

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

TURTLE MOUNTAIN BAND OF CHIPPEWA  
INDIANS, et al.,

Plaintiffs,

v.

MICHAEL HOWE, in his official capacity as  
Secretary of State of North Dakota, et al.,

Defendant.

Civil No. 3:22-cv-00022-PDW-ARS

**PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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## INTRODUCTION

For decades, Native American voters in northeastern North Dakota have had the opportunity to elect three candidates of their choice—one state senator and two state representatives—to the North Dakota legislature from District 9. From 1990 until 2022, District 9—which was coextensive with Rolette County, home to the Turtle Mountain Band of Chippewa Indians—elected a Native American to the state senate. The 2020 Census revealed that the district, which had a Native American Voting Age Population (“NVAP”) of 74.4%, needed to gain population to satisfy the Constitution’s one-person, one-vote requirement.

Although the legislature could have balanced the district’s population by extending it southward into nearby Benson County, home to the Spirit Lake Tribe, and thus retained a district with a similar NVAP share, the legislature instead expanded the district eastward into parts of Towner and Cavalier Counties. The addition of those counties—whose populations are nearly 100% white—dropped District 9’s NVAP by 20 percentage points. Citing the need to comply with Section 2 of the Voting Rights Act (“VRA”), the legislature then divided District 9 into two subdistricts, 9A and 9B, for state house elections. District 9A was drawn with a NVAP approaching 80%, while District 9B had an NVAP around 30%. Meanwhile, the Spirit Lake Tribe was drawn into neighboring District 15, with an NVAP of roughly 23%.

In the November 2022 election that followed, the incumbent Native American state senator, Richard Marcellais, lost his bid for reelection to his white opponent. Incumbent state representative Marvin Nelson, likewise the candidate of choice of Native American voters, lost his bid for reelection to the white-preferred candidate in District 9B. Native American candidates lost their bids for election to District 15. Only District 9A elected a Native American candidate. Native

American voters in the region thus saw their electoral opportunities under the new redistricting plan drop from three legislative seats to just one.

Plaintiffs, the Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, and three individual voters sued alleging that this districting configuration violated Section 2 of the VRA by diluting their voting strength. Plaintiffs offered a demonstrative plan showing how alternative districts in which Native Americans comprised a majority of the eligible voters could be created—districts that would retain for Native American voters the opportunity to elect three legislators. Plaintiffs likewise alleged that voting in the region was racially polarized, that the existing districting configuration led to white voters usually defeating the preferred candidates of Native American voters, and that the totality of circumstances established that Native American voters have less opportunity to participate in the political process than their white counterparts.

The Court held a four-day bench trial, heard from a host of expert and fact witnesses, and received and reviewed a substantial evidentiary record. For the reasons explained below, the Court agrees with Plaintiffs and finds that the configuration of Districts 9, 9A, 9B, and 15 violate Section 2 of the VRA.

## **FINDINGS OF FACT**

### **I. Native Voters' Opportunity to Elect Candidates to the North Dakota State Legislature**

1. The North Dakota Constitution and statutes permit state house representatives to be elected either at-large or from subdistricts within a given senatorial district. Stipulated Facts ¶ 2, ECF No. 108.

2. With 47 legislative districts, the North Dakota Legislature is made up of 47 state senators and 94 state house members. Stipulated Facts ¶¶ 2, 12, 22, ECF No. 108.

3. All or part of five Indian reservations are located within the boundaries of the State of North Dakota. The entirety of the Fort Berthold Indian Reservation, where the Mandan, Hidatsa, and Arikara Nation is located, the Spirit Lake Reservation, where the Spirit Lake Tribe is located, and the Turtle Mountain Reservation, where the Turtle Mountain Band of Chippewa Indians is located, are located within the boundaries of North Dakota. The northern portions of the Standing Rock Reservation, where the Standing Rock Sioux Tribe is located, and the Lake Traverse Reservation, where the Sisseton Wahpeton Oyate Tribe is located, are located within the boundaries of North Dakota. Stipulated Facts ¶ 1, ECF No. 108.

4. Rolette County is home to the Reservation and Trust Lands of the Turtle Mountain Band of Chippewa Indians. Benson County, along with portions of Eddy, Ramsey, and Nelson Counties, are home to the Spirit Lake Nation. Stipulated Facts ¶ 11, ECF No. 108.

5. According to the 2020 Census data, North Dakota's population grew to 779,094, with an "any part" Native American voting age population ("VAP") of 35,031 (5.9%).<sup>1</sup> Both figures increased from the 2010 Census, which reported 672,591 North Dakota residents, with a Native American VAP of 26,656 (5.1%). Stipulated Facts ¶ 8, ECF No. 108.

6. If Native Americans were elected to the state senate and state house in proportion to their share of the voting age population (5.9%), 3 of the 47 state senate seats would be held by Native American senators and 6 of the 94 state house seats would be held by Native American house members.

7. A member of a North Dakota Tribe had been elected to the North Dakota Senate from 1990 until 2022, including District 9 Senators Daniel F. Jérôme, Les. J. LaFountain, Dennis

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<sup>1</sup> VAP is reported as "any part" Native American (e.g., alone or in combination with another race) in Plaintiffs' Proposed Findings of Fact and Conclusions of Law, except where the "single race" figure is specified.

Bercier, and Richard Marcellais. No member of a North Dakota Native American Tribe serves in the North Dakota Senate following the November 2022 election. Trial Tr. Vol. 2 at 48:11-49-5, 53:20-23 (Testimony of Sen. Marcellais); Trial Tr. Vol. 2 at 117:21-23 (Testimony of Dr. Dan McCool); P042.006 (Rebuttal Report of Dr. Loren Collingwood); P064.050 (Expert Report of Dr. Dan McCool).

8. After the 2022 election, there are just two Native American members of the state house, and no Native American members of the state senate. Trial Tr. Vol. 2 at 117:17-23 (Testimony of Dr. Dan McCool); Trial Tr. Vol. 2 at 48:11-49-5, 53:20-23 (Testimony of Sen. Marcellais).

9. Under the 2012 state legislative plan, Native American voters in northeastern North Dakota succeeded in electing their candidate of choice to all three seats in District 9. P042.007 (Rebuttal Report of Dr. Loren Collingwood); Trial Tr. Vol. 1 at 166:18-167:12 (Testimony of Dr. Loren Collingwood).

10. After the 2020 Census, the North Dakota State legislature adopted a new state legislative redistricting plan, which became law in November 2021. Stipulated Facts ¶ 21, ECF No. 108.

11. Under the 2021 enacted state legislative plan, Native American voters in the region were able to elect just one candidate of choice—Jayme Davis—to the state house in District 9A. P001.014-015 (Expert Report of Dr. Loren Collingwood); P012 (RPV Statewide 2022 Contests in Enacted District 9); P013 (Enacted Subdistrict 9A – Demographics and 2022 Legislative Results); P014 (Enacted Subdistrict 9B – Demographics and 2022 Legislative Results); P015 (Performance Analysis Statewide and Endogenous 2022 Contests in Enacted District 9 and Subdistricts 9A and 9B); P024 (RPV Statewide 2022 Contests in Enacted District 15); P025 (Performance Analysis



Statewide and Endogenous 2022 Contests in Enacted District 15); P042.007 (Rebuttal Report of Dr. Loren Collingwood); Trial Tr. Vol. 1 at 166:18-167:12 (Testimony of Dr. Loren Collingwood).

12. This action was filed on February 7, 2022, alleging that the 2021 enacted state legislative plan violates Section 2 of the Voting Rights Act of 1965 by diluting the votes of Native American voters in northeast North Dakota. ECF No. 1.

## **II. Parties**

13. Plaintiff Turtle Mountain Band of Chippewa Indians is a federally recognized Tribe, recognized by the Bureau of Indian Affairs under 88 Fed. Reg. 2112 (2023), possessing “the immunities and privileges available to federally recognized Indian Tribes[.]” The Turtle Mountain Band of Chippewa Indians maintains a government-to-government relationship with the United States and the State of North Dakota. Stipulated Facts ¶ 31, ECF No. 108.

14. Jamie Azure is the Chairperson of the Turtle Mountain Band of Chippewa Indians. Trial Tr. Vol. 3 at 10:25-11:4 (Testimony of Chairman Azure).

15. The Turtle Mountain Band is located on the Turtle Mountain Indian Reservation, which makes up part of the land base for the Turtle Mountain Band of Chippewa Indian. Another part of the Tribe’s land base located outside the Reservation on Turtle Mountain Trust Lands. Trial Tr. Vol. 3 at 13:12-14:23 (Testimony of Chairman Azure); Trial Tr. Vol. 3 at 13:12-14:23 (Testimony of Chairman Azure); Trial Tr. Vol. 3 at 15:11-16:4 (Testimony of Chairman Azure)

16. The Turtle Mountain Reservation covers 72 square miles and is located entirely within Rolette County. A large portion of Turtle Mountain Trust Land is also located in Rolette County, including adjacent to the Reservation to the north, west, and south. Trial Tr. Vol. 3 at 13:12-14:23 (Testimony of Chairman Azure); Trial Tr. Vol. 3 at 15:11-16:4 (Testimony of Chairman Azure).

17. The Turtle Mountain Band has over 34,000 enrolled members, approximately 19,000 of whom live on and around the Turtle Mountain Reservation, including on Turtle Mountain Trust Lands, in Rolette County. Trial Tr. Vol. 3 at 13:12-14:23 (Testimony of Chairman Azure). A substantial number of the members of the Turtle Mountain Tribe who live on and around the Reservation in Rolette County are eligible to vote in local, state, and federal elections. Trial Tr. Vol. 3 at 14:1-4 (Testimony of Chairman Azure).

18. The Tribe's headquarters are located in Belcourt, ND 58316. Trial Tr. Vol. 3 at 13:23-25 (Testimony of Chairman Azure).

19. Plaintiff Spirit Lake Tribe is a federally recognized Tribe, recognized by the Bureau of Indian Affairs under 88 Fed. Reg. 2112 (2023), possessing "the immunities and privileges available to federally recognized Indian Tribes[.]" The Spirit Lake Tribe maintains a government-to-government relationship with the United States and the State of North Dakota. Stipulated Facts ¶ 32, ECF No. 108.

20. Douglas Yankton Sr. is the former Chairman of the Spirit Lake Tribe. Chairman Yankton served during the 2021 redistricting cycle. Trial Tr. Vol. 1 at 45:12-22 (Testimony of Chairman Yankton).

21. The Spirit Lake Tribe is located on the Spirit Lake Reservation. The Spirit Lake Reservation covers approximately 405 square miles, primarily in Benson County. Trial Tr. Vol. 1 at 47:10-48:2, 55:13-23. (Testimony of Chairman Yankton).

22. The Spirit Lake Tribe has approximately 7,559 enrolled members, with approximately 4,500 members living on or near the Spirit Lake Reservation. Trial Tr. Vol. 1 at 47:10-48:2 (Testimony of Chairman Yankton).

23. Plaintiff Wesley Davis is an enrolled member of the Turtle Mountain Band of Chippewa Indians. He lives on the Turtle Mountain Reservation and is eligible to vote. He voted in the 2022 election and plans to continue voting in federal, state, and local elections in North Dakota. He currently resides in Senate District 9 and House District 9A. Stipulated Facts ¶ 33, ECF No. 108.

24. Plaintiff Zachary King is an enrolled member of the Turtle Mountain Band of Chippewa Indians. He lives on the Turtle Mountain Reservation and is eligible to vote. He voted in the 2022 election and plans to continue voting in federal, state, and local elections in North Dakota. He currently resides in Senate District 9 and House District 9A. Stipulated Facts ¶ 34, ECF No. 108.

25. Plaintiff Collette Brown is an enrolled member of the Spirit Lake Tribe. She lives on the Spirit Lake Reservation and is eligible to vote. She voted in the 2022 election and plans to continue voting in federal, state, and local elections in North Dakota. She currently resides in Benson County in Legislative District 15. Trial Tr. Vol. 2 at 7:8-9:11 (Testimony of Collette Brown).

26. Ms. Brown is the Executive Director of the Spirit Lake Gaming Commission, an entity of the Spirit Lake Tribal Council that operates the Spirit Lake Casino and Resort. Trial Tr. Vol. 2 at 8:6-17 (Testimony of Collette Brown).

27. Defendant Michael Howe is sued in his official capacity as Secretary of State of North Dakota. Stipulated Facts ¶ 35, ECF No. 108.

28. Defendant Michael Howe resides in the State of North Dakota and is a state official performing official duties in Bismarck, North Dakota. Defendant's Answer ¶ 10.

### III. Procedural History

29. Plaintiffs' filed suit on February 7, 2022, alleging that the 2021 enacted state legislative redistricting plan violates Section 2 of the Voting Rights Act of 1965 by denying Native American voters in northeastern North Dakota an equal opportunity to elect their candidates of choice to the state legislature. ECF No. 1, Compl.

30. Defendant moved to dismiss the case on April 15, 2022, on the grounds that the Court lacked jurisdiction to hear the case, and that Plaintiffs had failed to state a claim for relief. ECF No. 17, Def. Mot to Dismiss. The Court denied the motion to dismiss on July 7, 2022. ECF No. 30, Order Denying Mot. to Dismiss.

31. Plaintiffs supplemented their complaint on December 7, 2022, to add allegations relating to the 2022 elections for the state legislature. *See* ECF No. 44, Supp. Compl., Dec. 7, 2022.

32. Defendant subsequently moved for summary judgment, asking the Court to find that Plaintiffs had failed to establish two of the three necessary preconditions for a Section 2 claim. ECF No. 59, Mot. for Summary Judgment; ECF No. 60, Mem. in Support of Mot. for Summary Judgment. The Court denied the motion on April 11, 2023. *See* ECF No. 89, Order Denying Mot. for Summary Judgment, Apr. 10, 2023.

33. The Court held a four-day bench trial beginning on June 12, 2023. ECF No. 112, Minute Entry.

34. During trial, Plaintiffs sought leave to make an offer of proof related to evidence sought through third-party discovery but to which they were denied access pursuant to a writ of mandamus issued by the Eighth Circuit Court of Appeals. ECF No. 109. Plaintiffs indicated that the purpose of the offer of proof was, in an abundance of caution, to preserve their ability to continue seeking appellate review of the Eighth Circuit's ruling, although Plaintiffs maintained

their view that they should prevail in the trial regardless of the availability of the contested discovery. *Id.* The Court granted Plaintiffs' motion for leave to state the offer of proof, but the Court made clear that it was not in any way considering the offer of proof in reaching its decision in this matter. ECF No. 113; Trial Tr. Vol. 3 at 8-9.

35. At trial, the Court heard live testimony from Plaintiff Collette Brown, former Chairman Douglas Yankton Sr. of Plaintiff Spirit Lake Tribe, and Chairman Jamie Azure of Plaintiff Turtle Mountain Band of Chippewa Indians. Trial Tr. Vol. 2 at 6-44 (Testimony of Collette Brown); Trial Tr. Vol. 1 at 41-120 (Testimony of Chairman Yankton); Trial Tr. Vol. 3 at 10-66 (Testimony of Chairman Azure). The Court also heard testimony from former state Senator Richard Marcellais and former state House Representative Marvin Nelson. Trial Tr. Vol. 2 at 44-71 (Testimony of Sen. Marcellais); Trial Tr. Vol. 2 at 170-198 (Testimony of Rep. Nelson). Finally, the Court heard expert testimony on the *Gingles* preconditions from Plaintiffs' expert witnesses Dr. Loren Collingwood, and on the totality of the circumstances from Dr. Dan McCool and Dr. Weston McCool. Trial Tr. Vol. 1 at 120-201 (Testimony of Dr. Loren Collinwood); Trial Tr. Vol. 2 at 72-143 (Testimony of Dr. Dan McCool); Trial Tr. Vol. 2 at 144-170 (Testimony of Dr. Weston McCool).

36. Defendant then called Dr. M.V. Hood III to testify regarding the *Gingles* preconditions and presented live testimony from two representatives from the Defendant Secretary of State's office, Erika White and Bryan Nybakken. Trial Tr. Vol. 3 at 72-182 (Testimony of Dr. M.V. Hood III); Trial Tr. Vol. 3 at 186-203 (Testimony of Erika White); Trial Tr. Vol. 4 at 6-38 (Testimony of Bran Nybakken).

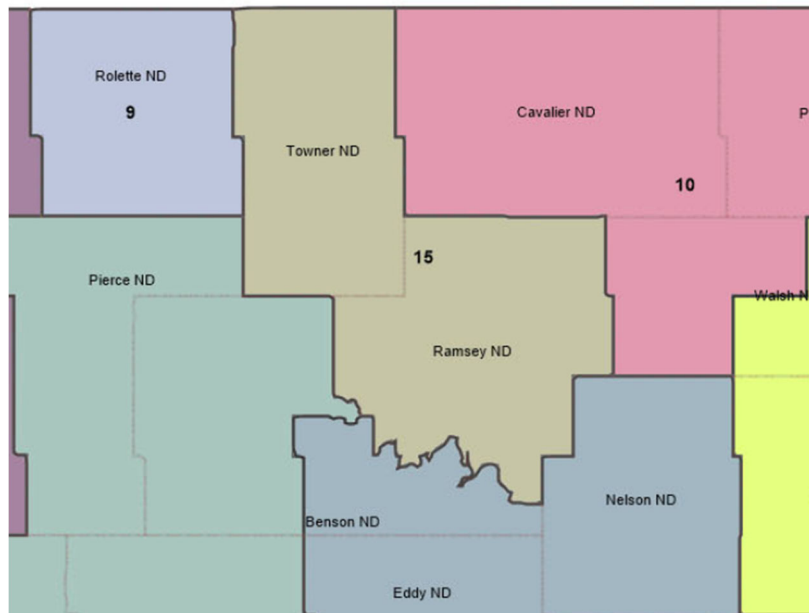
37. The following exhibits were admitted at trial: P001-P097, P100-P159, D300-516.

**IV. The 2020 Census and the 2021 Enacted Redistricting Plan**

**A. 2012-2020 Benchmark Redistricting Plan**

38. Under the state legislative plan in place during the decade prior to the 2021 redistricting process (“benchmark plan”), District 9 was wholly within Rolette County. Stipulated Facts ¶ 10, ECF No. 108; P103 (2012-2020 N.D. Legislative Plan Map); Trial Tr. Vol. 1 at 129:18-130:10, 131:18-23 (Testimony of Dr. Loren Collingwood).

39. Under the benchmark plan, District 9 had an NVAP of 74.4%, did not contain any subdivisions, and contained all of the Turtle Mountain Reservation, as well as all of the Turtle Mountain Trust Land contained within Rolette County. Stipulated Facts ¶ 10, ECF No. 108; P103 (2012-2020 N.D. Legislative Plan Map); Trial Tr. Vol. 1 at 129:18-130:10, 131:18-23 (Testimony of Dr. Loren Collingwood); Trial Tr. Vol. 4 at 17:17-18:10. The benchmark plan’s configuration of districts in the region is shown below:



P103 (2012-2021 Legislative Plan).

**B. The 2020 Census**

40. On August 12, 2021, the Census Bureau released the Public Law 94-171 redistricting data in the “legacy” format that could be incorporated into redistricting software. The legislature procured licenses for the commercial software Maptitude, sold by Caliper Corporation, which released the 2020 state level data on August 16, 2021. Stipulated Facts ¶ 4, ECF No. 108.

41. With 47 legislative districts, the ideal district population according to the 2020 Census was 16,576. The ideal subdistrict population according to the 2020 Census was 8,288. Stipulated Facts ¶ 12, ECF No. 108.

42. The Census Bureau did not release the P.L. 94-171 data in a user-friendly format for the public until September 16, 2021. Stipulated Facts ¶ 7, ECF No. 108.

43. From 1983 until 2021, District 9 was wholly contained within Rolette County. According to the 2020 Census, however, Rolette County no longer had sufficient population for its own state legislative district. Stipulated Facts ¶ 10, ECF No. 108.

**C. The 2021 Redistricting Process**

44. In preparation for the 2021 redistricting process, Governor Burgum signed House Bill 1397 on April 21, 2021, which established a legislative management redistricting committee (“Redistricting Committee”) that was required to develop and submit to legislative leadership a redistricting plan by November 30, 2021, along with legislation to implement that plan. Stipulated Facts ¶ 3, ECF No. 108.

45. On May 20, 2021, then-Chairman Doug Yankton sent a letter to the Redistricting Committee requesting that they schedule public hearings on each of the reservations principally located within North Dakota. P155 (D. Yankton Letter to Redistricting Committee, May 20, 2021). The letter requested that the Committee engage in “meaningful consultation” with tribal

governments during the process. P155 (D. Yankton Letter to Redistricting Committee, May 20, 2021).

46. The Joint Redistricting Committee did not hold committee meetings on tribal lands. Stipulated Facts ¶ 6, ECF No. 108.

