerrymandered district, the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action. U.S. v. Hays, 515 U.S. 737, 744-745 (1995); see also Shaw v. Reno, 517 U.S. 899 (holding a plaintiff who resides in a district which is the subject of a racial-gerrymander claim has standing to challenge the legislation which created that district). As such, Plaintiffs have standing to challenge the drawing of Districts 4 and 9.

CONCLUSION

The challenged Subdistricts perpetuate a clear racial gerrymander. The legislative record in this case proves that race was the Committee's predominant consideration in drawing the challenged Subdistricts. Because Defendants cannot meet their burden to show the Committee satisfied the narrow tailoring requirements of the Equal Protection clause at the time it enacted the Subdistricts, there is no question of material fact in this case. Summary Judgment enjoining the challenged Subdistricts is appropriate. Moreover, Plaintiffs are entitled to their reasonable costs and attorney's fees in accordance with 42 U.S.C. § 1988.

Respectfully submitted this 4th day of April, 2023.

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