47. Rather, on August 17, 2021, the North Dakota Tribal State Relations Committee held a joint meeting with the Tribal Council of the Turtle Mountain Band of Chippewa Indians at the Turtle Mountain Community College on the Turtle Mountain Reservation. D305; Stipulated Facts ¶ 5, ECF No. 108. The morning of the meeting the topic of redistricting was “slipped” onto the agenda and set for discussion before lunch. D418 at 17:18-21 (Tr., Tribal State Relations Committee Mtg, Aug. 17, 2021); D305 (listing redistricting discussion for 30 minutes from 10:45 to 11:15 am). Chairman Azure found out that redistricting had been added to the agenda right before the meeting began. Trial Tr. Vol. 3 at 29:21-31:24 (Testimony of Chairman Azure).

48. At the time of this discussion, the Tribe had limited information about the population data released by the U.S. Census and the discussion with the Tribal Council focused primarily on the census undercount. Trial Tr. Vol. 3 at 29:21-31:24 (Testimony of Chairman Azure); *see also* D418 at 24:2-32:11 (Tr., Tribal State Relations Committee Mtg, Aug. 17, 2021).

49. At no point during the August 17 Tribal State Relations Committee meeting did Chairman Azure, any member of the Turtle Mountain Tribal Council, or any person speaking on behalf of the Turtle Mountain Tribe request a subdistrict for the Turtle Mountain Reservation. Trial Tr. Vol. 3 at 33:10-23; *see also* D418. Only one person spoke in favor of subdistricts generally, and while Chairman Azure and the Tribal Council members were not present. D418 at 70:4-73:19 (Tr., Tribal State Relations Comm. Mtg., Aug. 17, 2021).



50. The Redistricting Committee held public meetings in Bismarck on August 26, 2021, in Fargo on September 8, 2021, and on September 15 and 16 in Bismarck. Additional public meetings of the Redistricting Committee were held in Bismarck on September 22 and 23, and September 28 and 29. Stipulated Facts ¶ 9, ECF No. 108.

51. Collette Brown testified on behalf of the Spirit Lake Tribe at the August 26 Redistricting Committee meeting. She advocated for the Committee to comply with the Voting Rights Act, to “carefully analyze whether there should be single-member House district to ensure tribal communities have equitable representation,” for tribal communities to be kept together as communities of interest, and for the Redistricting Committee to hold hearings on tribal lands. D327 (Aug. 26 Redistricting Committee—Testimony of C. Brown).

52. The Tribal and State Relations Committee held a public meeting, at which one topic addressed was redistricting, at the Spirit Lake Casino and Resort on the Spirit Lake Reservation on September 1, 2021. Stipulated Facts ¶ 5, ECF No. 108.

53. During the September 1 Tribal State Relations Committee meeting at Spirit Lake, Chairman Yankton testified that Spirit Lake “would prefer to be in a separate legislative district from Devils Lake” and noted that the Tribe may be interested in a legislative subdistrict for its state house representative. D334 (Sept. 1, 2021 Tribal and State Relations Committee Meeting Minutes). At subsequent hearings, representatives of Spirit Lake requested such a subdistrict, but one was not ultimately provided. D351 (Sept. 15-16 Redistricting Comm.—C. Brown Testimony) D398 (Sept. 28-29 Redistricting Committee Meeting—Chairman Yankton Testimony).

54. At the September 28 and 29 Redistricting Committee meeting, the Committee released several proposals for subdistricting District 9. D405 (Sept. 28 and 29 Redistricting Committee Meeting—Proposed District 9 Subdistricts).

55. The proposed plan extended District 9 to the east to incorporate population from Towner and Cavalier Counties, created a subdistrict in District 9 that split the Turtle Mountain Reservation from adjacent Trust Lands to the north and west, and placed Spirit Lake in an at-large district with Devil's Lake (contrary to Chairman Yankton's request), without the requested subdistrict. D408 (Sept. 28 and 29 Redistricting Committee Meeting—Proposed Statewide Plan).

56. Within one month after the proposed plan was introduced, the Spirit Lake and Turtle Mountain Tribes conferred, consulted their Tribal Councils, obtained an analysis of racially polarized voting to present to the Redistricting Committee, had a proposed district drawn, and sent a letter to the Governor and legislative leaders with their proposing a unified district on November 1, 2021. *See* P156 at 19-24 (Joint Legislative Redistricting Committee, HB 1504, Meeting Minutes (Nov. 8, 2021)); Trial Tr. Vol. 1 at 77:5-79:18 (Testimony of Chairman Yankton); Trial Tr. Vol. 3 at 34:14-36:11 (Testimony of Chairman Azure). Chairman Azure testified at trial that "it was rather impressive that we were able to bring it all together within one month and present to a committee" in light of the steps that needed to be taken for both Tribe's sovereign governments to sign off on the proposal. Trial Tr. Vol. 3 at 37:12-38:11 (Testimony of Chairman Azure). *See also* Stipulated Facts ¶ 18, ECF No. 108.

57. The letter noted that the Committee's proposed redistricting map placed the Turtle Mountain Reservation into a subdistrict in violation of the Voting Rights Act, and that Turtle Mountain never requested to be placed in a subdistrict. P156.019-024 (Joint Legislative Redistricting Committee, HB 1504, Meeting Minutes (Nov. 8, 2021)). It also provided an illustrative redistricting plan to show that both reservations could be placed into a single legislative district, with minimal changes to the Committee's proposed map, while avoiding costly litigation.

See P156.019-024 (Joint Legislative Redistricting Committee, HB 1504, Meeting Minutes (Nov. 8, 2021)). *See also* Stipulated Facts ¶ 19, ECF No. 108.

58. The alternative district proposed by the two Tribes combined Rolette County with portions of Pierce and Benson Counties, instead of combining Rolette County with portions of Towner and Cavalier County. *Compare* P156.019-024 (Joint Legislative Redistricting Committee, HB 1504, Meeting Minutes (Nov. 8, 2021)) *with* D408 (Sept. 28 and 29 Redistricting Committee Meeting—Proposed Statewide Plan).

59. The letter from Chairmen Azure and Yankton contained information showing that election results in the region were racially polarized, with Native American voters preferring different candidates than White voters. P156.019-024 (Joint Legislative Redistricting Committee, HB 1504, Meeting Minutes (Nov. 8, 2021)).

60. On October 29, 2021, North Dakota Governor Doug Burgum issued Executive Order 2021-17, convening a special session of the North Dakota Legislative Assembly to begin on November 8, 2021, to provide for redistricting of government pursuant to Article IV, Section 2, of the North Dakota Constitution, among other purposes. Stipulated Facts ¶ 13, ECF No. 108.

61. On November 1, 2021, the Redistricting Committee proposed a legislative redistricting plan described in House Bill 1504, and delivered the proposed plan, proposed legislation, and a final report to legislative management. Stipulated Facts ¶ 14, ECF No. 108.

62. Like the plan initially proposed at the end of September, House Bill 1504 would expand District 9 eastward into parts of Towner and Cavalier Counties. The Native American VAP of District 9 in the proposal was 51.7% measured by “single race” Native American population and 54.5% measured by “any part” Native American. Stipulated Facts ¶ 15, ECF No. 108; *see also* D408 (Sept. 28 and 29 Redistricting Committee Meeting—Proposed Statewide Plan)

63. In addition, House Bill 1504 proposed to divide District 9 into two subdistricts, 9A and 9B, for purposes of state house districts. Under the proposal, District 9A would have a NVAP of 77.0% (single race) or 79.8% (any part). District 9B would have a NVAP of 29.4% (single race) or 32.2% (any part). Stipulated Facts ¶ 16, ECF No. 108.

64. House Bill 1504 proposed to split Benson County, with its western portion in District 14 and its eastern portion, home to the Spirit Lake Nation, in District 15. Benson County was previously split between Districts 14 and 23 in the prior redistricting. District 15 would include Ramsey County, part of Towner County, and part of Eddy County. The Native American VAP of District 15 would be 20.4% (single race) or 23.1% (any part). Stipulated Facts ¶ 17, ECF No. 108.

65. At the November 8, 2021 Redistricting Committee hearing during the special session called by the Governor, Senator Marcellais, who represented District 9 since his election in 2006, spoke in favor of the Turtle Mountain and Spirit Lake proposal. In addition, Chairman Azure and Chairman Yankton spoke in favor of the joint district and in opposition to HB1504. D429 at 21, 23, 29, 33 (Transcript of November 8, 2021 Meeting of the Joint Redistricting Committee); D444 (November 8, 2021 Meeting of the Joint Redistricting Committee); Trial Tr. Vol. 1 at 79:12-80:5 (Testimony of Chairman Yankton); Trial Tr. Vol. 3 at 36:12-37:11 (Testimony of Chairman Azure). Representative Marvin Nelson from District 9 likewise spoke in favor and took members' questions. D429 at 21, 23, 29, 33 (Transcript of November 8, 2021 Meeting of the Joint Redistricting Committee); D444 (November 8, 2021 Meeting of the Joint Redistricting Committee).

66. Representative Boschee moved the adoption of an amendment to include the Turtle Mountain and Spirit Lake proposal, but the Committee rejected it. Stipulated Facts ¶ 20, ECF No. 108; *See* D429 at 46:24-48:6 Transcript of November 8, 2021 Meeting of the Joint Redistricting

Committee); D444 (November 8, 2021 Meeting of the Joint Redistricting Committee); Trial Tr. Vol. 3 at 38:12-22) (Testimony of Chairman Azure). The Committee voted in favor of other amendments to the Bill that day. D429 at 46:24-48:6 Transcript of November 8, 2021 Meeting of the Joint Redistricting Committee); D444 (November 8, 2021 Meeting of the Joint Redistricting Committee); Trial Tr. Vol. 3 at 38:12-22) (Testimony of Chairman Azure).

67. Although Chairman Yankton had specifically testified to that he did not want the Spirit Lake Tribe to be drawn into a district with the city of Devil’s Lake, D334 (Sept. 1, 2021 Tribal and State Relations Committee Meeting Minutes), at the November 8 Meeting of the Joint Redistricting Committee Chairman Devlin stated “the one thing you brought up was – and which we tried to do – was with your Devil’s Lake – city of Devil’s Lake situation, we considered that a community – interest – like interest between the two so you were in with them.” D429 (Tr. of Nov. 8 Joint Redistricting Committee Meeting at 27:21-25).

68. On November 9, 2021, the House of Representatives debated and passed House Bill 1504. On November 10, 2021, the Senate debated House Bill 1504 and rejected Senator Marcellais’ amendment to adopt the proposal of Turtle Mountain and Spirit Lake. The Senate passed House Bill 1504, which was signed by Governor Burgum on November 11, 2021 and became law when filed with the Secretary of State the next day. The district descriptions were codified as North Dakota Century Code Section 54-03-01.14 after technical corrections were made. Stipulated Facts ¶ 21, ECF No. 108.

**D. 2021 Enacted Redistricting Plan**

69. The 2021 Redistricting Plan, as enacted by HB 1504, created 47 state legislative districts and subdivided District 4 and District 9 into single-member House Subdistricts 4A, 4B, 9A, and 9B. Stipulated Facts ¶ 22, ECF No. 108.

70. The 2021 Redistricting Plan, as enacted by HB 1504, did not place the Turtle Mountain and Spirit Lake reservations in the same state legislative district. Stipulated Facts ¶ 23, ECF No. 108. Instead, the enacted plan extended District 9 eastward to include portions of Towner and Cavalier Counties, with the Towner and Cavalier County portions included with parts of Rolette County in Subdistrict 9B. P100 (2021 Enacted N.D. State Senate Plan).

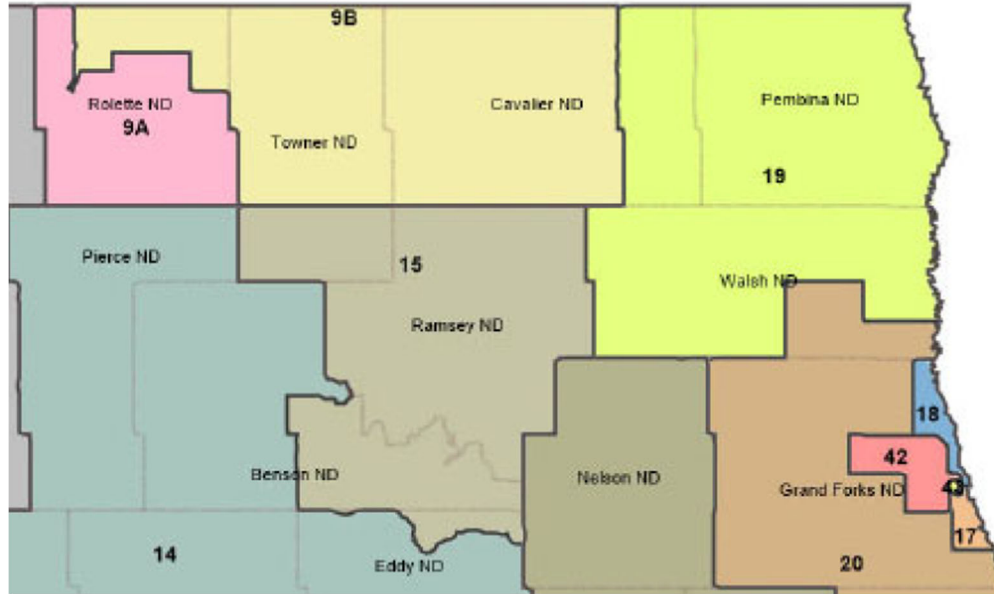
71. The 2021 Redistricting Plan, as enacted by HB 1504, placed the Turtle Mountain Reservation into Senate District 9 and State House Subdistrict 9A and placed portions of Turtle Mountain Trust Lands located within Rolette County into State House Subdistrict 9B. Stipulated Facts ¶ 24, ECF No. 108; P101 (2021 Enacted N.D. State House Plan).

72. According to the 2020 Census, the NVAP of Rolette County is 74.4%, while it is just 2.7% in the portions of Towner County in District 9 and 1.8% in the portions of Cavalier County in District 9. P001.016 (Expert Report of Dr. Loren Collingwood)

73. By extending District 9 east into overwhelmingly white counties, the enacted plan dramatically changed the demographic makeup of the district, reducing its NVAP by twenty percentage points, from 74.4% to 54.5%. P001.031 (Expert Report of Dr. Loren Collingwood); Trial Tr. Vol. 1 at 132:11-133:1, 134:4-12 (Testimony of Dr. Loren Collingwood); P115 (Maptitude Population Summary (2012-2020 Plan)); P116 (Maptitude Population Summary: 2021 Enacted Senate Plan).

74. The enacted plan placed the Spirit Lake Reservation into District 15, separating it from all the counties with which it previously shared a legislative district. Stipulated Facts ¶ 25, ECF No. 108; P100 (2021 Enacted N.D. State Senate Map); P103 (2012-2020 N.D. Legislative Plan Map).

75. The enacted plan’s configuration of districts in northeastern North Dakota is shown below:

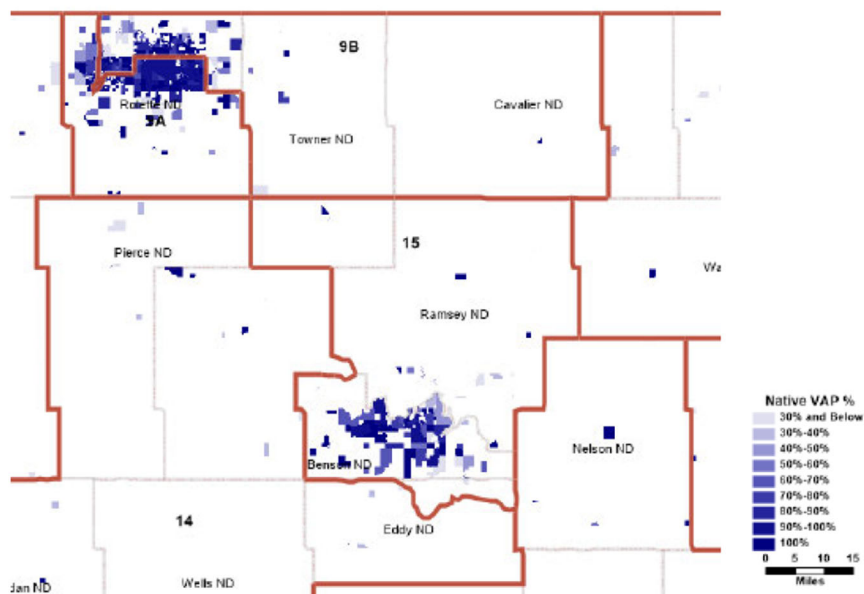


P101 (2021 Enacted N.D. State House Plan).

76. By creating a subdistrict around the Turtle Mountain Reservation, the map fragmented Native voters living on the Reservation and Native voters living on the Turtle Mountain Trust Lands to the north and west into two separate Subdistricts. P001.031 (Expert Report of Dr. Loren Collingwood); Trial Tr. Vol. 1 at 134:13-19 (Testimony of Dr. Loren Collingwood).

77. According to the 2020 Census, Subdistrict 9A has a NVAP of 79.8% and Subdistrict 9B has a NVAP of 32.2%. P0042.007 (Rebuttal Report of Dr. Loren Collingwood); Trial Tr. Vol. 1 at 134:13-19, 136:7-137:25 (Testimony of Dr. Loren Collingwood); P057 (Enacted District 9 Split of Turtle Mountain Reservation and Trust Lands); Stipulated Facts ¶ 16, ECF No. 108. Neighboring District 15 has a NVAP of 23.1%. Trial Tr. Vol. 1 at 135:3-13 (Testimony of Dr. Loren Collingwood); Stipulated Facts ¶ 17, ECF No. 108.

78. The concentration of Native American voters in District 9A and the fragmentation of Native American voters in neighboring Districts 9B and 15 is illustrated below, with Native American populations shown in blue:



P059 (Collingwood Reb. App. A – 2021 Enacted Plan ND Native VAP Shading).

79. Among the 31 Native American-majority state legislative districts in the country, the enacted version of District 9 has the second lowest NVAP share nationwide. P042.005 (Rebuttal Report of Dr. Loren Collingwood); Trial Tr. Vol. 1 at 135:3-136:4 (Testimony of Dr. Loren Collingwood); P116 (Maptitude Population Summary: 2021 Enacted Senate Plan); D491 (Native American Majority State Legislative Districts). The average NVAP of a majority-Native American legislative district nationwide is 68.1% and the median is 66.7%. P042.005 (Rebuttal Report of Dr. Loren Collingwood); Trial Tr. Vol. 1 at 135:3-136:4 (Testimony of Dr. Loren Collingwood); D491 (Native American Majority State Legislative Districts).

80. Voters in Senate District 9, Senate District 4, and Senate District 15 each elect a single State Senator. Stipulated Facts ¶ 26, ECF No. 108.



81. Voters in House Subdistricts 9A and 9B and 4A and 4B each elect a single representative to the North Dakota House of Representatives. Stipulated Facts ¶ 27, ECF No. 108.

82. Voters in District 15 elect two representatives at-large to the North Dakota House of Representatives. Stipulated Facts ¶ 28, ECF No. 108.

**V. The *Gingles* Preconditions**

83. Plaintiffs' expert, Dr. Loren Collingwood, Ph.D. testified as to the three *Gingles* preconditions. Trial Tr. Vol. 1 at 122:2-12 (Testimony of Dr. Loren Collingwood).

84. The Court recognized Dr. Collingwood as an expert on voting behavior, race and ethnicity, racially polarized voting, map drawing, electoral performance, and redistricting analysis. Trial Tr. Vol. 1 at 128:7-17. Having observed Dr. Collingwood and reviewed his reports, the Court credits the analysis, opinions, and testimony of Dr. Collingwood, granting them substantial weight.

85. Dr. Collingwood's relevant opinions, set forth in both his initial and rebuttal expert reports, are based on quantitative analysis of demographic data and election results. P001 (Expert Report of Dr. Loren Collingwood); P042 (Rebuttal Report of Dr. Loren Collingwood).

86. Dr. Collingwood concluded that Plaintiffs' two demonstrative plans are reasonably compact, comply with traditional redistricting criteria, and have an eligible voter population that is majority Native American. Dr. Collingwood further concluded that Plaintiffs' demonstrative plans would allow Native voters an equal opportunity to elect candidates of their choice. Trial Tr. Vol. 1 at 139:8-16, 165:9-166:3 (Testimony of Dr. Loren Collingwood); P001 (Expert Report of Dr. Loren Collingwood); P042 (Rebuttal Report of Dr. Loren Collingwood). The Court agrees with Dr. Collingwood's conclusion.

87. Dr. Collingwood concluded that there is political cohesion among Native American voters in Districts 9, 9A, 9B, and 15. Trial Tr. Vol. 1 at 166:4-7; P001 (Expert Report of Dr. Loren Collingwood); P042 (Rebuttal Report of Dr. Loren Collingwood). The Court agrees.

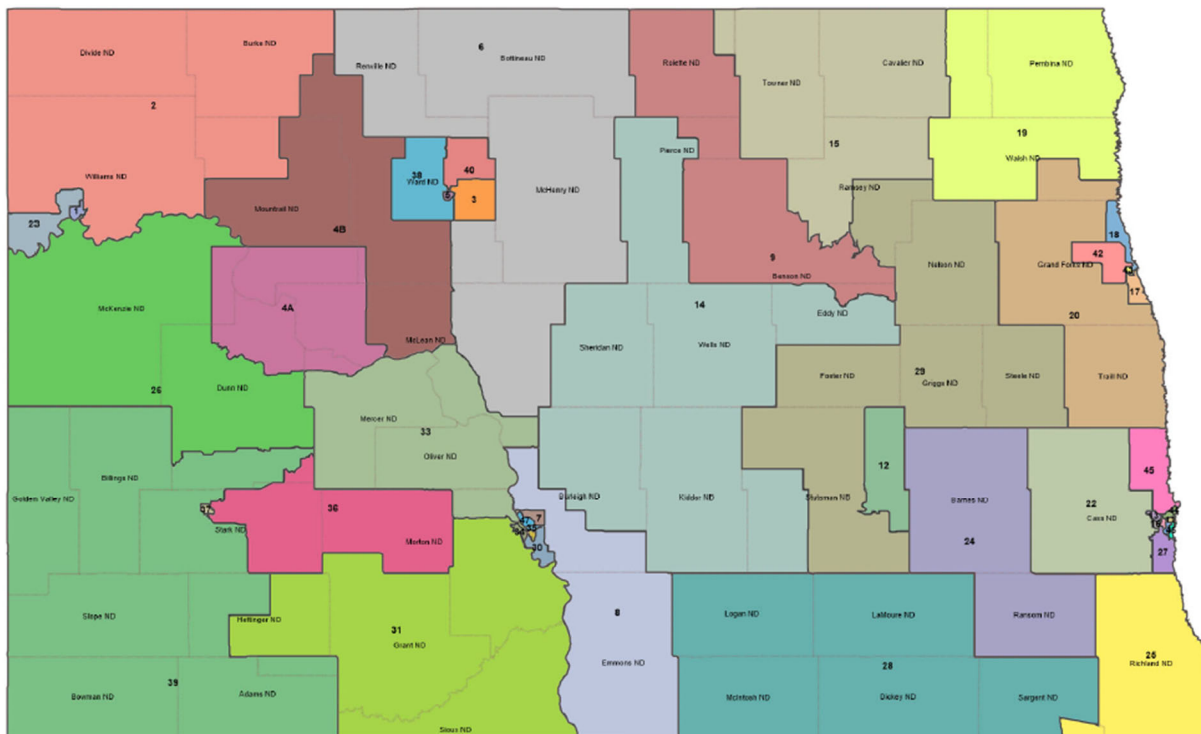
88. Dr. Collingwood concluded that white bloc voting usually defeats the Native-preferred candidate in Districts 9, 9B, and 15. Trial Tr. Vol. 1 at 166:8-12. P001 (Expert Report of Dr. Loren Collingwood); P042 (Rebuttal Report of Dr. Loren Collingwood). The Court credits Dr. Collingwood's testimony in this regard and agrees with his conclusion.

89. The Court's factual findings relevant to each *Gingles* precondition are detailed below.

**A. *Gingles* 1: The Native American Population Is Sufficiently Large and Geographically Compact to Constitute a Majority in a Single Multi-Member Legislative District.**

**1. Plaintiffs' Demonstrative Plans Demonstrate it Is Possible to Draw a Majority Native District by NVAP.**

90. Plaintiffs produced two illustrative plans containing alternative district configurations that demonstrate that the Native American population in northeast North Dakota is sufficiently large and geographically compact to constitute an effective majority in a single multi-member district. P105 (Plaintiffs' Demonstrative Plan 1 Map); P106 (Plaintiffs' Demonstrative Plan 2 Map). The first of those two demonstrative plans is shown below:



P105 (Plaintiffs’ Demonstrative Plan 1).

91. Plaintiffs’ Demonstrative Plans both feature a District 9 that is majority Native American. Plaintiffs’ Demonstrative Plan 1 District 9 has a Native American VAP of 66.1%. Plaintiffs’ Demonstrative Plan 2 District 9 has a Native American VAP of 69.1%. Trial Tr. Vol. 1 at 134:22-135:2, 135:14-17, 166:1-3 (Testimony of Dr. Loren Collingwood).

**2. Plaintiffs’ Demonstrative Plans Comport with Traditional Redistricting Principles.**

92. Plaintiffs’ demonstrative plans comport with traditional redistricting principles, including compactness, contiguity, respect for political boundaries, and keeping together communities of interest. *See* Trial Tr. Vol. 1 at 139:17-144:24 (Testimony of Dr. Loren Collingwood); P001.030-032, 038-039 (Expert Report of Dr. Loren Collingwood); P042.009-023 (Rebuttal Report of Dr. Loren Collingwood).

*i. Contiguity*

93. Plaintiffs' demonstrative District 9 in both plans is made up of a contiguous land base. P105 (Plaintiffs' Demonstrative Plan 1 Map); P106 (Plaintiffs' Demonstrative Plan 2 Map).

*ii. Compactness*

94. Plaintiffs' demonstrative District 9 in both plans is reasonably compact. *See* Trial Tr. Vol. 1 at 139:17-23, 141:4-8; P001.032, 039 (Expert Report of Dr. Loren Collingwood); P042.009-019 (Rebuttal Report of Dr. Loren Collingwood).

95. On its face, District 9 in Plaintiffs' demonstrative plans contains no tentacles, appendages, bizarre shapes, or any other obvious irregularities. *See* Trial Tr. Vol. 1 at 139:17-23 (Testimony of Dr. Loren Collingwood).

96. Plaintiffs' demonstrative districts are also comparatively compact when measured against other districts in the Enacted Plan. Visually, District 9 in Plaintiffs' demonstrative plans fits well within the overall enacted plan. Its compactness scores are within the range of compactness scores for other districts created by the legislature in the enacted plan. This is especially true when compared with other districts that, like demonstrative District 9, have water boundaries. *See* Trial Tr. Vol. 1 at 139:17-140:5, 141:24-143:20 (Testimony of Dr. Loren Collingwood); P001.032, 039 (Expert Report of Dr. Loren Collingwood); P0042.009-011, 013-016 (Rebuttal Report of Dr. Loren Collingwood); P126 (Maptitude Compactness Report: 2021 Enacted Senate Plan); P128 (Maptitude Compactness Report: Plaintiffs' Demonstrative Plan 1); P129 (Maptitude Compactness Report: Plaintiffs' Demonstrative Plan 2).

97. Plaintiffs' demonstrative districts are also comparatively compact when measured against other districts that have been approved by the Supreme Court in challenges under Section

2 of the Voting Rights Act. *See* Trial Tr. Vol. 1 at 140:6-20, 144:3-25 (Testimony of Dr. Loren Collingwood); P042.011-013 (Rebuttal Report of Dr. Loren Collingwood).

98. Finally, Plaintiffs' demonstrative districts are comparatively compact when measured against other districts Defendant's Expert Dr. M.V. Hood has found to be compact in prior cases where he testified as an expert witness. *See* Trial Tr. Vol. 3 at 116:4-120:9 (Testimony of Dr. M.V. Hood); P124 (Virginia 2012-2020 Maps).

***iii. Respecting Political Boundaries***

99. Plaintiffs' demonstrative plans also respect political boundaries, including reservations, counties, and precincts. P105 (Plaintiffs' Demonstrative Plan 1 Map); P106 (Plaintiffs' Demonstrative Plan 2 Map); P120 (Precinct Maps for Benson, Eddy, Pierce, and Rolette Counties); P057 (Enacted District 9 Split of Turtle Mountain Reservation and Trust Lands).

100. Plaintiffs' demonstrative plans keep together the Turtle Mountain Reservation and Turtle Mountain Trust Lands located in nearby Rolette County in the same legislative district. P105 (Plaintiffs' Demonstrative Plan 1 Map); P106 (Plaintiffs' Demonstrative Plan 2 Map); P057 (Enacted District 9 Split of Turtle Mountain Reservation and Trust Lands).

***iv. County Splits***

101. Plaintiffs' demonstrative plans have a similar number of county splits as the Enacted Plan. *See* Trial Tr. Vol. 1 at 140:24-141:3, 141:9-12 (Testimony of Dr. Loren Collingwood); P001.032, 039 (Expert Report of Dr. Loren Collingwood).

102. Plaintiffs' Demonstrative Plan 1 splits 21 counties 51 times, while the Enacted Plan splits 20 counties 49 times. *See* P001.032 (Expert Report of Dr. Loren Collingwood).

103. District 9 in Demonstrative Plan 1 contains the same number of whole and partial counties within its borders as Enacted District 15. *See* P042.020 (Rebuttal Report of Dr. Loren Collingwood).

104. Plaintiffs' Demonstrative Plan 2 has the same number of county splits as the Enacted Plan, both splitting 20 counties 49 times. *See* P001.039 (Expert Report of Dr. Loren Collingwood); Trial Tr. Vol. 1 at 141:9-12 (Testimony of Dr. Loren Collingwood).

**v. *Respecting Precinct Boundaries***

105. Plaintiffs' demonstrative plans also respect precinct boundaries. District 9 in Plaintiffs' Demonstrative Plan 1 splits no precincts, while Demonstrative Plan 2's District 9 splits only two. *See* Trial Tr. Vol. 1 at 138:14-139:7, 140:21-23 (Testimony of Dr. Loren Collingwood); P001.031, P001.038 (Expert Report of Dr. Loren Collingwood); P120 (Precinct Maps for Benson, Eddy, Pierce, and Rolette Counties).

**vi. *Preserving Communities of Interest***

106. In addition to respecting political boundaries, Plaintiffs' demonstrative plans keep together communities of interest.

107. Together, the Turtle Mountain Reservation and Spirit Lake Reservation represent a community of interest because of their geographic proximity and their residents' shared representational interests, socioeconomic statuses, and cultural values. *See* Trial Tr. Vol. 1 at 50:24-52:11, 52:24-73:9 (Testimony of Former Chairman Douglas Yankton); Trial Tr. Vol. 3 at 22:4-16-27:15, 28:18-25; 50:3-7; 52:23-53:1, 55:9-12 (Testimony of Chairman Jamie Azure).

108. The Turtle Mountain Reservation and Spirit Lake Reservation are only approximately 55 miles apart. *See* Trial Tr. Vol. 1 at 50:8-12 (Testimony of Former Chairman

Douglas Yankton); Trial Tr. Vol. 3 at 21:24-22:3 (Testimony of Chairman Jamie Azure); P042.016-017 (Rebuttal Report of Dr. Loren Collingwood).

109. Chairman Jamie Azure of the Turtle Mountain Band and Former Chairman Douglas Yankton of the Spirit Lake Tribe persuasively testified to the shared representational interests, socioeconomic statuses, and cultural and political values of Turtle Mountain Citizens and Spirit Lake Citizens who live on the Tribes' respective Reservations. *See* Trial Tr. Vol. 1 at 50:24-52:11, 52:24-73:9 (Testimony of Former Chairman Douglas Yankton); Trial Tr. Vol. 3 at 22:4-16-27:15, 28:18-25; 50:3-7; 52:23-53:1, 55:9-12 (Testimony of Chairman Jamie Azure). Having observed their testimony, the Court found both Chairmen credible and specifically credits their testimony.

110. The Tribes regularly work together to advance their shared representational interests. For instance, officials from the two Tribes commonly collaborate to lobby the North Dakota Legislature on issues that are critical to the Tribal Nations, such as gaming, law enforcement, child welfare, taxation, and road maintenance, amongst others. *See* Trial Tr. Vol. 1 at 56:12-61:18, 64:1-70:6 (Testimony of Former Chairman Douglas Yankton); Trial Tr. Vol. 2 at 21:11-21 (Testimony of Plaintiff Collette Brown); Trial Tr. Vol. 3 at 25:23-28:8 (Testimony of Chairman Jamie Azure).

111. When lobbying the Legislature, officials from the Spirit Lake Tribe more commonly collaborate with state representatives from the Turtle Mountain area who are Turtle Mountain Citizens, including former District 9 Senator Richard Marcellais and current District 9A Representative Jayme Davis, than with their own Senators and Representatives. *See* Trial Tr. Vol. 1 at 67:13-20, 68:12-69:6, 70:1-6 (Testimony of Former Chairman Douglas Yankton); Trial Tr. Vol. 2 at 21:22-22:20 (Testimony of Plaintiff Collette Brown).

112. The Tribes also collaborate internally on matters affecting the Reservations, including public safety, gaming, tourism, and tribal colleges. *See* Trial Tr. Vol. 1 at 56:12-61:18 (Testimony of Former Chairman Douglas Yankton); Trial Tr. Vol. 3 at 22:17-25:22 (Testimony of Chairman Jamie Azure).

113. The Tribes have likewise come together in litigation on similar policies. *See* Trial Tr. Vol. 1 at 70:7-71:4 (Testimony of Former Chairman Douglas Yankton); Trial Tr. Vol. 3 at 27:12-15 (Testimony of Chairman Jamie Azure).

114. Moreover, the State itself commonly interacts with the Spirit Lake Tribe and Turtle Mountain Band on similar levels, including through the Legislature's Tribal and State Relations Committee and the North Dakota Indian Affairs Commission. *See* Trial Tr. Vol. 1 at 61:19-63:25 (Testimony of Former Chairman Douglas Yankton); Trial Tr. Vol. 3 at 27:16-28:8 (Testimony of Chairman Jamie Azure).

115. Individuals who reside on both Reservations have similar socioeconomic statuses and educational levels and are more similar to each other on such measures than to white residents in neighboring counties. *See infra* PFOFs ¶¶ 217-218.

116. Turtle Mountain Citizens and Spirit Lake Citizens share many cultural and political values and participate together in various cultural events. *See* Trial Tr. Vol. 1 at 50:24-52:11, 52:24-56:11 (Testimony of Former Chairman Douglas Yankton); Trial Tr. Vol. 3 at 22:4-16, 28:22-25; 50:3-7; 52:23-53:1 (Testimony of Chairman Jamie Azure).

117. Indeed, many Turtle Mountain Citizens are also descendants of the Spirit Lake Tribe or related to Spirit Lake Citizens and vice versa. *See* Trial Tr. Vol. 1 at 53:16-21 (Testimony of Former Chairman Douglas Yankton); Trial Tr. Vol. 3 at 50:3-7 (Testimony of Chairman Jamie Azure).



118. Chairman Azure and Chairman Yankton persuasively testified that Tribal Members residing on their Tribe's Reservation have more in common with Tribal Members residing on the other Tribe's Reservation, in terms of socioeconomic status, political values, and representational interests, than they do with non-Native residents in nearby areas outside the boundaries of the Reservations. *See* Trial Tr. Vol. 1 at 55:2-12 (Testimony of Former Chairman Douglas Yankton); Trial Tr. Vol. 3 at 28:18-21 (Testimony of Chairman Jamie Azure).

119. Unlike the Enacted Plan, District 9 in both of Plaintiffs' demonstrative plans keeps together the community of interest made up of the Turtle Mountain and Spirit Lake Reservations. P105 (Plaintiffs' Demonstrative Plan 1 Map); P106 (Plaintiffs' Demonstrative Plan 2 Map); P101 (2021 Enacted N.D. State House Map); P059 (Enacted Plan Native American VAP Shading); P001.030 (Expert Report of Dr. Loren Collingwood).

120. Plaintiffs' demonstrative plans also keep together the community of interest comprised of the Turtle Mountain Reservation and Turtle Mountain Trust Lands. *See* Trial Tr. Vol. 3 at 16:21-17:18 (Testimony of Chairman Jamie Azure); P105 (Plaintiffs' Demonstrative Plan 1 Map); P106 (Plaintiffs' Demonstrative Plan 2 Map); P101 (2021 Enacted N.D. State House Map). The Enacted Plan splits Turtle Mountain Trust lands to the north and west of the reservation into a separate house subdistrict, District 9B. P057 (Enacted District 9 Split of Turtle Mountain Reservation and Trust Lands).

121. Many Turtle Mountain Citizens reside on Turtle Mountain Trust Lands and the Turtle Mountain Reservation and Turtle Mountain Trust Lands in Rolette County form a contiguous community. *See* Trial Tr. Vol. 3 at 16:17-20; 18:14-19:13 (Testimony of Chairman Jamie Azure).

122. Turtle Mountain Members living on Trust Lands enjoy the same rights as Turtle Mountain Members residing within the Reservation, including the right to vote in Tribal elections and to serve on the Tribal Council. Residents of both areas also share socioeconomic statuses and political perspectives and participate in cultural practices and events. *See* Trial Tr. Vol. 3 at 18:14-19:13 (Testimony of Chairman Jamie Azure).

123. Plaintiffs' demonstrative plans perform as well or better on the traditional redistricting criteria of keeping communities of interest together than the Enacted Plan. Trial Tr. Vol. 3 at 126:2-7 (Testimony of Dr. M.V. Hood III).

**B. *Gingles* 2: Native Voters are Politically Cohesive**

124. Voting in Districts 9 and 15 is racially polarized, with Native American voters cohesively supporting the same candidates. Stipulated Facts ¶ 30, ECF No. 108; *see also* Trial Tr. Vol. 1 at 145:23-146:2 (Testimony of Dr. Loren Collingwood); P081.003-005 (Expert Report of Dr. M.V. Hood III (Turtle Mountain)); Trial Tr. Vol. 3 at 91:15-92:2, 130:15-17 (Testimony of Dr. M.V. Hood III).

125. Voting in Districts 9A and 9B is also racially polarized, with Native American voters cohesively supporting the same candidates. P013 (Enacted Subdistrict 9A - Demographics and 2022 Legislative Results); P014 (Enacted Subdistrict 9B - Demographics and 2022 Legislative Results); Trial Tr. Vol. 1 at 145:23-146:2 (Testimony of Dr. Loren Collingwood) (“Racially polarized voting is effectively a fact of life in this area”).

126. Districts 9A and 9B contain too few precincts to conduct a full ecological inference statistical analysis on each subdistrict, but the record is nevertheless clear—and the Court finds as a matter of fact—that Native American voters in both Districts 9A and 9B are politically cohesive.

Trial Tr. Vol. 1 at 148:3-149:13 (Testimony of Dr. Loren Collingwood); P001.015 (Expert Report of Dr. Loren Collingwood).

127. The political cohesion of Native American voters within each of District 9's subdistricts is established in several ways. First, District 9A contains 68.5% of District 9's NVAP; given the extreme levels of cohesion among Native American voters in the full District 9, it necessarily follows that Native American voters within District 9A are politically cohesive. P001.015 (Expert Report of Dr. Loren Collingwood); Trial Tr. Vol 1 at 149:7-150:25 (Testimony of Dr. Loren Collingwood).

128. Second, the extreme level of Native American political cohesion that is statistically confirmed for the full District 9 is readily apparent within each subdistrict by the correlation between the demographic makeup of the precincts within Districts 9A and 9B and the election results for those precincts. P001.015-016 (Expert Report of Dr. Loren Collingwood). For example, Senator Marcellais was the Native American candidate of choice in the 2022 state senate race in District 9. Trial Tr. Vol. 1 at 147:23-148:11; P001.015 (Expert Report of Dr. Loren Collingwood). Senator Marcellais's performance in each precinct within Districts 9A and 9B correlates with its NVAP, with support increasing for Senator Marcellais as NVAP increases, and support for Senator Marcellais decreasing as NVAP decreases. P001.015-016 (Expert Report of Dr. Loren Collingwood); Trial Tr. Vol. 1 at 149:7-150:25 (Testimony of Dr. Loren Collingwood). The same pattern is true for other candidates of choice of Native American voters, including Jayme Davis (District 9A state house election) and Marvin Nelson (District 9B state house election). P001.015-016 (Expert Report of Dr. Loren Collingwood). This confirms that the voting patterns in both subdistricts are consistent with the statistically confirmed voting patterns of the full District 9.

129. Third, Defendant’s expert, Dr. Hood, agrees that Native American voters are politically cohesive in both Districts 9A and 9B. P080.004-006 (Expert Report of Dr. M.V. Hood III) (Walen v. Burgum)); Trial Tr. Vol. 3 at 139:19-140:16 (Testimony of Dr. M.V. Hood III). Dr. Hood testified that he reached this conclusion based upon his assumption—which he reaffirmed at trial—that the vote distribution with each subdistrict “mirrors the overall district.” Trial Tr. Vol. 3 at 140:1-16 (Testimony of Dr. M.V. Hood III).

130. Fourth, analysis of Dr. Hood’s estimated turnout and vote shares in subdistricts 9A and 9B show it to be algebraically impossible for Native American voters not to be politically cohesive in both subdistricts given the extreme level of Native American political cohesion in the full District 9 and the population distribution between the subdistricts. Trial Tr. Vol. 3 at 91:15-92:2, 130:23- 138:18; 139:19-140:16 (Testimony of Dr. M.V. Hood III).

131. Fifth, lay testimony further confirms that Native American voters in the region are politically cohesive. Trial Tr. Vol. 1 at 52:12-53:25 (Testimony of Chairman Yankton that voters who live on the Turtle Mountain Reservation and voters who live on the Spirit Lake Reservation are politically cohesive); Trial Tr. Vol. 2 at 16:5-19:19, 28:14-25 (Testimony of Chairman Azure that Turtle Mountain members who live on the trust lands in District 9B tend to share political positions with and vote for the same candidates as members who live on the reservation) Trial Tr. Vol. 2 at 28:14-25 (Testimony of Chairman Azure that tribal members on both reservations are politically cohesive).

**C. *Gingles 3: White Bloc Voting Usually Defeats the Native American Candidate of Choice in Districts 9, 9B, and 15***

132. Dr. Collingwood’s analysis credibly and conclusively establishes that white bloc voting usually defeats the Native American candidate of choice in the challenged districts.

133. Both Dr. Collingwood and Dr. Hood agree that in addition to Native American voters being politically cohesive in Districts 9, 9A, 9B, and 15, white voters likewise cohesively vote as a bloc for the opposing set of candidates. Stipulated Facts ¶ 30, ECF No. 108; *see also* Trial Tr. Vol. 1 at 145:23-146:2 (Testimony of Dr. Loren Collingwood); P001.010-016, P001.022-026 (Expert Report of Dr. Loren Collingwood); P081.002-004 (Expert Report of Dr. M.V. Hood III) (Turtle Mountain); Trial Tr. Vol. 3 at 91:15-92:2, 130:15-17, 140:1-16 (Testimony of Dr. M.V. Hood III).

134. Dr. Collingwood performed an electoral performance analysis on the elections in which he found racially polarized voting. P001.001 (Expert Report of Dr. Loren Collingwood).

135. In evaluating the results of his electoral performance analysis, Dr. Collingwood focused on the three categories of elections that are most probative for determining whether the white majority bloc votes against Native American voters' candidates of choice: (1) "endogenous" elections, or elections for the office that is at issue (here state legislative elections as opposed to statewide, or "exogenous" elections), (2) more recent elections, and (3) elections featuring a Native American candidate. P042.005-007 (Rebuttal Report of Dr. Loren Collingwood); P001.021 (Expert Report of Dr. Loren Collingwood); Trial Tr. Vol. 1 at 159:11-23. Dr. Hood agrees that these categories of elections are more probative than others in analyzing whether white voters usually defeat the minority candidate of choice. P042.006 (Rebuttal Report of Dr. Loren Collingwood) (citing Dr. Hood's published works); Trial Tr. Vol. 3 at 142:11-143:17 (Testimony of Dr. M.V. Hood III).

**1. *Gingles* 3 is Present in District 9B**

136. Across all elections reported by Dr. Collingwood for District 9B, Native American preferred candidates were defeated by white bloc voting 81% of the time. P042.008 (Rebuttal

Report of Dr. Collingwood); P015 (Analysis Statewide and Endogenous 2022 Contests in Enacted District 9 and Subdistricts 9A and 9B); P016 (Performance Analysis Statewide 2020 Contests in Enacted District 9 and Subdistricts 9A and 9B); P017 (Performance Analysis Statewide 2018 Contests in Enacted District 9 and Subdistricts 9A and 9B); P018 (Performance Analysis Statewide 2016 Contests in Enacted District 9 and Subdistricts 9A and 9B); P019 (Performance Analysis Statewide 2014 Contests in Enacted District 9 and Subdistricts 9A and 9B).

137. The defeat rate is 100% in endogenous interracial elections, endogenous all-white elections, exogenous interracial elections, and exogenous all white elections from the most recent three election cycles exhibiting typical electoral conditions (2022, 2020, and 2016). P001.017, 18, and 20 (Expert Report of Dr. Loren Collingwood).

**2. *Gingles 3* is Present in District 15**

138. Across 30 contests between 2016 and 2022, the block rate by which white voters prevent the Native American preferred candidate from prevailing in District 15 is 97%. P001.026 (Expert Report of Dr. Loren Collingwood); Trial Tr. Vol. 1 at 164:7-22 (Testimony of Dr. Loren Collingwood); P021 (RPV Statewide 2016 Contests in Enacted District 15); P022 (RPV Statewide 2018 Contests in Enacted District 15); P023 (RPV Statewide 2020 Contests in Enacted District 15); P024 (RPV Statewide 2022 Contests in Enacted District 15); P025 (Performance Analysis Statewide and Endogenous 2022 Contests in Enacted District 15); P026 (Performance Analysis Statewide 2020 Contests in Enacted District 15); P027 (Performance Analysis Statewide 2018 Contests in Enacted District 15); P028 (Performance Analysis Statewide 2016 Contests in Enacted District 15). The only contest in which the Native American-preferred candidate prevailed was in 2018. P001.026 (Expert Report of Dr. Loren Collingwood); P022 (RPV Statewide 2018 Contests

in Enacted District 15); P027 (Performance Analysis Statewide 2018 Contests in Enacted District 15).

139. Without the 2018 elections (in which special circumstances were present), the defeat rate for Native American preferred candidates in District 15 is 100%. P001.027, 028, and 030 (Expert Report of Dr. Loren Collingwood).

140. The 100% defeat rate is true for all three election categories in District 15: endogenous interracial elections, exogenous interracial elections, and exogenous all-white elections. P001.027, 028, and 030 (Expert Report of Dr. Loren Collingwood).

### **3. *Gingles 3* is Present in Districts 9**

141. White bloc voting defeats the Native American preferred candidate in 100% of the endogenous elections in the full District 9. P001.017 (Expert Report of Dr. Loren Collingwood); P042.007 (Rebuttal Report of Dr. Loren Collingwood); Trial Tr. Vol. 1 at 162:1-4, 162:20-24 (Testimony of Dr. Loren Collingwood); P015 (Analysis Statewide and Endogenous 2022 Contests in Enacted District 9 and Subdistricts 9A and 9B).

142. White bloc voting defeats the Native American preferred candidate in 100% of the most recent (2022) elections in District 9, in 71% of elections in the most recent two cycles 2022 and 2020, and in 57% of the most recent three cycles that exhibited typical electoral circumstances. P042.007-008 (Rebuttal Report of Dr. Loren Collingwood); Trial Tr. Vol. 1 at 162:25-163:5, 199:17-200:3 (Testimony of Dr. Loren Collingwood); P015 (Analysis Statewide and Endogenous 2022 Contests in Enacted District 9 and Subdistricts 9A and 9B); P016 (Performance Analysis Statewide 2020 Contests in Enacted District 9 and Subdistricts 9A and 9B); P018 (Performance Analysis Statewide 2016 Contests in Enacted District 9 and Subdistricts 9A and 9B).

143. White bloc voting defeats the Native American preferred candidate in 100% of the most recent elections featuring a Native American candidate in the full District 9, and in 60% of elections featuring a Native American candidate across all elections analyzed for the full District 9. P042.007 (Rebuttal Report of Dr. Loren Collingwood); Trial Tr. Vol. 1 at 163:6-13 (Testimony of Dr. Loren Collingwood); P015 (Analysis Statewide and Endogenous 2022 Contests in Enacted District 9 and Subdistricts 9A and 9B); P016 (Performance Analysis Statewide 2020 Contests in Enacted District 9 and Subdistricts 9A and 9B); P017 (Performance Analysis Statewide 2018 Contests in Enacted District 9 and Subdistricts 9A and 9B); P018 (Performance Analysis Statewide 2016 Contests in Enacted District 9 and Subdistricts 9A and 9B); P019 (Performance Analysis Statewide 2014 Contests in Enacted District 9 and Subdistricts 9A and 9B).

144. In endogenous elections featuring a Native American candidate, the defeat rate for Native American candidates is 100% in District 9. In exogenous elections featuring a Native American candidate, the defeat rate is 50%. And in exogenous elections featuring white candidates, the defeat rate for Native American preferred candidates is 56%. P001.017, 018, and 020 (Expert Report of Dr. Loren Collingwood) (reporting 2022, 2020, and 2016 election results in District 9).

**4. The Court Does Not Credit Dr. Hood's Contrary Conclusion with Respect to District 9.**

145. The Court rejects Dr. Hood's conclusion that *Gingles* 3 is not satisfied in District 9.

146. Dr. Hood did not do any independent analysis of election results for *Gingles* 3 in his expert report he wrote for this case, and instead relied entirely on the analysis conducted by Dr. Collingwood. In reaching his conclusion, Dr. Hood simply summed up all of the elections analyzed by Dr. Collingwood across District 9, 9A, and 9B. He did not consider the relative probative weight of any of the elections, nor did he consider whether the 2018 election results



indicated that special circumstances were at play during that election. Trial Tr. Vol. 3 at 143:25-144:14 (Testimony of Dr. M.V. Hood III).

147. But even when all elections in Districts 9 and 9B are summed without District 9A—a district in which there is no concern that white voters can defeat the preferred candidates of the near-80% NVAP majority—the Native American preferred candidates win only 30 of 72 elections. This is a block rate by white voters of 58%—more often than not defeating the candidates preferred by Native American voters. P042.007 (Rebuttal Report of Dr. Loren Collingwood); Trial Tr. Vol. 3 at 147:9-148:24, 176:8-13 (Testimony of Dr. M.V. Hood III).

148. Dr. Hood admitted that there is no concern that white bloc voting usually defeats the Native American candidate of choice in District 9A because the Native preferred candidate wins 100% of elections analyzed there. Trial Tr. Vol. 3 at 147:9-15.

149. Nonetheless, Dr. Hood testified that in concluding whether the full District 9 functions to elect Native American candidates of choice, he summed District 9A's results with both District 9's and District 9B's. Trial Tr. Vol. 3 at 175:9-15 (Testimony of Dr. M.V. Hood III).

150. Dr. Hood admitted that if the subdistrict lines were removed from District 9, and District 9A no longer existed as a separate supermajority Native American district, then “District 9 is no longer going to function as an opportunity-to-elect district” because that would be the “natural result of taking out the one subdistrict that has a high population of Native Americans.” Trial Tr. Vol. 3 at 176:8-13 (“Correct”) (Testimony of Dr. M.V. Hood III). This is the same thing as saying that in the full District 9, white voters usually defeat the preferred candidates of Native American voters.

151. Dr. Hood also submitted an expert report analyzing the presence of *Gingles* 3 in District 9 in the *Walen v. Burgum* case and the parties stipulated to the admission of that report as evidence in this case. P080 (Expert Report of Dr. M.V. Hood III, *Walen v. Burgum*).

152. Dr. Hood's submitted his expert report in the *Walen* matter on January 17, 2023. Trial Tr. Vol. 3 at 152:10-12.

153. The 2022 election results were available at the time Dr. Hood submitted his reports and indeed were included in Dr. Collingwood's report in that matter. Trial Tr. Vol. 3 at 152:16-18; D468 (Expert Report of Dr. Loren Collingwood, *Walen v. Burgum*).

154. Dr. Hood's handwritten notes produced in discovery included the 2022 election results for Districts 9, 9A, and 9B. P083 (Handwritten Notes of Dr. M.V. Hood III).

155. Dr. Hood agrees that endogenous elections and more recent elections are more probative than other elections. Trial Tr. Vol. 3 at 142:11-143:17, 149:14-23 (Testimony of Dr. M.V. Hood III).

156. Nonetheless, Dr. Hood did not include any 2022 elections in his analysis of white bloc voting in District 9 in his *Walen v. Burgum* expert report, including any of the endogenous contests in Districts 9 and 9B for which he had collected results. Trial Tr. Vol. 3 at 142:11-143:17, 149:14-23 (Testimony of Dr. M.V. Hood III). He omitted these elections from his report despite having the results and despite testifying that the 2022 District 9 state senate election was the "single most probative" election. Trial Tr. Vol. 3 at 143:8-17 (Testimony of Dr. M.V. Hood III).

157. Dr. Hood agreed that if he were doing the election performance analysis for District 9 at the time of trial, he would add four elections from 2022 to his analysis. Trial Tr. Vol. 3 at 152:23-154:4 (Testimony of Dr. M.V. Hood III).

158. Based on Dr. Collingwood's undisputed performance analysis for these 2022 elections, if you add these four contests to the six contests Dr. Hood considered in the *Walen* case, white bloc voting defeats the Native American candidate of choice in the full District 9 in six out of the ten contests selected by Dr. Hood as the most probative to consider for purposes of *Gingles* III. That is a 60% block rate for Native-preferred candidates in District 9. Trial Tr. Vol. 3 at 161:3-163:12 (Trial Testimony of Dr. M.V. Hood III).

159. Taking into account the results of the elections Dr. Hood identified as most probative, together with his admission that District 9 only performs for Native American voters when subdistricted, both parties' expert testimony demonstrates that white bloc voting usually operates to defeat the Native American preferred candidate of choice in full District 9 and in subdistrict 9B. *Compare* Trial Tr. Vol. 1 at 163:14-16 (Testimony of Dr. Loren Collingwood) *with* Trial Tr. Vol. 3 at 176:8-13 (Testimony of Dr. M.V. Hood III).

160. Even looking at full District 9 alone, the only way to conclude that Native American-preferred candidates usually succeed is to overweight old elections, exogenous elections, and elections that do not feature Native American candidates. Trial Tr. Vol. 1 at 200:4-8 (Testimony of Dr. Loren Collingwood).

##### **5. Special Circumstances Surrounding the 2018 Election in North Dakota**

161. The 2018 elections exhibited "special circumstances" and the Court agrees with Dr. Collingwood's conclusion that "it would be appropriate to entirely disregard the 2018 elections" or at least give them "very little weight" in assessing white bloc voting. P042.008 (Rebuttal Report of Dr. Loren Collingwood); Trial Tr. Vol. 1 at 153:13-158:3 (Testimony of Dr. Loren Collingwood).

162. The special circumstances of the 2018 Election are most evident when analyzing Native American voter turnout rates. Although the redrawn District 9 has a small majority NVAP (down twenty percentage points from the benchmark district), its voting electorate is, under usual circumstances, substantially majority white. P042.005 (Rebuttal Report of Dr. Loren Collingwood). Trial Tr. Vol. 1 at 156:13-23 (Testimony of Dr. Loren Collingwood).

163. The chart below shows the demographic composition of the voting electorate in District 9 for the past five election cycles:

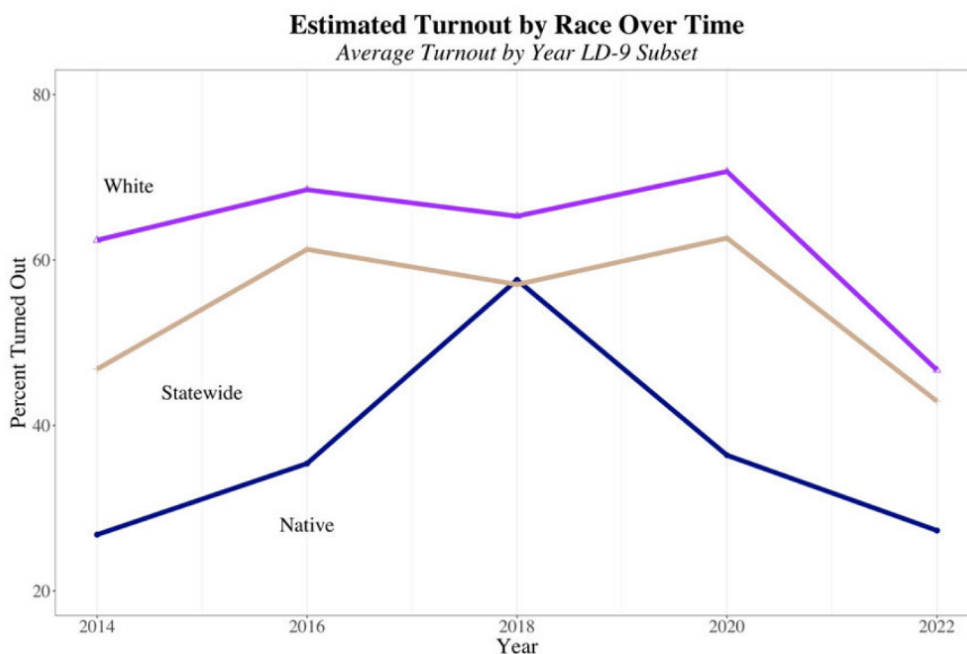
**Enacted District 9 Electorate Demographic Composition**

<b>Election</b>	<b>White Electorate Share</b>	<b>Native American Electorate Share</b>
2014	67%	33%
2016	63%	37%
2018	50%	50%
2020	63%	37%
2022	60%	40%

P042.004-005 (Rebuttal Report of Dr. Loren Collingwood); P043 (Voter Turnout by Race, 2014-2022 Contests in Enacted District 9).

164. Native American voter turnout nationwide, in North Dakota, and specifically in District 9, is typically substantially lower than white voter turnout. P042.003-004 (Rebuttal Report of Dr. Loren Collingwood); Trial Tr. Vol. 1 at 153:13-155:7 (Testimony of Dr. Loren Collingwood) (Testimony of Dr. Loren Collingwood). In District 9, Native American voter turnout is “usually in the neighborhood of 20-30 percentage points” lower than white turnout. P042.004 (Rebuttal Report of Dr. Loren Collingwood); Trial Tr. Vol. 1 at 155:17-158:3 (Testimony of Dr. Loren Collingwood). For all categories of voters, turnout in presidential election cycles exceeds turnout in midterm election cycles as a general matter. P042.004 (Rebuttal Report of Dr. Loren Collingwood); Trial Tr. Vol. 1 at 155:17-158:3 (Testimony of Dr. Loren Collingwood).

165. As the graph below shows, however, Native American turnout in 2018 skyrocketed to 57.6% in District 9, exceeding statewide overall turnout and approaching (but not reaching) white turnout in the district. P042.004 (Rebuttal Report of Dr. Loren Collingwood); Trial Tr. Vol. 1 at 155:17-158:3 (Testimony of Dr. Loren Collingwood).



P042.004 (Rebuttal Report of Dr. Loren Collingwood); P043 (Voter Turnout by Race, 2014-2022 Contests in Enacted District 9); Trial Tr. Vol. 1 at 155:17-158:3 (Testimony of Dr. Loren Collingwood).

166. As Dr. Collingwood persuasively explained, “[i]n all the many elections in different jurisdictions that I have studied, I have never seen a Native American turnout number begin to approach 60% in a federal, state, or local contest. Rather, the figures often hover around 30% - which is in line with my estimates in every other election year in LD-9.” P042.004 (Rebuttal Report of Dr. Loren Collingwood); *see also* Trial Tr. Vol. 1 at 156:9 (Testimony of Dr. Loren Collingwood) (“I’ve never seen any turnout number like this, ever.”). Furthermore, the pattern of

midterm versus presidential cycle turnout for Native Americans is “strikingly inverted” with respect to the 2018 election. P042.004 (Rebuttal Report of Dr. Loren Collingwood).

167. The 2018 election results were similarly anomalous, with Native American preferred candidates more likely to succeed when compared to other election years. Trial Tr. Vol. 1 at 157:16-22 (Testimony of Dr. Loren Collingwood).

168. Lay testimony confirms that the circumstances surrounding the 2018 election were strikingly different than in the typical election year. Trial Tr. Vol. 1 at 80:18-86:17 (Testimony of Chairman Yankton that there were unusual circumstances that led to increased Native voter turnout in 2018 including a high profile race, a backlash by Native voters who perceived the state as trying to block them from voting by imposing a residential address requirement for voting, and the national attention and resources brought to Native voting in North Dakota following the Supreme Court decision allowing the address requirement to go into effect just before the election); Trial Tr. Vol. 3 at 19:21-21:12 (Testimony of Chairman Azure). Both Chairmen testified that they had never seen such intense turn out by Native voters in North Dakota as they did in 2018 have not seen such turnout since. Trial Tr. Vol. 1 at 86:11-17 (Testimony of Chairman Yankton); Trial Tr. Vol. 3 at 21:8-12 (Testimony of Chairman Azure). The Court credits the testimony of Dr. Collingwood, Chairman Azure, and former Chairman Yankton regarding the special circumstances surrounding the 2018 elections.

169. Accordingly, the Court concludes as a factual matter that the 2018 elections in District 9 were exceedingly atypical special circumstances and the Court gives them little weight in assessing the third *Gingles* precondition.

**VI. Totality of Circumstances Senate Factors**

170. Plaintiffs' expert, Daniel McCool, Ph.D. testified as to the Senate Factors. Trial Tr. Vol. 2 at 72-142 (Testimony of Dr. Dan McCool).

171. The Court received and afforded Dr. McCool's testimony as expert testimony in Native American voting rights. Trial. Tr. Vol. 2 at 80:21-81:3 (Testimony of Dr. Dan McCool). Having observed Dr. Daniel McCool and reviewed his reports, the Court credits the analysis, opinions, and testimony of Dr. McCool, granting it substantial weight.

172. Reflecting a reliable application of the Senate Factors to the facts of this case, Dr. McCool's relevant opinion set forth in his 87-page report is based on a qualitative analysis of 183 sources and dozens of interviews. P064.071-085 (Expert Report of Dr. Dan McCool).

173. His analysis – including reviewing Census and ACS data; federal, state, local and tribal government documents; court decisions; academic work; newspaper articles; and gray files – centered on his research question: whether HB 1504 dilutes the voting strength of members of the Turtle Mountain Band of Chippewa Indians and the Spirit Lake Nation, and thus reduces their opportunity to elect candidates of their choice. P064.003 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 83:20-84:3 (Testimony of Dr. Dan McCool).

174. Dr. McCool concluded that seven of the nine Senate Factors are present. P064 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 89:17-19; 125:15-126:1 (Testimony of Dr. Dan McCool). The Court agrees with Dr. McCool's conclusion in this regard.

175. Senate Factors 4 and 6 – slating and racial appeals – not present here, are not particularly applicable in modern politics. P064.035, 049-050 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 88:9-20 (Testimony of Dr. Dan McCool).

176. Defendant presented no controverting expert evidence on the Senate Factors, and at Defendant’s counsel acknowledged the presence of a number of Senate Factor, focusing their presentation instead of the question of responsiveness of the legislature during the redistricting process.

**A. Senate Factor 1: The History of Official Voting-Related Discrimination in North Dakota**

177. There is a history of official voting-related discrimination against Native Americans in North Dakota. P064.007-027 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 89-101 (Testimony of Dr. Dan McCool).

178. From the time of the territorial days when military confrontation, largely driven by settlers’ demand for Indian land, forced Native people to defend their homes, through the time when the Dakota Territory was being considered for statehood when Native people were forcibly removed to reservations that were a small remnant of their traditional homelands was a devastating tragedy for the Native people of the northern Great Plains—a historical trauma that still affects the relationship between Native people and Anglos today and their ability to participate in the electoral process. P064.007-009 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 90:3-22 (Testimony of Dr. Dan McCool).

179. Incoming Anglos, especially those who settled near Indian reservations, often harbored hostility for their Native American neighbors. As explained by the Supreme Court, “They [Indian tribes] owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies.” *United States v. Kagama*, 118 U.S. 375, 384 (1886).

180. The article on suffrage in the first adopted state Constitution demanded that Native Americans in North Dakota pass a cultural litmus test as a prerequisite to vote: “Civilized persons



of Indian descent who shall have severed their tribal relations two years next preceding such election.” P147.144 (Journal of the Constitutional Convention for North Dakota (1889)); Trial Tr. Vol. 2 at 90:23-91:15 (Testimony of Dr. Dan McCool).

181. The only group of citizens in U.S. history who were required to give up their home, their language, and their culture as a prerequisite to the right to vote, Native Americans were forced to prove they were “civilized” in order to vote in *State ex rel. Tompton v. Denoyer*, 6 N.D. 586 (1897) and *Swift v. Leach*, 45 N.D. 437 (1920). P064.010 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 91:16-92:22 (Testimony of Dr. Dan McCool).

182. Restrictions on voting for Native people remained in the North Dakota constitution until 1958. Trial Tr. Vol. 2 at 92:24-93:5 (Testimony of Dr. Dan McCool).

183. During the Senate Floor Session on HB 1504 on November 10, 2021, Senator Oley Larsen made comments echoing the cultural litmus test. D432 at 26:7-10, 41:6-13. (Tr. of Nov. 10, 2021 Senate Vote); D447 (Video of Nov. 10, 2021 Session); P064.063 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 94:2-9 (Testimony of Dr. Dan McCool).

184. Discrimination against Native people in North Dakota still today has a negative impact on their ability to participate equally in the electoral process. P064.013-016, and 021 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 94:10-13 (Testimony of Dr. Dan McCool).

185. The conflict over the “Fighting Sioux” team mascot heightened racial tensions and prompted overt racist insults. P064.016-018 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 94:14-21 (Testimony of Dr. Dan McCool).

186. Differing perceptions regarding the existence or extent of discrimination is an indicator of polarization. P064.018-021 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 95:12-22 (Testimony of Dr. Dan McCool).

187. Contradicting all the tribal members Dr. McCool interviewed and presenting evidence of polarization, Representative Terry Jones during the House Floor Session on HB 1504 on November 9, 2021 said he did not believe there is racial discrimination in North Dakota. D431 at 5:7-10 (Tr. Of Nov. 9, 2021 Senate Debate); D446 (Video of Nov. 9, 2021 Senate Debate); P064.020 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 96:9-12 (Testimony of Dr. Dan McCool).

188. Of the nine legal challenges in North Dakota involving the voting rights of minorities, Natives have either won or successfully settled all that have concluded: *U.S. v. Benson County*, A2-00-30 (D.N.D. March 10, 2000); *Parshall School District* (2007); *Spirit Lake Tribe v. Benson Cnty., N.D.*, No. 2:10-CV-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010); *Brakebill v. Jaeger*, No. 1-16-cv-008, 2016 WL 7118548 (D.N.D. Aug. 1, 2016); *Brakebill v. Jaeger*, No. 1-16-cv-008, 2018 WL 1612190 (D.N.D. Apr. 3, 2018); *Spirit Lake v. Jaeger*, No. 1-18-CV-222, 2020 WL 625279 (Feb. 10, 2020); *Spirit Lake v. Benson County*, 3:22-cv-161 (D.N.D. April 24, 2023); *Walen v. Burgum*, 1:22-cv-31-CRH (D.N.D. 2022); and this pending case. P064.021-026 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 97:24-101:9 (Testimony of Dr. Dan McCool).

189. In 2000, Benson County North Dakota entered into a consent decree with the United States requiring it to change from at-large elections for the Benson County Board of Commissioners to a district-based system. The consent decree contained factual findings that voting in Benson County Commissioner elections was racially polarized and that white bloc voting usually resulted in the defeat of the Native American candidate of choice. *U.S. v. Benson County*, A2-00-30 (D.N.D. March 10, 2000); P064.021-022, .032 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 98:2-20 (Testimony of Dr. Dan McCool).

190. In 2023, Benson County entered into a consent decree with the Spirit Lake Tribe and individual Spirit Lake Members once again ordering it to change from at-large elections to a district-based system after a finding that Benson County had violated the 2000 consent decree. *Spirit Lake v. Benson County*, 3:22-cv-161 (D.N.D. April 24, 2023); Trial Tr. Vol. 2, 98:21-99:5.

191. In 2020, then-Secretary of State Al Jaeger entered into a consent decree with the Spirit Lake Tribe, the Standing Rock Sioux Tribe, and several individual Native American voters requiring the Secretary of State to recognize tribal IDs and Tribal Governments' designation of voters' residential street addresses for purposes of voting. *Spirit Lake v. Jaeger*, No. 1-18-CV-222, 2020 WL 625279 (Feb. 10, 2020); P064.024-026 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 99:13-100:100 (Testimony of Dr. Dan McCool).

**B. Senate Factor 2: The Extent to Which Voting in Elections Is Racially Polarized**

192. Dr. Collingwood provided substantial evidence that voting in North Dakota and in District 9, 9A, 9B, and 15 is racially polarized. *See supra* PFOFs ¶¶ 124-133.

193. Tribal members across the State provided the Redistricting Committee evidence of racially polarized voting in elections. P156 (Joint Legislative Redistricting Committee, HB1504, meeting Minutes, Nov. 8, 2021); P157 (Written Testimony of Mike Faith, Sept. 15-16, 2021); P158 (Written Testimony of Chairman Fox, Sept. 29, 2021); P159 (Written Testimony of Lisa DeVille, Sept. 28, 2021); P064.029-033 (Expert Report of Dr. Dan McCool).

**C. Senate Factor 3: The Extent to which the State Has Used Voting Practices or Procedures that Tend to Enhance the Opportunity for Discrimination against Native Americans, such as Unusually Large Election Districts**

194. The Redistricting Committee's refusal to place Turtle Mountain and Spirit Lake in the same district pursuant to the Chairmen's request on behalf of their tribes, instead of sub-districting District 9 into 9a and 9b and placing Spirit Lake into separate District 15, is an example

of a voting practice and procedure that enhanced the possibility of discrimination against Native Americans. P064.033-035 (Expert Report of Dr. Dan McCool).

195. The nine cases referenced in Conclusions of Law (“COL”), Part IV (*infra*) also provide evidence of Senate Factor 3 because they involve challenges to discriminatory electoral procedures including the use of at-large districts, discriminatory voter ID laws, and the closure of polling places that had a disparate impact on Native Americans. Trial Tr. Vol. 2 at 101:10-23 (Testimony of Dr. Dan McCool).

**D. Senate Factor 5: The Extent to which Native Americans Bear the Effects of Discrimination in Areas such as Education, Employment, and Health, which Hinder their Ability to Participate Effectively in the Political Process – *Historical Qualitative Analysis***

196. Defendant does not dispute Dr. Daniel McCool’s historical qualitative analysis and opinion that Native Americans bear the effects of discrimination in income, poverty, education, and health, all of which combine to increase the costs of voting and decrease political participation. P064.036-049 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 101:24-117:4, 115:12-116:7 (Testimony of Dr. Dan McCool). The Court agrees with and credits that testimony.

197. Decreased political participation is evident in the turnout data for the three counties with the highest Native American population compared to the state as a whole. According to the North Dakota Secretary of State website, turnout for the 2020 election, state-wide was 42.9%; 21.45% for Sioux County; 29.34% for Rolette County; and 33.39% for Benson County. P064.049 (Expert Report of Dr. Dan McCool).

**1. Senate Factor 5: Income**

198. Income correlates positively with political participation. P064.036 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 105:7-12 (Testimony of Dr. Dan McCool).

199. Once rich in land and other resources, the tribes in North Dakota were forced to starvation with the reservation system and are still living in desperate poverty a century later – this legacy of long-term poverty continued into the contemporary era. P064.036-037 (Expert Report of Dr. Dan McCool).

200. According to the Census Bureau’s five-year American Community Survey data from 2011-2013 in North Dakota: the rate of employment in the labor force for whites was 71% and for Native American was 58%; 30.5% of Native Americans worked in service occupations compared to 16% of whites; 35.2% of whites worked in “management, business, science and arts,” and 25.6% of Native Americans had such jobs; 76.2% of whites lived in owner-occupied housing, compared to 46.3% for Native Americans; 32.8% of whites lived in rentals, compared to 53.7% of Native Americans; and the average value of a home for whites was \$144,400 while the same figure for Native Americans was \$74,700. P064.037-039 (Expert Report of Dr. Dan McCool).

201. According to North Dakota Department of Health data from 2016, the median income for Native Americans was \$25,255 and the median income for North Dakotans as a whole was \$48,670; the average number of people living below the poverty line in North Dakota was 13% and the average number of Native Americans living below the poverty line was 39.8%. P064.037-038 (Expert Report of Dr. Dan McCool).

202. Native Americans are over-represented in the homeless population and in federal and state prisons in North Dakota. P064 at 39-40 (Expert Report of Dr. Dan McCool).

## **2. Senate Factor 5: Education**

203. An important determinant of political participation, educational level correlates positively with the ability and willingness to participate in the electoral system. P064.041 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 109:5-7 (Testimony of Dr. Dan McCool).

204. There were twelve American Indian boarding schools in North Dakota, including schools on the Turtle Mountain Chippewa Reservation and the Spirit Lake Reservation. P064.042 (Expert Report of Dr. Dan McCool).

205. According to the Census Bureau's five-year American Community Survey data from 2011-2013 in North Dakota, 8% of whites had less than a high school education, while the figure for Native Americans was 18.1%; and 20.2% of whites had a bachelor's degree, while 10.6% of Native Americans had that degree. P064.042-043 (Expert Report of Dr. Dan McCool).

206. As of 2020, the Native American graduation rate in North Dakota was 72%, compared to 89% for white students. P064.043 (Expert Report of Dr. Dan McCool).

207. A 2015 survey of middle school children in North Dakota found that 78% of white students "made mostly A's or B's," but the comparable figure for Native Americans was 50.8%; and 32.3% of Native American students in middle school received special education assistance, while 14.8% of white students needed special education assistance. P064.043 (Expert Report of Dr. Dan McCool).

208. In a 2000 survey of ACT scores, white high school students in North Dakota scored an average of 21.6, but the state's Native American students scored an average of 17.1. P064.043 (Expert Report of Dr. Dan McCool).

### **3. Senate Factor 5: Health Care**

209. The health status of citizens affects their ability to exercise their right to vote. P064.044 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 111:24-112:20 (Testimony of Dr. Dan McCool).

210. According to 2016 data from the North Dakota Department of Health, Native Americans in the United States have an infant mortality rate of 13.5% and Anglo Americans have an infant mortality rate of 7.5%. P064.045 (Expert Report of Dr. Dan McCool).

211. According to 2009-2011 data on mortality disparity rates for Native Americans in Indian Health Services (“IHS”) service areas compared to all races across the United States: the disparity ratio for all causes of death is 1.3; the ratio for diabetes 3.2; and for alcohol-induced is 6.6. P064.086, Appendix A (Expert Report of Dr. Dan McCool).

212. In North Dakota, there are only two IHS hospitals, among a total of 50 hospitals. P064.045 (Expert Report of Dr. Dan McCool).

213. In some cases, care at IHS hospitals can be inferior. Trial. Tr. Vol. 2 at 113:25-114:12 (Testimony of Dr. Dan McCool).

214. According to 2015 surveys of high school and middle school students in North Dakota, 8.2% of white high school students had attempted suicide, and 14.3% of Native American high school students had; 5.2% of white middle school students had attempted suicide, and 18.7% of Native American middle school students had. P064.045 (Expert Report of Dr. Dan McCool).

#### **4. Senate Factor 5: Internet Access**

215. One of the most important components of infrastructure in terms of accessing government services—including registering to vote and receiving information about voting, candidates, and elections services—is the internet. The internet requires having, not just broadband service, but the economic means to buy a computer or smart phone, pay a monthly service fee, and if one wants to print government permits or registration forms, a printer and paper. P064.046 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 114:13-115:2 (Testimony of Dr. Dan McCool).

216. According to a 2020 Sacred Pipe Resources Center study of tribal internet analyzing the availability (not the actual prescription rate) of low-cost wired broadband (defined as less than \$60/month), Spirit Lake had a rate of 54% and Turtle Mountain had a rate of 75%. P064.047 (Expert Report of Dr. Dan McCool).

**E. Senate Factor 5: The Extent to which Native Americans Bear the Effects of Discrimination in Areas such as Education, Employment, and Health, which Hinder their Ability to Participate Effectively in the Political Process – Contemporary Quantitative Analysis**

217. Plaintiffs' expert Dr. Weston McCool provided a contemporary quantitative analysis of Senate Factor 5. Trial Tr. Vol. 2 at 144:5-162:1. Having observed Dr. Weston McCool and reviewed his reports, the Court credits the analysis, opinions, and testimony of Dr. McCool, granting it substantial weight.

218. Using data from the Census Bureau's 2015-2019 five-year American Community Survey, Dr. Weston McCool compared how Native Americans and white North Dakotans in Rolette, Ramsey, and Benson Counties perform on seven socioeconomic variables—income, poverty, education, computer ownership and access, homeownership, and employment -- and found that the Native American population is at a systemic and statistically significant race-based disadvantage when compared to the white population on each of these factors, across all three counties. P073.005-013 (Expert Report of Dr. Weston McCool); Trial Tr. Vol. 2 at 156:17-159:8; 161:13-161:24

219. Using data from the Kaiser Family Foundation, Dr. Weston McCool determined that Native Americans in North Dakota are more than three times as likely as white residents to report avoiding seeking medical care because of cost. P073.003, .008, .010, .013 (Expert Report of Dr. Weston McCool); Trial Tr. Vol. 2 at 148:21-149:1, 150:21-151:23, 160:6-160:24.



**F. Senate Factor 7: The Extent to Which Native Americans Have Been Elected to Public Office in North Dakota**

220. Native people express a low sense of political efficacy, which is the idea that your vote matters and which is a crucial component of political agency and democratic participation. P064.056-057 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 119:17-120:11 (Testimony of Dr. Dan McCool).

221. Currently, only two state house legislative seats are held by Native Americans – Jayme Davis (District 9A) and Lisa DeVille (4A). Trial Tr. Vol. 2 at 117:17-20 (Testimony of Dr. Dan McCool).

222. With Turtle Mountain tribal member Richard Marcellais losing his senate legislative seat in 2022, no Native American currently serves in the North Dakota Senate. Trial Tr. Vol. 2 at 117:21-23 (Testimony of Dr. Dan McCool).

223. There has never been a Native American statewide elected official. Trial Tr. Vol. 2 at 117:24-118:4 (Testimony of Dr. Dan McCool).

224. All seven members of the Legislature’s Tribal and State Relations Committee are white. P064.050-051 (Expert Report of Dr. Dan McCool).

225. Only two members of the governor’s administration and staff are Native American. P064.051 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 118: 8-12 (Testimony of Dr. Dan McCool).

226. The last entry on the North Dakota Indian Affairs Commission website is from 2013. P064.051 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 118:13-119:5 (Testimony of Dr. Dan McCool).

227. There are no Native Americans serving on the city commissions of Bismarck, Mandan or Fargo. P064.055 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 119:10-16 (Testimony of Dr. Dan McCool).

228. Native Americans are rare among elected officials at the county level, on school boards, and in civil service administrator positions. P064.052-054 (Expert Report of Dr. Dan McCool).

**G. Additional Senate Factor: The Responsiveness of State and Local Officials to the Needs of Native People**

229. Dr. McCool opined that the North Dakota government is not responsive to the needs of its Native American citizens. P064.057-063 (Expert Report of Dr. Dan McCool); Trial Tr. Vol. 2 at 120:12-124:4 (Testimony of Dr. Dan McCool).

230. The Redistricting Committee's refusal to hold hearings on reservations despite repeated requests is evidence of lack of responsiveness. P064.058 (Expert Report of Dr. Dan McCool). Trial Tr. Vol. 2, 120:15-121:11. D327 (Aug. 26, 2021 Redistricting Committee Meeting, Testimony of Collette Brown); P156 (Joint Legislative Redistricting Committee, HB1504, meeting Minutes, Nov. 8, 2021); P157 (Written Testimony of Mike Faith, Sept. 15-16, 2021).

231. The Tribal and State Relations Committee held meetings on reservations, but they did not have the power to redistrict. Trial Tr. Vol. 2 at 121:16-122:10 (Testimony of Dr. Dan McCool).

232. The Redistricting Committee was unresponsive in regard to District 9's subdivision and the request to place Turtle Mountain and Spirit Lake in one district. P064.059-061 (Expert Report of Dr. Dan McCool).

233. The Redistricting Committee was unresponsive in failing to preserve communities of interest, the Spirit Lake and Turtle Mountain tribes. P064.061-062 (Expert Report of Dr. Dan McCool).

234. Representative Jones at the September 1, 2021 Tribal and State Relations Committee meeting and Representative Dan Ruby at the November 9, 2021 House Floor Session made statements indicating that white people know what is best for Native Americans, which is a hallmark of a lack of responsiveness. D421 at 50:20-52:18 (Tr. Sept. 1, 2021 Tribal State Relations Committee Meeting); D436 (Video of Sept. 1, 2021 Tribal State Relations Committee Meeting); Trial Tr. Vol. 2 at 123:1-18 (Testimony of Dr. Dan McCool); D431 at 14:12-17 (Tr. of Nov. 9 House Floor Session); D446 (Video of Nov. 9 House Floor Session); Trial Tr. Vol. 2 at 123:24-124:4 (Testimony of Dr. Dan McCool).

235. The conflict over DAPL resulted in nine legislative bills – HB 1193, HB 1382, HB 1426, HB1281, HB 1203, HB 1332, HB1304, HB 1293, SB 2246, and HB 3033 – that provoked strong reactions on both sides. P064.063-067 (Expert Report of Dr. Dan McCool).

236. Collette Brown testified that the state legislature has also been nonresponsive to Native American voters with respect to the impact of the legalization of e-pull tab machines on Tribal gaming revenue. When the state first legalized the machines in 2017, they did not consult the Tribes or Tribal Gaming Commissioners like Ms. Brown. The legalization of e-pull tab machines has had a significant and detrimental effect on revenue for Tribes, including for the Spirit Lake Tribe, which saw its gaming revenue decrease by 45% in the first year that the machines were legalized, and by 65% overall prior to the pandemic. The loss in revenue has affected social services and other social and economic programs on the Spirit Lake Reservation. Despite

testimony to the legislature on the detrimental impacts of the law, the legislature has taken no action to address those impacts. Trial Tr. Vol. 2 at 19:16-21:10.

**H. Additional Senate Factor: The Policy underlying the State's Use of the Contested Structure Is Tenuous**

237. The legislature's claim that they passed HB 1504 to avoid a lawsuit, even when the leaders of the Turtle Mountain and Spirit Lake tribes told them what they wanted, is tenuous reasoning. Trial Tr. Vol. 2 at 124:13-125:14 (Testimony of Dr. Dan McCool).

238. This is particularly so given that the enacted plan replaced a performing multi-member district that reliably elected a Native American candidate of choice to the state senate and two Native American candidates of choice to the state house with a single house subdistrict that elects one Native American candidate of choice. As Plaintiffs' Demonstrative Plans demonstrate, this reduction was unnecessary because a district can be drawn that maintains Native voters' opportunity to elect a candidate of choice to the state senate and two candidates of choice to the state house. Trial Tr. Vol 1 at 166:13-167:12 (Testimony of Dr. Loren Collingwood).

239. District 9 proposed by the Tribes is visually more geographically compact than the districts that surround it. P064.068 (Expert Report of Dr. Dan McCool).

240. HB 1504, as opposed to the plan proposed by the tribes, divided communities of interest into three legislative/sub-districts. *See supra* FOF ¶¶ 107-118; P105 (Plaintiffs' Demonstrative Plan 1 Map); P106 (Plaintiffs' Demonstrative Plan 2 Map); P057 (Enacted District 9 Split of Turtle Mountain Reservation and Trust Lands); Trial Tr. Vol. 3 at 126:2-7 (Testimony of Dr. M.V. Hood III).

## CONCLUSIONS OF LAW

### I. Section 2 of the Voting Rights Act, 52 U.S.C. § 10301.

1. Section 2 of the VRA prohibits states from enacting a redistricting plan that results in an “inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred candidates.” *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1018 (8th Cir. 2006) (quoting *Cottier v. City of Martin*, 445 F.3d 1113, 1116 (8th Cir. 2006)).

2. “Dilution of racial minority group voting strength may be caused by the dispersal of [minority voters] into districts in which they constitute an ineffective minority of voters or from the concentration of [minority voters] into districts where they constitute an excessive majority.” *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986).

3. A Section 2 violation “occurs when: ‘based on the totality of circumstances, it is shown that the political processes leading to nomination or election ... are not equally open to participation by members of a [a racial group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.’” *Bone Shirt*, 461 F.3d at 1018 (quoting *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 425 (2006)).

4. As the Eighth Circuit has explained, a minority group that is a “bare numerical majority” of a district may “still face actual impediments and disadvantages” to electoral participation that result from “the history of discrimination and disenfranchisement.” *Missouri State Conf. of NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 933-34 (8th Cir. 2018). Thus, a majority-minority district may violate Section 2 when the “citizen voting-age majority . . . lack[s] real electoral opportunity.” *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 428 (2006) (“LULAC”).

5. The Court’s inquiry under Section 2 “requires an ‘intensely local appraisal’ of the challenged district,” *LULAC*, 548 U.S. at 437, and is “peculiarly dependent upon the facts of each case,” *Gingles*, 478 U.S. at 79 (quoting *Rogers v. Lodge*, 458 U.S. 613, 621 (1982)). In states with multi-member state legislative districts, like North Dakota, that “intensely local appraisal” may require creating a multi-member Section 2 minority opportunity district, it may require the creation of subdistricts for the state house elections, or it may require a mix of both statewide. A Section 2 remedy depends on local conditions in each district and on which configuration affords the minority group an equal opportunity to elect candidates of their choice. For example, in *Bone Shirt*, the Eighth Circuit affirmed a ruling that South Dakota’s state legislative plan violated Section 2 by minimizing the number of legislators Native American voters could elect. 461 F.3d at 1023-24.

6. In *Bone Shirt*, the district court ordered a remedial plan that included one multi-member NVAP majority district (District 27), because the election data showed that district would permit Native American voters to elect their preferred candidates for all three legislative positions. *Bone Shirt v. Hazeltine*, 387 F. Supp. 2d 1035, 1039, 1041 (D.S.D. 2005) (remedial order). The remedial map also included two subdistricts, however—District 26A and 28A—in which the electoral data showed Native American voters could elect their candidates of choice to a single house seat but not the second house seat or the senate seat. *Id.* at 1039; *see also Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 989 (D.S.D. 2004) (trial order). The NVAP of the two subdistricts and one multi-member district adopted by the court ranged from 65.6% to 74.4%. *Id.* (Plan E). Moreover, District 28A combined two separate Native American Reservations—the Cheyenne River Reservation and the Standing Rock Reservation. *Id.* The Eighth Circuit affirmed the district court’s remedial order. *Bone Shirt*, 461 F.3d at 1023-24.

7. To succeed on a Section 2 claim, plaintiffs must first meet three elements known as the *Gingles* preconditions:

(1) [T]he racial group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the racial group is politically cohesive; and (3) the majority votes as a bloc to enable it usually to defeat the minority's preferred candidate.

*Bone Shirt*, 461 F.3d at 1018 (quoting *LULAC*, 548 U.S. at 425) (bracket in original).

8. Once the three *Gingles* Preconditions are established, the court must consider whether “the totality of the circumstances indicates minority voters ha[ve] ‘less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice[.]’” *Id.* at 1021 (quoting 52 U.S.C. § 10301(b)).

9. To determine whether the totality of the circumstances are met, the Court may consider “the extent to which members of the [racial minority group] have been elected to office in the State,” 52 U.S.C. § 10301(b), as well as the factors identified in the Senate Judiciary Committee majority Report accompanying the bill that amended § 2 (the “Senate Factors”). S. Rep., at 28–29, U.S. Code Cong. & Admin. News 1982, pp. 206–207. *Gingles*, 478 U.S. at 36.

10. In the totality analysis, Senate Factors 2 and 7 are the most probative. “The two primary factors considered in our totality analysis are the extent to which voting is racially polarized and the extent to which minorities have been elected under the challenged scheme.” *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1390 (8th Cir. 1995) (citing *Thornburg v. Gingles*, 478 U.S. 30, 48–49 n. 15 (1986)).

## **II. Jurisdiction and Venue**

11. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 1357, 42 U.S.C. § 1983, and 52 U.S.C. § 10301, et seq. Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202, as well as Fed. R. Civ. P. 57

and 65. Jurisdiction for Plaintiffs' claim for costs and attorneys' fees is based upon Fed. R. Civ. P. 54, 42 U.S.C. § 1988, and 52 U.S.C. § 10310(e). This court also has jurisdiction pursuant to 28 U.S.C. § 1362, which provides that "district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

12. Venue is proper in the United States District Court for the District of North Dakota. Stipulated Facts ¶ 36, ECF No. 108.

13. The United States District Court for the District of North Dakota has personal jurisdiction over Defendant Michael Howe, who resides in the District of North Dakota. Defendant's Answer ¶ 10, ECF No. 31.

14. This Court has already held, as a matter of law, that section 1983 "provides a private remedy for violations of Section 2 of the VRA;" that individuals residing in the challenged districts have standing to bring a Section 2 claim; and that all Plaintiffs have standing to bring a Section 2 claim so long as they establish standing with respect to at least one Plaintiff. See ECF No. 30, Order Denying Mot. to Dismiss at 4-6, Jul. 7, 2022.

15. "When there are multiple plaintiffs, at least one of the plaintiffs must demonstrate standing for each claim and each form of relief being sought." ECF No. 30, Order Denying Mot. to Dismiss at 4 (citing *Spirit Lake Tribe v. Jaeger*, No. 1:18-CV-222, 2020 WL 625279, at \*3 (D.N.D. Feb. 10, 2020)). "One plaintiff having standing to bring a specific claim generally confers standing to all plaintiffs on that claim." *Id.* (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977); *Jones v. Gale*, 470 F.3d 1261, 1265 (8th Cir. 2006)).



16. Individuals residing in an allegedly aggrieved voting district have standing to bring a claim under the VRA. *See Gill v. Whitford*, 138 S. Ct. 1916 (2018); *see also Roberts v. Wamser*, No. 88-1138, 1989 WL 94513 (8th Cir. Aug. 21, 1989).

17. The individual Plaintiffs in this case have standing to bring their claims under the VRA because they live in the challenged districts and are regular voters. *See supra* PFOFs ¶¶ 23 (Plaintiff Wesley Davis), 24 (Plaintiff Zachary King), 26 (Plaintiff Collette Brown). *See also* ECF No. 30, Order Denying Mot. to Dismiss at 4-5, Jul. 7, 2022. As such, all Plaintiffs have standing.

### **III. The *Gingles* Preconditions**

18. Plaintiffs have demonstrated that there is a sufficiently large and geographically compact population of Native Americans North Dakota Legislative Districts 9, 9A, 9B, and 15 to constitute a majority in a single state legislative district. *See supra* PFOFs ¶¶ 91-98 . .

19. Plaintiffs have demonstrated that Native Americans in North Dakota State Legislative Districts 9, 9A, 9B, and 15 vote in politically cohesive manner. *See supra* PFOFs ¶¶ 11, 41, 69, 87, 127, 128, 130, 156.

20. Plaintiffs have demonstrated that white voters vote sufficiently as a bloc to enable them usually to defeat Native Americans' preferred candidate in Districts 9, 9B, and 15. *See supra* PFOFs ¶¶ 53-63, 141-143.

21. As such, Plaintiffs have demonstrated that the *Gingles* preconditions are satisfied. *See Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1018 (8th Cir. 2006).

#### **A. *Gingles* 1: Native Voters Are Sufficiently Large and Geographically Compact**

22. Plaintiffs contend that *Gingles* 1 is satisfied because their demonstrative plans contain a reasonably configured District 9 in which Native Americans are a majority of eligible voters and in which Native American voters would have an equal opportunity to elect all three

legislative positions. Defendant contends that *Gingles* 1 is not met because, compared to the enacted version of District 9, Plaintiffs’ demonstrative districts are somewhat less compact (though more compact than other enacted districts) and because the district unites two Tribes. Defendant also contends that *Gingles* 1 is not satisfied with respect to District 15 because the enacted version of that District is not majority NVAP. The Court agrees with Plaintiffs.

23. The first *Gingles* precondition is met because there is a sufficiently large and geographically compact population of Native Americans in northeastern North Dakota to constitute the majority of the voting age population in a reasonably drawn legislative district. *See, e.g., Allen v. Milligan*, 599 U.S. \_\_\_, 143 S. Ct. 1487, Slip Op. at 10 (June 8, 2023); *Gingles*, 478 U.S. at 50; *Bone Shirt*, 461 F.3d at 1018.

24. The first *Gingles* precondition requires Plaintiffs to demonstrate that Native American voters can constitute the majority of voters “in some reasonably configured legislative district.” *Cooper v. Harris*, 581 U.S. 285, 301 (2017); *Milligan*, Slip Op., at 10; *see also LULAC*, 548 U.S. at 430 (“[T]he first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidate of its choice.” (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994))).<sup>2</sup>

25. The Redistricting Committee relied on the “single race” definition of Native American in performing its redistricting work. Plaintiffs rely on the “any part” definition, which is alone or in combination with another race. This “case involves an examination of only one minority group’s effective exercise of the electoral franchise. In such circumstances, . . . it is proper to look at *all* individuals who identify themselves as [Native American].” *Georgia v.*

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<sup>2</sup> *De Grandy* articulated this standard in the context of single-member districts. Here, given the comparison of subdistricts to multimember districts, it is more useful to consider the number of *seats* where Native voters have an opportunity to elect.

*Ashcroft*, 539 U.S. 461, 474 n.1 (2003). The “any part” definition is used in this Order and must be used in the remedial redistricting plan.<sup>3</sup>

26. The *Gingles* 1 inquiry generally focuses on an *alternative* district presented by plaintiffs, rather than the challenged district or districts themselves. *See, e.g., Milligan*, Slip Op., at 12 (applying *Gingles* Prong 1 to the “illustrative maps” adduced by plaintiffs). That is because the purpose of this precondition “is to establish that the minority has the potential to elect a representative of its own choice in some single-member district.” *Id.* at 10 (quoting *Grove v. Emison*, 507 U. S. 25, 40 (1993)).

27. The Supreme Court has explained that a “district will be reasonably configured . . . if it comports with traditional districting criteria, such as being contiguous and reasonably compact.” *Milligan*, Slip Op., at 10). Courts may also consider other traditional redistricting criteria, including respect for political boundaries and keeping together communities of interest. *See, e.g., id.* at 12-13 (considering respect for political subdivisions and communities of interest as traditional redistricting criteria); *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 259 (2015) (citing compactness and not splitting counties or precincts as examples of traditional redistricting criteria, amongst others).

28. Importantly, the question of whether a plaintiff’s alternative districts are reasonably configured is not a “beauty contest” between the alternative districts and the enacted plan. *Milligan*, Slip Op., at 13.

29. Moreover, Defendants cannot defeat a Section 2 claim merely because the challenged plan performs better on certain traditional redistricting criteria than plaintiffs’ proposed

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<sup>3</sup> It should be noted, however, that the *Gingles* 1 precondition is satisfied regardless of which demographic metric is used.

plan. *Milligan*, Slip Op., at 11-13) (finding that plaintiffs’ demonstrative plans were reasonably configured, even where the enacted plan arguably performed better on certain traditional redistricting criteria than the demonstrative plans).

30. There are also certain criteria courts should not take into consideration when deciding whether a plaintiff’s alternative districts comport with traditional redistricting criteria. The Supreme Court has rejected the idea that “core retention,” which refers to the proportion of districts in the previously enacted plan that remain in the same district in the newly enacted or proposed plans, is a relevant principle for courts to consider. *Milligan*, Slip Op., at 14-15; *see also Robinson v. Ardoin*, 37 F.4th 208, 220-21 (5th Cir. 2022) (finding that a core retention analysis by Defendants’ expert Dr. Hood had “little value”).

31. Indeed, “[the Supreme] Court has never held that a State’s adherence to a previously used districting plan can defeat a § 2 claim. If that were the rule, a State could immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan. That is not the law: § 2 does not permit a State to provide some voters ‘less opportunity . . . to participate in the political process’ just because the State has done it before.” *Milligan*, Slip Op., at 14) (quoting 52 U. S. C. §10301(b)).

32. Therefore, this Court will not consider “core retention” as a criterion in deciding whether Plaintiffs’ Demonstrative Plans are “reasonably drawn.”

33. Plaintiffs here satisfy the first *Gingles* precondition because District 9 in both demonstrative plans encompasses a geographically compact Native American population that constitutes the majority of the voting age population in the district and the districts are reasonably drawn.

34. First, the Native American population in northeastern North Dakota is sufficiently large to constitute the majority of the voting age population in a state legislative district because in both of Plaintiffs' demonstrative plans, Native Americans make up the majority of the voting age population: Demonstrative Plan 1 has an NVAP of 66.1% and Demonstrative Plan 2 has an NVAP of 69.1%. *See supra* PFOF ¶¶ 91.

35. Plaintiffs' demonstrative districts are reasonably drawn and comport with traditional redistricting criteria. *See supra* PFOFs ¶¶ 86, 123.

36. Plaintiffs' demonstrative districts have compactness scores within reasonable bounds and contain no "tentacles, appendages, bizarre shapes, or any other obvious irregularities that would make it difficult to find" them sufficiently compact." *Milligan*, Slip Op., at 12; *see supra* PFOFs ¶¶ 95-96.

37. Plaintiffs' demonstrative plans also satisfy other traditional redistricting criteria. They contain population deviations within the acceptable range, are contiguous, and respect existing political boundaries, including reservation boundaries, county lines, and electoral precincts, and keep together a community of interest. *See Milligan*, Slip Op. at 12); *see supra* PFOFs ¶¶ 92-93, 99-122.

38. Plaintiffs' demonstrative plans perform the same on some measures, better on some measures, and similar on other measures as the Enacted Plan. *See supra* PFOF ¶¶ 123. As such, on average Plaintiffs' demonstrative plans perform at least as well as the Enacted Plan on these measures overall.

39. It is irrelevant whether the enacted version of District 15 is majority NVAP; the Spirit Lake Tribe can be included in an alternatively configured district that is majority NVAP.

40. Plaintiffs have satisfied the first *Gingles* precondition.<sup>4</sup>

**B. *Gingles 2: Voting is Racially Polarized and Native Voters Are Politically Cohesive***

41. The parties agree that *Gingles 2* is satisfied in Districts 9 and 15. Defendant questions whether there is sufficient statistical evidence to show the presence of *Gingles 2* in subdistricts 9A and 9B, but the evidence establishes that *Gingles 2* is present in both subdistricts.

42. “The second *Gingles* precondition requires a showing that the Native–American minority is politically cohesive.” *Bone Shirt*, 461 F.3d at 1020 (citing *LULAC*, 126 S. Ct. at 2614).

43. “Proving this factor typically requires a statistical and non-statistical evaluation of the relevant elections.” *Id.* (citing *Cottier*, 445 F.3d at 1118).

44. “Evidence of political cohesiveness is shown by minority voting preferences, distinct from the majority, demonstrated in actual elections, and can be established with the same evidence plaintiffs must offer to establish racially polarized voting, because ‘political cohesiveness is implicit in racially polarized voting.’” *Id.* (quoting *Cottier*, 445 F.3d at 1118).

45. Defendant does not dispute that *Gingles 2* is satisfied in Districts 9 and 15. And the record demonstrates that even though a statistical ecological inference analysis is not possible within subdistricts 9A and 9B because of their limited number of precincts, there is clear evidence

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<sup>4</sup> Defendant expresses concern that, should the Enacted Plan be enjoined, the Legislature might subsequently be accused of racial gerrymandering by drawing a remedial district joining the Turtle Mountain and Spirit Lake Tribes in a single legislative district. This concern is unwarranted. The record in this case well establishes that a remedial district need not subordinate traditional districting principles to racial considerations. Indeed, Rolette and Benson Counties are more proximate than the counties currently joined in District 9. Moreover, the testimony reflects a host of nonracial shared representational interests between the Spirit Lake and Turtle Mountain Tribes. The Court finds that race would not predominate in the drawing of a district such as those proposed by Plaintiffs. In any event, Plaintiffs’ showing of a Section 2 violation provides a compelling justification for the consideration of race in drawing a remedial district. *See Cooper*, 581 U.S. at 292.

that Native American voters within both subdistricts are politically cohesive. *Id.* ¶¶ 125-127. There is a stark correlation between the demographic makeup of the precincts with both subdistricts and the election results within those precincts and the trial testimony showed that it would be mathematically impossible—given the high degree of cohesion within the full District 9—for Native American voters to *not* be politically cohesive within each subdistrict. *Id.* ¶ 130. Indeed, Defendant’s expert Dr. Hood likewise concluded that Native American voters in both subdistricts were politically cohesive. *Id.* ¶ 129. This evidence is bolstered by the qualitative evidence presented by Chairman Azure, whose unchallenged knowledge and experience informed his testimony that Native Americans living on both sides of the subdistrict lines are politically cohesive. *Id.* ¶ 131. This evidence readily shows that *Gingles 2* is present in each relevant district.

**C. *Gingles 3: White Bloc Voting Usually Defeats the Native-Preferred Candidate***

46. The parties agree that *Gingles 3* is established in Districts 9B (state house) and 15 (state senate and state house). Defendant disputes whether *Gingles 3* is established in the full District 9, in which state senate elections occur. The Court agrees with Plaintiffs that *Gingles 3* is satisfied in District 9.

47. The third *Gingles* precondition “asks whether the white majority typically votes in a bloc to defeat the minority candidate.” *Bone Shirt*, 461 F.3d at 1020. “This is determined through three inquiries: (1) identifying the minority-preferred candidates; (2) determining whether the white majority votes as a bloc to defeat the minority preferred candidate, and (3) determining whether there were special circumstances . . . present when minority-preferred candidates won.” *Id.* (internal quotation marks, citations, and alterations omitted).

48. Not all elections are equally relevant in assessing the third *Gingles* precondition. “Endogenous<sup>5</sup>] and interracial elections are the best indicators of whether the white majority usually defeats the minority candidate.” *Id.* “Although they are not as probative as endogenous elections, exogenous<sup>6</sup>] elections hold *some* probative value.” *Id.* (emphasis added).

49. In addition, “[t]he more recent an election, the higher its probative value.” *Id.*; *see also Uno v. City of Holyoke*, 72 F.3d 973, 990 (1st Cir. 1995) (“[E]lections that provide insights into past history are less probative than those that mirror the current political reality.”).

50. There is no requirement that a particular number of elections be analyzed in determining whether white bloc voting usually defeats minority-preferred candidates. “The number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances.” *Gingles*, 478 U.S. at 57 n.25; *see also Pope v. Cnty. of Albany*, 687 F.3d 565, 581 (2d Cir. 2012) (“[T]he law does not require that expert opinions be supported by an exhaustive analysis of elections within the relevant period.”). In *Gingles*, six districts were challenged, and the Court considered a total of 53 elections across three election years—an average of nine election contests per challenged district (three contests for each of three election years considered). *Gingles*, 478 U.S. at 52; *see id.* at 61 (approving the use of “three election years in each district”).

51. In assessing the third *Gingles* precondition, courts should look to the districts in which it is alleged that Native American preferred candidates are prevented from winning, and not on neighboring “packed” districts. *Bone Shirt*, 461 F.3d at 1027 (Gruender, J., concurring) (“If the

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<sup>5</sup> Endogenous elections are those for the particular office at issue in the case—here, state legislative elections for Districts 9, 9A, 9B, and 15.

<sup>6</sup> “Exogenous races are elections in a district for positions that are not exclusively representative of that district, such as governor and attorney general” *Id.* at 1021 n.9.



State’s approach were correct, packing would be both the problem and the solution—i.e., having illegally packed Indians into one district, the State could then point out that Indians are sometimes able to elect their preferred candidate in the packed district”); *see also Bone Shirt*, 336 F. Supp. 2d at 1011 (same); *De Grandy*, 512 U.S. at 1003-04 (focusing on whether white voters vote as bloc “to bar minority groups from electing their chosen candidates except in a district where a given minority makes up the voting majority”); *Old Person v. Cooney*, 230 F.3d 1113, 1122 (9th Cir. 2000) (noting that counting results of majority minority district in *Gingles* prong three would “permit white bloc voting in a majority-white district to be washed clean by electoral success in neighboring majority-Indian districts”).

52. Finally, in assessing the third precondition the Court must also consider whether “special circumstances . . . may explain minority electoral success in a polarized contest.” *Gingles*, 478 U.S. at 57 & n.26. Special circumstances will remove an election from consideration in *Gingles* prong three if “the election was not representative of the typical way in which the electoral process functions.” *Ruiz v. City of Santa Maria*, 160 F.3d 543, 557 (9th Cir. 1998). “Only minority electoral success in typical elections is relevant to whether a Section 2 majority voting bloc usually defeats the minority’s preferred candidate.” *Id.* at 558.

### 1. *Gingles* 3 in District 9B

53. It is undisputed that the third *Gingles* precondition is satisfied for District 9B. White bloc voting usually defeats Native American preferred candidates when each of the three most probative contest types are considered, and when all available elections are considered.

#### *i. Endogenous Interracial Elections*

54. Because the challenged plan was adopted in 2021, the only endogenous election available is the 2022 election. One of the two state legislative contests in District 9B’s boundaries

included a Native American candidate—the District 9 state senate election.<sup>7</sup> As shown below, the Native American candidate lost, yielding a 100% defeat rate (Native American candidate marked with asterisk). P001.021 (Expert Report of Dr. Loren Collingwood).

***Gingles 3: Endogenous Interracial Elections in District 9B***

<b>Election</b>	<b>Result</b>	<b>Native American Candidate Win or Lose</b>
2022 State Senate District 9	Weston: 63.0% Marcellais*: 36.8%	Lose

***ii. Endogenous All White Elections***

One of the 2022 endogenous elections in District 9B featured two white candidates. The candidate of choice of Native American voters, incumbent Marvin Nelson, lost his bid for reelection in District 9B, yielding a 100% defeat rate for endogenous all white elections, as shown below (Native American candidate of choice shown in italics). P001.021 (Expert Report of Dr. Loren Collingwood); P139 (N.D. Sec’y of State Election Results District 9B).

***Gingles 3: Endogenous All-White Elections in District 9B***

<b>Election</b>	<b>Result</b>	<b>Native American Candidate Win or Lose</b>
2022 State House District 9B	Henderson: 56.5% <i>Nelson: 37.6%</i>	Lose

***iii. Exogenous Interracial Elections***

55. Four statewide exogenous elections since 2016 have featured Native American candidates within the boundaries of District 9B. In each of those contests—100% of the time—the

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<sup>7</sup> Although this election was for the state senate rather than the state house, the Court classifies it as endogenous here because it was for the state legislature, and most districts in North Dakota elect both state senators and state representatives from the same multi-member district.

Native American candidate lost, as shown in the Table below (Native American candidate labeled with asterisk):

***Gingles 3: Exogenous Interracial Contests in District 9B***

<b>Election</b>	<b>Result</b>	<b>Native American Candidate Win or Lose</b>
2022 Public Service Commissioner	Fedorchak: 64.4% Moniz*: 35.3%	Lose
2016 Insurance Commissioner	Godfred: 58.4% Buffalo*: 41.6%	Lose
2016 Public Service Commissioner	Fedorchak: 60.2% Hunte Beaubrun*: 32.4%	Lose
2016 U.S. House	Cramer: 62.2% Iron Eyes*: 32.9%	Lose

P001.017, .020 (Expert Report of Dr. Loren Collingwood).

***iv. Exogenous All White Elections***

56. Consistent with the *Gingles* Court's focus on three election cycles, the Court here considers the most recent three election cycles in which special circumstances were not present, the 2022, 2020, and 2016 elections, in its *Gingles 3* analysis.<sup>8</sup> The 2022 election, as the most recent, warrants the greatest weight. But the pattern is the same across all three relevant election years in District 9B. As the table below shows, Native American-preferred candidates lost 100% of the 2022 elections, 100% of the 2022 and 2020 elections combined, and 100% of the 2022, 2020, and 2016 elections combined in District 9B (Native American preferred candidates italicized).

<sup>8</sup> As explained below, the 2018 election in the region was characterized by special circumstances that made it exceedingly atypical. The Court thus focuses on the 2022, 2020, and 2016 election cycles as the three most recent exhibiting typical electoral conditions. Moreover, although the record also contains data from the 2014 elections, the Court weighs the most recent elections as more probative and follows the three-election cycle analysis employed by the *Gingles* Court itself. *See Bone Shirt*, 461 F.3d at 1020.

**Gingles 3: Exogenous All-White Elections in District 9B**

<b>Election</b>	<b>Result</b>	<b>Native American Preferred Candidate Win or Lose</b>	<b>Defeat Rate for Native American Preferred Candidates</b>
2022 Agricultural Commissioner	Goehring: 70.9% Dooley: 28.9%	Lose	<b>2022 Defeat Rate: 100%</b>
2022 Attorney General	Wrigley: 65.6% Charles Lamb: 34.3%	Lose	
2022 Public Service Commissioner (4 Year)	Haugen Hoffart: 65.4% Hammer: 34.3%	Lose	
2022 Secretary of State	Howe: 57.1% Powell: 33.7%	Lose	
2022 U.S. House	Armstrong: 61.4% Mund: 38.4%	Lose	
2022 U.S. Senate	Hoeven: 60.6% Christiansen: 27.5%	Lose	
2020 Auditor	Gallion: 59.8% Hart: 40.1%	Lose	<b>2022 + 2020 Defeat Rate: 100%</b>
2020 Governor	Burgum: 65.3% Lenz: 29.8%	Lose	
2020 President	Trump: 60.8% Biden: 37.0%	Lose	
2020 Public Service Commissioner	Kroshus: 60.4% Buchmann: 39.8%	Lose	
2020 Treasurer	Beadle: 58.6% Haugen: 41.2%	Lose	
2020 U.S. House	Armstrong: 64.4% Raknerud: 33.4%	Lose	
2016 Governor	Burgum: 61.7% Nelson: 35.8%	Lose	<b>2022 + 2020 + 2016 Defeat Rate: 100%</b>
2016 President	Trump: 56.6% Clinton: 33.8%	Lose	
2016 Treasurer	Schmidt: 53.6% Mathern: 39.8%	Lose	
2016 U.S. Senate	Hoeven: 72.9% Glassheim: 22.1%	Lose	

P001.017-020 (Expert Report of Dr. Loren Collingwood)

\* \* \*

57. The record evidence plainly establishes that white bloc voting usually—and always in the most probative contests and in the absence of special circumstances—results in the defeat of Native American preferred candidates in District 9B. As a result, Native American voters in District 9B no longer have the opportunity to elect their candidate of choice to the State House, despite previously being able to elect two candidates of choice in the benchmark at-large configuration of District 9.

58. All three *Gingles* preconditions are readily established with respect to District 9B.<sup>9</sup>

## 2. *Gingles* 3 in District 15

59. It is likewise undisputed that the third *Gingles* precondition is established with respect to District 15. White bloc voting usually defeats Native American preferred candidates when each of the three most probative contest types are considered, and when all available elections are considered.

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<sup>9</sup> Although the Court likewise concludes that the *Gingles* preconditions are present in District 9, Plaintiffs' entitlement to a remedy for the Section 2 violation in District 9B (and District 15, *see infra*) does not turn on an analysis of the full District 9. Standing alone, the configuration of District 9B has reduced from two to one the number of Native American preferred candidates that can be elected to the state house—regardless of the enacted plan's effect on state senate elections.

Moreover, even if the Court were to have concluded that District 9 as a whole did not satisfy *Gingles* 3, District 9B and 15 plainly do and simply eliminating the subdistrict line within District 9 would not fully remedy the violation, given the endogenous, recent, and interracial election results within District 9 and the turnout differentials that result in District 9 usually having a supermajority white electorate that has, in the most probative contests, resulted in the defeat of Native American preferred candidates. *See infra*; *see also Bone Shirt*, 461 F.3d at 1023 (noting that remedial district for Native American voters generally requires a 65% NVAP majority, though the standard is “flexible and practical”). Indeed, Defendants' counsel and Defendants' expert Dr. Hood agreed as much at trial. *See* Trial Tr. Vol. 3 at 176:8-13 (Testimony of Dr. M.V. Hood III) (testifying that District 9 would not function as an opportunity-to-elect district if its subdistrict lines were eliminated).

*i. Endogenous Interracial Elections*

60. Because the plan was enacted in 2021, the only endogenous elections are the 2022 state legislative elections, in which two Native-American preferred candidates ran (on each for state house and state senate). As the table below shows, both were defeated; Plaintiff Collette Brown lost her election for District 15 state senate and Heather Lawrence-Skadsem lost her election for District 15 state house to her two white opponents. P001.027 (Expert Report of Dr. Loren Collingwood); P140 (N.D. Sec’y of State Election Results District 15). This yields a 100% defeat rate for Native American preferred candidates in District 15’s endogenous interracial elections. There have been no endogenous all-white elections in District 15.

**Gingles 3: Endogenous Interracial Elections in District 15**

<b>Election</b>	<b>Result</b>	<b>Native American Candidate Win or Lose</b>
2022 State Senate District 15	Estenson: 65.5% Brown*: 33.8%	Lose
2022 State House District 15	Frelich: 41.6% Johnson: 38.6% Lawrence-Skadsem*: 19.7%	Lose

*ii. Exogenous Interracial Elections*

61. Four statewide exogenous elections since 2016 have featured Native American candidates within the boundaries of District 15. In each of those contests—100% of the time—the Native American candidate lost, as shown in the Table below (Native American candidate labeled with asterisk):

**Gingles 3: Exogenous Interracial Elections in District 15**

<b>Election</b>	<b>Result</b>	<b>Native American Candidate Win or Lose</b>
2022 Public Service Commissioner	Fedorchak: 69.3% Moniz*: 30.6%	Lose

<b>Election</b>	<b>Result</b>	<b>Native American Candidate Win or Lose</b>
2016 Insurance Commissioner	Godfread: 64.6% Buffalo*: 35.4%	Lose
2016 Public Service Commissioner	Fedorchak: 63.8% Hunte Beaubrun*: 27.6%	Lose
2016 U.S. House	Cramer: 65.5% Iron Eyes*: 27.9%	Lose

P001.017, 020 (Expert Report of Dr. Loren Collingwood).

*iii. Exogenous All-White Elections*

62. As show below, Native American preferred candidates have lost all exogenous all-white elections (Native American preferred candidates italicized):

***Gingles 3: Exogenous All-White Elections in District 15***

<b>Election</b>	<b>Result</b>	<b>Native American Preferred Candidate Win or Lose</b>	<b>Defeat Rate for Native American Preferred Candidates</b>
2022 Agricultural Commissioner	Goehring: 75.0% <i>Dooley: 24.9%</i>	Lose	<b><i>2022 Defeat Rate: 100%</i></b>
2022 Attorney General	Wrigley: 70.9% <i>Charles Lamb: 29.0%</i>	Lose	
2022 Public Service Commissioner	Fedorchak: 69.3% <i>Moniz: 30.6%</i>	Lose	
2022 Public Service Commissioner (4 Year)	Haugen Hoffart: 70.4% <i>Hammer: 29.4%</i>	Lose	
2022 Secretary of State	Howe: 61.2% <i>Powell: 27.8%</i>	Lose	
2022 U.S. House	Armstrong: 62.8% <i>Mund: 37.1%</i>	Lose	
2022 U.S. Senate	Hoeven: 58.5% <i>Christiansen: 24.8%</i>	Lose	
2020 Auditor	Gallion: 65.4% <i>Hart: 34.5%</i>	Lose	
2020 Governor	Burgum: 67.6% <i>Lenz: 25.8%</i>	Lose	
2020 President	Trump: 64.3% <i>Biden: 33.0%</i>	Lose	

<b>Election</b>	<b>Result</b>	<b>Native American Preferred Candidate Win or Lose</b>	<b>Defeat Rate for Native American Preferred Candidates</b>
2020 Public Service Commissioner	Kroshus: 64.1% <i>Buchmann: 35.7%</i>	Lose	<b>2022 + 2020 Defeat Rate: 100%</b>
2020 Treasurer	Beadle: 63.2% <i>Haugen: 36.3%</i>	Lose	
2020 U.S. House	Armstrong: 68.7% <i>Raknerud: 28.1%</i>	Lose	
2016 Governor	Burgum: 71.1% <i>Nelson: 24.8%</i>	Lose	<b>2022 + 2020 + 2016 Defeat Rate: 100%</b>
2016 President	Trump: 57.6% <i>Clinton: 31.2%</i>	Lose	
2016 Treasurer	Schmidt: 59.5% <i>Mathern: 31.8%</i>	Lose	
2016 U.S. Senate	Hoeven: 75.7% <i>Glassheim: 18.5%</i>	Lose	

P001.027-030 (Expert Report of Dr. Loren Collingwood)

\* \* \*

63. The record evidence plainly establishes that white bloc voting usually—and always in the most probative contests and in the absence of special circumstances—results in the defeat of Native American preferred candidates in District 15. All three *Gingles* preconditions are readily established in District 15.

### 3. *Gingles* 3 in District 9

64. Unlike in Districts 9B and 15, where the satisfaction of the third *Gingles* precondition is undisputed, Defendant disputes whether white vote bloc usually results in the defeat of Native American preferred candidates in the full version of District 9. Although District 9 presents a closer question than do Districts 9B and 15 (where the matter is indisputable), the Court is persuaded, based upon the entire record and after according elections their appropriate weight based upon their respective probative values, that Plaintiffs have proven by a



preponderance of the evidence that white bloc voting does usually defeat Native American preferred candidates in the full District 9 such that *Gingles 3* is likewise established there.

65. The Court accords one election special weight—the 2022 state senate election. This is because that election features *all three* probative features—it is an endogenous election, it featured a Native American candidate, and it is the most recent election. Native American incumbent Sen. Marcellais lost his bid for reelection despite Native American voters casting roughly 80% of their ballots for him. P001.015 (Expert Report of Dr. Loren Collingwood); *see Bone Shirt*, 461 F.3d at 1021 (affirming finding that *Gingles 3* was satisfied where “[i]n the only mixed-race endogenous election . . . the Indian-preferred candidate for state senate lost even though he received 70 percent of the Native-American vote”). The Court accordingly gives the most weight to this election in its assessment of *Gingles 3*.

*i. Endogenous Interracial Elections*

66. Because the map was adopted in 2021, the only endogenous election available for consideration is the 2022 state senate election. As noted above, in that election the Native American incumbent, Sen. Marcellais, was defeated by his opponent—the candidate of choice of white voters in the district. This yields a 100% defeat rate in endogenous elections, as shown below. There are no endogenous all-white elections in District 9.

***Gingles 3: Endogenous Interracial Elections in District 9***

Election	Result	Native American Candidate Win or Lose
2022 State Senate District 9	Weston: 53.7% Marcellais*: 46.1%	Lose

P001.017 (Expert Report of Dr. Loren Collingwood).

**ii. Exogenous Interracial Elections**

67. Four statewide exogenous elections since 2016 have featured Native American candidates within the boundaries of District 9. Among the four exogenous elections, the Native American candidate lost half, as shown below. Notably, of the two races in in which the Native American preferred candidate carried District 9, that candidate received a majority of the votes in just one contest. And when all contests featuring Native American candidates (whether endogenous or exogenous) are considered together, the defeat rate for Native American candidates is 60%.

***Gingles 3: Exogenous Interracial Elections***

<b>Election</b>	<b>Result</b>	<b>Native American Candidate Win or Lose</b>
2022 Public Service Commissioner	Fedorchak: 54.1% Moniz*: 45.7%	Lose
2016 Public Service Commissioner	Fedorchak: 46.5% Hunte Beaubrun*: 46.1%	Lose
2016 Insurance Commissioner	Godfread: 43.2% Buffalo*: 56.8%	Win
2016 U.S. House	Cramer: 46.9% Iron Eyes*: 49.3%	Win

P001.017, 020 (Expert Report of Dr. Loren Collingwood).

**iii. Exogenous All-White Elections**

68. Among exogenous all-white elections in District 9, Native American preferred candidates lost 100% of the 2022 elections, 67% of the 2022 and 2020 elections combined, and 56% of the 2022, 2020, and 2016 elections combined, as shown in the table below (Native American preferred candidates italicized):<sup>10</sup>

<sup>10</sup> Because the Court has separated the exogenous from the endogenous elections, *see, e.g., Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1012-15 (D.S.D. 2004) (assessing *Gingles 3* by four categories, endogenous interracial, endogenous all-white, exogenous interracial, and exogenous

**Gingles 3: Exogenous All-White Elections**

<b>Election</b>	<b>Result</b>	<b>Native American Preferred Candidate Win or Lose</b>	<b>Defeat Rate for Native American Preferred Candidates</b>
2022 Agricultural Commissioner	Goehring: 60.2% Dooley: 39.6%	Lose	<b>2022 Defeat Rate: 100%</b>
2022 Attorney General	Wrigley: 55.3% Charles Lamb: 44.6%	Lose	
2022 Public Service Commissioner (4 Year)	Haugen Hoffart: 55.2% Hammer: 44.6%	Lose	
2022 Secretary of State	Howe: 47.5% Powell: 42.3%	Lose	
2022 U.S. House	Armstrong: 52.8% Mund: 47.0%	Lose	
2022 U.S. Senate	Hoeven: 51.3% Christiansen: 36.4%	Lose	
2020 Auditor	Gallion: 46.5% Hart: 53.4%	Win	<b>2022 + 2020 Defeat Rate: 67%</b>
2020 Governor	Burgum: 52.8% Lenz: 43.1%	Lose	
2020 President	Trump: 47.2% Biden: 50.8%	Win	
2020 Public Service Commissioner	Kroshus: 46.4% Buchmann: 53.4%	Win	
2020 Treasurer	Beadle: 45.6% Haugen: 54.2%	Win	
2020 U.S. House	Armstrong: 50.6% Raknerud: 47.0%	Lose	
2016 Governor	Burgum: 48.3% Nelson: 48.7%	Win	<b>2022 + 2020 + 2016 Defeat Rate: 56%</b>
2016 President	Trump: 44.2% Clinton: 45.1%	Win	
2016 Treasurer	Schmidt: 41.6% Mathern: 50.0%	Win	
2016 U.S. Senate	Hoeven: 59.7% Glassheim: 33.9%	Lose	

P001.017-020 (Expert Report of Dr. Loren Collingwood)

all-white), the defeat percentages reported here vary slightly from those reported by Dr. Collingwood, who analyzed the three probative categories (endogenous, interracial, and recent elections) separately, with endogenous and exogenous contests reported within each of those categories.

*iv. The 2018 Election's Special Circumstances*

69. The 2018 election featured special circumstances making it an exceedingly atypical election in which Native American preferred candidates performed unusually well. Chairmen Azure and former Chairman Yankton persuasively testified about the extraordinary amount of resources—state and national—that poured onto North Dakota's Native American reservations in the lead up to the 2018 election after the Supreme Court permitted the State's voter ID law—which required proof of a physical address—to go into effect. *See supra* PFOF ¶¶ 166. This created an immense backlash among Native American voters, aided by substantial financial resources promoting get-out-the-vote efforts on the reservations. *Id.* National celebrities gave concerts and performances on the reservations to promote Native turnout. *See supra* PFOF ¶¶ 168. Chairman Azure and former Chairman Yankton testified that the resources—and resulting turnout among Native American voters--was unlike anything they have seen, previously, or since. *Id.*

70. Their testimony is borne out in the data. As Dr. Collingwood showed, the Native American turnout in 2018 was striking. Not only did it exceed statewide turnout and approach white turnout in District 9, but it inverted the normal pattern of lower turnout in midterm versus presidential elections. *See supra* PFOFs ¶¶ 161, 162, 163. As Dr. Collingwood's analysis shows, Native turnout in the 2018 election in District 9 was *double* its usual level. *See supra* PFOF ¶ 163.

71. Not only was Native American turnout astronomical, but so too was Native American political cohesion in the 2018 election. According to Dr. Collingwood's ecological inference analysis, Native American support exceeded 90% for seven of the eight candidates on the ballot that year—including a stunning 98.3% support for former Senator Heidi Heitkamp. P001.013 (Expert Report of Dr. Loren Collingwood). This translated into election results in

District 9 unlike the more usual pattern seen across the 2016, 2020, and 2022 elections. *See supra* FOF ¶ 163.

72. “Only minority electoral success in typical elections is relevant to whether a Section 2 majority voting bloc usually defeats the minority’s preferred candidate.” *Ruiz*, 160 F.3d at 558.<sup>11</sup> The Court cannot conclude that an election in which Native American voter turnout was *double* its usual level—a feat that has occurred just once and which Dr. Collingwood has never before observed anywhere in the country, *See supra* PFOF ¶ 166—can plausibly be characterized as “typical.” Plaintiffs have shown that it is more likely than not that the success of Native American preferred candidates in the 2018 election was attributable to the special circumstances surrounding the immense and singular influx of financial resources, attention, and voter backlash attributable to the controversy surrounding enforcement of the State’s voter ID law. The 2018 elections already would have been afforded lesser probative value; all were exogenous elections and none featured a Native American candidate. The Court finds that the special circumstances surrounding 2018 elections leads the Court to accord them little to no weight in its assessment of the third *Gingles* precondition. A one-time turnout event—made possible by an influx of national resources and attention that had never previously occurred and has not occurred since—should not preclude Plaintiffs from obtaining relief where the typical electoral conditions exhibit the satisfaction of the third *Gingles* precondition.

**v.      *The Court rejects Dr. Hood’s contrary conclusion.***

73.      The Court rejects Dr. Hood’s conclusion that *Gingles* 3 is not present in District 9 and assigns little weight to his opinion and testimony in that regard.

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<sup>11</sup> The special circumstances in this case differ from those identified in *Gingles*, but the Court made clear that its “list of special circumstances is illustrative, not exclusive.” 478 U.S. at 57 n.26.

74. Dr. Hood asserts that the proper methodology for determining *Gingles* 3 is to determine what elections the expert believes will be most probative and to only report the results of those elections. Trial Tr. Vol. 3 at 149:24-150:21. Dr. Hood's assertion is that once an election result is reported, it must be given equal weight to all other elections, simply because it was reported, even if the election has less probative value relative to other elections. Trial Tr. Vol. 3 at 85:19-86:6.

75. The Court rejects these assertions and agrees with Dr. Collingwood that the more appropriate methodology is to identify a set of elections that are likely to provide relevant information about the existence of white bloc voting, and to consider each elections' probative value in determining what the results tell us, if anything, about the existence of white bloc voting. To do otherwise would encourage experts to cherry-pick evidence to present to courts, rather than allowing courts to make a determination based on all of the evidence available.

76. Dr. Hood's contention in this regard is furthermore rebutted by his own testimony acknowledging that endogenous elections, elections featuring Native American candidates, and more recent elections are indeed more probative. Trial Tr. Vol. 3 at 142:9-143:7 (Testimony of Dr. M.V. Hood III). Dr. Hood likewise testified that he agreed the 2022 endogenous contest for the District 9 state senate seat was the "single most probative" election because it featured all three probative characteristics. *Id.* at 143:12-17.

77. Where the results across all analyzed elections point in the direction of white bloc voting usually defeating minority preferred candidates (as in Districts 9B and 15), there will usually be little doubt or disagreement that *Gingles* 3 is present.

78. Where there is a divergence between less probative elections (older elections, exogenous elections, and elections that do not feature minority candidates, and elections featuring

special circumstances) and more probative elections (elections that are more recent, endogenous, and feature minority candidates) it is appropriate to conduct a more nuanced analysis. Where the most probative elections point in the direction of white bloc voting usually defeating minority preferred candidates, however, and only the least probative elections provide evidence of minority success, a straightforward weighing of the evidence will typically result in a finding that *Gingles* prong 3 is satisfied.

79. This is the situation presented here: when considering all of the most probative elections, the totality of the evidence shows that white bloc voting usually defeats the Native American candidate of choice in District 9. The Court declines to overweight older elections, exogenous elections, and elections that do not feature Native candidates, in order to reach the opposite conclusion.

80. Dr. Hood also used an incorrect methodology in his *Gingles* 3 analysis, summing together all elections across District 9, 9A, and 9B. P081.004 (Expert Report of Dr. M.V. Hood III) (Turtle Mountain). District 9A has a near 80% NVAP, and Native American preferred candidates win it 100% of the time. *See supra* PFOF ¶ 77. A district with a packed minority population is not one in which the defeat of minority preferred candidates is to be expected, and it should not be considered as part of the third *Gingles* precondition. *See, e.g., Bone Shirt*, 461 F.3d at 1027 (Gruender, J., concurring) (“If the State’s approach were correct, packing would be both the problem and the solution—i.e., having illegally packed Indians into one district, the State could then point out that Indians are sometimes able to elect their preferred candidate in the packed district”); *see also Bone Shirt*, 336 F. Supp. 2d at 1011 (same); *De Grandy*, 512 U.S. at 1003-04 (focusing on whether white voters vote as bloc “to bar minority groups from electing their chosen candidates except in a district where a given minority makes up the voting majority”); *Old Person*

*v. Cooney*, 230 F.3d 1113, 1122 (9th Cir. 2000) (noting that counting results of majority minority district in *Gingles* prong three would “permit white bloc voting in a majority-white district to be washed clean by electoral success in neighboring majority-Indian districts”).

81. As Dr. Hood testified at trial, if District 9A were removed from his analysis, the Native American preferred candidates would be defeated 59.5% of the time across all elections in Districts 9 and 9B combined. Trial Tr. Vol. 3 at 148:16-24 (Testimony of Dr. M.V. Hood III). This, Dr. Hood agreed, would establish the third *Gingles* prong—and would do so without resorting to according certain elections greater or lesser weight. *Id.* at 148:25-149:4.

82. Moreover, Dr. Hood’s expert report issued in the *Walen* matter, which the parties stipulated to admit as evidence in this case, further undermines his conclusion with respect to *Gingles* 3 in District 9 and bolsters Plaintiffs’ position. In that report, Dr. Hood conducted an independent analysis of the *Gingles* preconditions in District 9. On its face, the report examines a total of six elections, three each from 2018 and 2020 (2018 Attorney General, 2018 U.S. House, 2018 U.S. Senate, 2020 Governor, 2020 U.S. House, and 2020 President). P080.007 (Expert Report of Dr. M.V. Hood III) (*Walen*). The Native American preferred candidates lost two of those six elections in District 9. *See supra* COL ¶ 66.

83. Dr. Hood’s *Walen* report was served on January 17, 2023—two months after the November 2022 elections and after Dr. Collingwood’s report that included the 2022 election results—yet Dr. Hood declined to include those most recent elections in his analysis. Dr. Hood testified that he did not include the 2022 elections because he “didn’t have time” to conduct the analysis. Trial Tr. Vol. 3 at 152:10-22 (Testimony of M.V. Hood III). Yet Dr. Hood’s handwritten notes, where he logged his work in creating his report, included the results of the 2022 District 9 state senate and state house elections. P083.009 (Handwritten Notes of Dr. M.V. Hood III). Dr.



Hood offered no justification for not including this election—which he testified was the “single most probative,” Trial Tr. Vol. 3 at 143:12-17 (Testimony of Dr. M.V. Hood III)—in his analysis despite being aware of the result.

84. Indeed, Dr. Hood testified at trial that, if he were conducting his analysis now, he would add four of the eight 2022 elections to his *Gingles 3* assessment for District 9: the elections for the U.S. Senate, Attorney General, District 9 State Senate, and the Public Service Commission (which featured a Native American candidate). Trial Tr. Vol. 3 at 153:10-154:4 (Testimony of Dr. M.V. Hood III).

85. The undisputed record evidence for those four elections in District 9, contained in Dr. Collingwood’s report, shows that the Native American preferred candidates lost all four. P001.017 (Expert Report of Dr. Loren Collingwood). Dr. Hood testified he had no basis to dispute Dr. Collingwood’s analysis in that regard. Trial Tr. Vol. 3 at 154:19-155:10.

86. When those results are added to Dr. Hood’s analysis—which he testified they should be—it yields a 60% defeat rate for Native American preferred candidates in District 9. Trial Tr. Vol. 3 at 162:13-163:12 (Testimony of Dr. M.V. Hood III). Thus, in the election contests selected by Defendant’s own expert as most probative for purposes of *Gingles 3*, white bloc voting usually defeats Native American preferred candidates. And it does so without weighing elections differently and without eliminating any elections on account of special circumstances.

87. Ultimately, on redirect examination Defendant’s counsel asked Dr. Hood whether removing the subdistrict lines from District 9 would eliminate the opportunities for minority-preferred candidates to prevail, and Dr. Hood agreed. Trial Tr. Vol. 3 at 176:8-13 (Testimony of Dr. M.V. Hood III). This, of course, is the same as saying that white bloc voting usually defeats minority preferred candidates in District 9.

88. Thus Dr. Hood’s own testimony and analysis rebuts his stated opinion that *Gingles* 3 is not present in District 9. The Court therefore does not credit Dr. Hood’s conclusion in that regard.

\* \* \*

89. Viewing the election results holistically, and according endogenous, interracial, and more recent elections greater weight, the Court is convinced that Plaintiffs have carried their burden to show, by a preponderance of the evidence, that white bloc voting in District 9 usually defeats the preferred candidates of Native American voters in the absence of special circumstances. The 2022 state senate election—which features all three probative characteristics—best demonstrates this. But the remaining elections confirm the pattern. Native American candidates lost District 9 in 60% of all elections (100% of endogenous elections and 50% of exogenous elections) and—absent special circumstances—white candidates preferred by Native American voters lost 56% of all relevant elections (100% in the most recent election cycle). This pattern is revealed from a robust data set—a total of 21 analyzed elections in District 9. *See Gingles*, 478 U.S. at 52 (affirming *Gingles* 3 finding based upon data from an average of 9 elections per challenged district). The only way to reach a contrary result is by overweighing old, exogenous elections featuring only white candidates and ignoring the special circumstances surrounding the 2018 elections. The Court declines to do so. The third *Gingles* precondition is established in District 9.

#### **IV. The Totality of the Circumstances**

##### **A. The Senate Factors**

90. The typical, non-exhaustive Senate Factors include: 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of

the minority group to register, to vote, or otherwise to participate in the democratic process; 2. the extent to which voting in the elections of the state or political subdivision is racially polarized; 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process; 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; 6. whether political campaigns have been characterized by overt or subtle racial appeals; 7. the extent to which members of the minority group have been elected to public office in the jurisdiction; 8. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and 9. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous. *Gingles*, 478 at 36–37.

91. “[T]his list of typical factors is neither comprehensive nor exclusive. While the enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims, other factors may also be relevant and may be considered. Furthermore, ... there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.” *Id.* at 45 (internal citations omitted).

92. The Senate factors, with two exceptions, have characterized the relationship between Native Americans and the state of North Dakota for an extended period of time. There is a significant and prolonged history of official and *de facto* discrimination against Native

Americans, racially polarized voting and a hostile political atmosphere, significant socio-economic differences between Native people and non-Native North Dakotans, and a lack of electoral success for Native Americans. The proposed redistricting plan exacerbates problems with Native-Anglo relationships and is a tenuous policy that makes it more difficult for Native Americans to elect candidates of their choice.

93. “[T]he question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality, and on a functional view of the political process.” *Gingles*, 478 U.S. at 45 (internal citations omitted).

94. Plaintiffs have demonstrated that the totality of the circumstances indicates Native voters in northeastern North Dakota have “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice[.]” *Id.* at 63; *see also Bone Shirt*, 461 F.3d at 1021 (quoting 52 U.S.C. § 10301(b)).

**1. The Two Most Important Senate Factors: Senate Factors 2 and 7**

95. “Two factors predominate the totality-of-circumstances analysis: the extent to which voting is racially polarized and the extent to which minorities have been elected under the challenged scheme.” *Bone Shirt*, 461 F.3d at 1022 (internal citations omitted).

96. As to Senate Factor 2 – the extent of racially polarized voting – the record reflects a high level of polarization in Districts 9, 9A, 9B, and 15.

97. As to Senate Factor 7 – the extent to which Native Americans have been elected – not only have Native Americans consistently been excluded from elected positions across the State, but the only election under the challenged scheme in 2022 resulted in a loss of Native American candidates of choice across the board. The 2022 elections “reflect the [Native American] voters' present ability to elect representatives of their choice under the current election scheme.”

*Harvell v. Ladd*, 958 F.2d 226, 230 (8th Cir. 1992). District 9 Senator Marcellais lost after having held the seat since the 2006 election. Having previously held both state house seats in District 9, Native American candidates of choice were reduced from two to one with Representative Nelson losing 9B in the 2022 election. And Plaintiff Collette Brown lost the District 15 race.

## **2. Undisputed Senate Factors**

### ***i. Senate Factor 1***

98. Here, as in *Bone Shirt*, “[t]he record is clear that [North] Dakota’s history of discrimination against Native–Americans has limited their ability to succeed in the state political process. The vestiges of this discrimination remain, dampening Native–American interest in [North] Dakota politics and affecting the ability of Native–Americans to register, to vote, and to participate in the electoral process.” 461 F.3d at 1022.

99. Dr. McCool considered the long history of mistreatment of Native people in North Dakota and discussed evidence of contemporary discrimination against Native Americans, highlighting numerous successful voting discrimination claims affecting Native Americans.

100. The evidence of discrimination against Native Americans in North Dakota is well-documented.

### ***ii. Senate Factor 3***

101. HB 1504 itself is the most probative evidence of Senate Factor 3 - voting practices or procedures that enhance the opportunity for discrimination.

102. The Native American voting cases highlighted by Dr. McCool provide further evidence that Senate Factor 3 weighs in favor of Plaintiffs, such as the use of voter id laws and at-large election schemes that have a disparate impact on Native American voters. In *Lower Brule*

*Sioux Tribe v. Lyman County*, the court found an at-large election plan is evidence of Senate Factor 3. 625 F. Supp. 3d 891, 913 (D.S.D. 2022).

**iii. Senate Factor 5**

103. The Court in *Missouri State Conference of the National Ass'n for the Advancement of Colored People v. Ferguson-Florissant School District*, upheld the district court's findings of Senate Factor 5 where it found that “[g]iven the extent to which African Americans in FFSD continue to experience the effect of discrimination, their ability to participate in the political process is impacted.” 894 F.3d 924, 940 (8th Cir. 2018).

104. “Further, the historic effects of discrimination in the areas of health, employment, and education impact negatively on the ability of Indians to participate in the political process.” *Bone Shirt*, 461 F.3d at 1022 (internal citations omitted).

105. Here, as in *Lower Brule Sioux Tribe v. Lyman Cnty.*, “Historic discrimination has affected education, employment, and health of Native Americans in [North] Dakota generally and [Turtle Mountain and Spirit Lake] Tribe members on the Reservation in particular. Poverty appears to hinder Native Americans ... from participating in elections at the same level as non-Indians . . .” 625 F. Supp. 3d at 924.

106. As the Eighth Circuit has held, “[o]nce lower socio-economic status of [the minority group] has been shown, there is no need to show the causal link of this lower status on political participation.” *Whitfield v. Democratic Party of State of Ark.*, 890 F.2d 1423, 1431 (8th Cir. 1989) (quoting *United States v. Dallas Cnty. Comm’n*, 739 F.2d 1529, 1537 (11th Cir. 1984)).

107. The Eighth Circuit cited the Senate Report from which the totality of circumstances factors are derived, which explains that:

[d]isproportionate educational, employment, income levels and living conditions arising from past discrimination tend to depress minority political participation.

Where these conditions are shown, and where the level of [minority] participation in politics is depressed, plaintiffs need not prove any further causal link between their disparate socio-economic status and the depressed level of political participation.

*Id.* (quoting S. Rep. No. 417 at 29 n.144, 1982 U.S. Code Cong. & Admin. News at 207); *see also Bone Shirt*, 336 F. Supp. 2d at 1037-38 (explaining that plaintiffs are not required to prove the causal nexus, “[r]ather the burden is on ‘those who deny the causal nexus to show that the cause is something else’” (quoting *Whitfield*, 890 F.2d at 1431)).

108. The Eighth Circuit further explained that “[i]nequality of access is an inference which flows from the existence of economic and educational inequalities.” *Whitfield*, 890 F.2d at 1431 (quoting *Dallas Cnty. Comm’n*, 739 F.2d at 1537).

109. Two Plaintiffs’ experts provided robust and largely undisputed historical qualitative and contemporary quantitative evidence in support of Senate Factor 5. *See supra* PFOFs ¶¶ 196-218. As such, the Court concludes that Native Americans continue to experience the effects of discrimination across a host of socioeconomic measures, which results in unequal access to the political process as compared to other groups.

#### *iv. Tenuousness*

110. “The tenuousness of the justification for the state policy may indicate that the policy is unfair.” *Cottier v. City of Martin*, 466 F. Supp. 2d 1175, 1197 (D.S.D. 2006) (quoting *Marengo Cnty. Comm’n*, 731 F.2d at 1571) (internal citations omitted).

111. “Along with elected officials’ lack of responsiveness to minority needs, a tenuous fit between the expressed policy and the provisions of the law bolsters the conclusion that minorities are not able to equally participate in the political process.” *Veasey v. Abbott*, 830 F.3d 216, 262–63 (5th Cir. 2016). In finding the law tenuous, the court in *Veasey* explained, “[t]he State is entitled to make policy choices about when and how it will address various priorities. But in this

case, the provisions of SB 14 fail to correspond in any meaningful way to the legitimate interests the State claims to have been advancing through SB 14.” *Id.* at 263.

112. Here, the interests the North Dakota legislature claims to have been advancing do not correspond to HB 1504 – they failed to avoid a lawsuit, they diluted the Native American vote, they decreased the number of Native American representatives, and they divided a community of interest. HB 1504 is unfair and tenuous.

### **3. Lack of Responsiveness**

113. “[U]nresponsiveness may be raised at the plaintiff’s discretion, although it is not a necessary factor . . . [when plaintiffs offer evidence of unresponsiveness], [t]he district court may not ignore this evidence.” *Buckanaga v. Sisseton Indep. Sch. Dist., No. 54-5, S.D.*, 804 F.2d 469, 477 (8th Cir. 1986).

114. Many of Plaintiffs’ witnesses offered substantial evidence that the Legislature was unresponsive to the needs of the Native American community. The three areas of unresponsiveness during the redistricting process itself are particularly persuasive. One, the Redistricting Committee refused to hold hearings on reservations despite repeated requests. Two, the Redistricting Committee was unresponsive in regard to District 9’s subdivision and the request to place Turtle Mountain and Spirit Lake in one district. And three, the Redistricting Committee was unresponsive in failing to preserve communities of interest, the Spirit Lake and Turtle Mountain tribes, and in rejecting Spirit Lake’s request not to be placed in a district with Devil’s Lake.

115. On balance, the Court is persuaded that there is a lack of responsiveness. As the Court said at the end of trial, the issue of responsiveness “has existed longer than any of us in here have lived and is going to exist longer than any of us in here exist, and it has to be addressed.” Trial Tr. Vol. 4, 75:21-24.



**B. Proportionality**

116. “[P]roportionality is ‘a relevant fact in the totality of circumstances.’” *LULAC v. Perry*, 548 U.S. 399, 436 (2006) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994)); *De Grandy*, 512 U.S. at 1025 (O’Connor, J., concurring) (“Lack of proportionality is probative evidence of vote dilution.”). Although not dispositive, *LULAC*, 399 U.S. at 436, it is a relevant consideration.

117. Native American voters fall far short of their proportionate share of legislative seats; based on their share of statewide VAP, a proportionate share would be three senate seats and six state house seats. Under the enacted plan, Native American voters have zero opportunity seats in the state senate and just two in the state house. A remedial plan in this case will yield one state senate seat and three state house positions statewide—still far short of proportional representation.

118. This notable lack of proportionality is further evidence of vote dilution under the totality of circumstances.

**ORDER**

1. North Dakota State Legislative Districts 9, 9A, 9B, and 15, as enacted by HB 1504, prevent Native American voters from having an equal opportunity to elect candidates of their choice in violation of Section 2 of the Voting Rights Act.
2. Defendants are permanently enjoined from administering, enforcing, preparing for, or in any way permitting the nomination or election of members of the North Dakota Legislature from Districts 9, 9A, 9B, and 15 as currently configured.
3. The Legislature shall have until [DATE] to adopt a plan to remedy the violation of Section 2. Plaintiffs shall file any objections to such a plan by [DATE], along with any supporting expert analysis and potential remedial plan proposals. Defendant shall have until [DATE] to file any

response, and Plaintiffs shall have until [DATE] to file any reply. The Court may choose to conduct a remedial hearing.

4. The first election for the state legislative positions in the remedial district shall occur in the November 2024 election.

5. Judgment is hereby entered for Plaintiffs as prevailing parties in this action.

6. Plaintiffs are prevailing parties entitled to attorneys' fees, expenses, and costs pursuant to 42 U.S.C. § 1988 and 52 U.S.C. § 10310(e).

July 7, 2023

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**CERTIFICATE OF SERVICE**

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

/s/ Mark P. Gaber  
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