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

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

INTERVENOR-DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Although the cross-motions, memoranda, and exhibits in support of summary judgment in this case will span hundreds of pages, this is a simple case for the Court to resolve. Because Intervenor-Defendants' ("Tribal Defendants") arguments in opposition to Plaintiffs' motion for summary judgment overlap with the arguments set forth in Tribal Defendants' separate motion for summary judgment, Tribal Defendants will not multiply the briefing in this case by rehashing those arguments here.[1] Instead, Tribal Defendants briefly highlight four points that illustrate the

[1] Tribal Defendants incorporate herein by reference their arguments that race did not predominate in the drawing of District 4A and that District 4A is required by Section 2 of the Voting Rights Act ("VRA") and thus satisfies strict scrutiny. *See generally* ECF No.108.

simplicity of this Court's task in denying Plaintiffs' motion for summary judgment and granting Tribal Defendants' motion.

First, Plaintiffs lack standing. This is especially clear with respect to Plaintiffs' challenge to District 9A, in which neither Plaintiff resides. But it is likewise clear with respect to District 4A, because in their deposition testimony Plaintiffs disclaim any race-based injury and instead challenge the concept of subdistricts (whatever their justification). But Plaintiffs' dissatisfaction with the concept of subdistricts is a policy objection and has no grounding in any federal legal claim. Plaintiffs neither suffer a racial gerrymandering injury nor is the injury they *do* allege—a distaste for the concept of single-member districts—justiciable or a redressable "injury."

Second, Plaintiffs do not dispute that Section 2 of the Voting Rights Act ("VRA") *actually requires* the drawing of District 4A. Instead, their case rests upon a basic misunderstanding—or obfuscation—of the Supreme Court's VRA jurisprudence. Put simply, this Court does not need to inquire into the information available to the legislature at the time the redistricting plan was enacted because Tribal Defendants have proven—and Plaintiffs *do not dispute*—that the VRA requires District 4A. That begins and ends the inquiry.

Third, Plaintiffs' motion for summary judgment simply cherry-picks quotations from legislators indicating that they were considering the VRA's requirements. But this alone does not show that race *predominated* in the decision of which voters to include or exclude as the actual lines were drawn. Mere awareness or consideration of race is not evidence of racial predominance.

Fourth, Plaintiffs are wrong to contend that this Court can simply order the subdistricts eliminated. Even if Plaintiffs could somehow prevail on the merits, the legislature must be afforded the opportunity to fashion a remedy—of which subdistricts would remain not only a lawful option, but in the case of District 4A, a requirement of federal law.

ARGUMENT

I. Plaintiffs lack standing.

Neither Plaintiff Walen nor Plaintiff Henderson has standing to assert racial gerrymandering claims and thus their motion for summary judgment should be denied. Both Plaintiffs testified that their injuries stem solely from their objections to the concept of single member state house districts, not from any racial classifications they have suffered. Tribal Defendants' motion for summary judgment explains in detail why Plaintiffs lack standing, and those arguments will not be repeated here but instead are incorporated by reference. ECF No. 108 at 13-18.

But one point warrants further discussion. Plaintiffs' motion focuses on the legislature's creation of Districts 4A and 9A as a result of its view of the VRA's requirements. However, neither Plaintiff resides in District 9A.[2] Plaintiff Henderson instead resides in Cavalier County in the eastern half of District 9B. ECF No. 109-21 at 12:9-18. While Plaintiffs' motion occasionally references District 9B, *see, e.g.*, ECF No. 99 at 2, 17, 26, nowhere do Plaintiffs contend that District 9B *itself* was drawn predominantly on the basis of race. *See Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 262 (2015) ("A racial gerrymandering claim . . . applies to the boundaries of individual districts. It applies district-by-district."); *id.* at 263 (explaining that voters living

[2] Although the Tribal Defendants' interest in this case relates to defending District 4A, this Court has an obligation to ensure itself of jurisdiction. The Tribal Defendants address Plaintiffs' standing with respect to the case as a whole to aid the Court in considering its subject matter jurisdiction in this case. *See* ECF No. 108 at 20, n. 2.

Moreover, even if the Court determines that Plaintiffs have standing to challenge District 9A, constitutional avoidance principles warrant refraining from addressing that claim because the statutory challenge proceeding in *Turtle Mountain v. Howe*, No. 3:22-cv-00022-PDW-ARS, may render Plaintiffs' claim regarding District 9A moot.

outside the allegedly racially gerrymandered district "normally lack[] standing to pursue a racial gerrymandering claim").

Plaintiffs offer no allegations or evidence to suggest that any of the boundaries of District 9B were drawn on the basis of race—nor could they. Within Rolette County, the boundary between District 9A and 9B primarily separates Native American voters in District 9A from other Native American voters in District 9B, while the rest of the District 9A/9B border follows the Rolette/Towner County boundary. *See Turtle Mountain v. Howe*, No. 3:22-cv-00022-PDW-ARS (D.N.D.), ECF No. 65-3, App. A. Apart from the Canadian border, the remainder of District 9B's boundaries in Cavalier and Towner Counties separate white voters in District 9B from other white voters in Districts 15 and 19. *See id.* Plaintiffs do not—and cannot—allege that race predominated in the placement of District 9B's boundaries. Nor does Plaintiffs' contention that District 9A is racially gerrymandered provide them standing to challenge that district merely because Plaintiff Henderson lives in a bordering district. *See Sinkfield v. Kelley*, 531 U.S. 28, 29 (2000) (holding plaintiffs lacked standing to challenge their white-majority district even though some of its borders were affected by creation of neighboring majority minority district that they alleged was a racial gerrymander); ECF No. 109-21 (Henderson Dep.) at 27:24-28:2. In any event, Plaintiff Henderson has testified to suffering no race-based injury, precluding any possibility of standing in this case. *See* ECF 109-21 at 28:5-29:17 (Henderson Dep.).

For these reasons and the reasons set forth in more detail in Tribal Defendants' motion for summary judgment, ECF No. 108 at 13-18, Plaintiffs lack standing. As such, Plaintiffs' motion for summary judgment should be denied and Tribal Defendants' motion granted.

II. Plaintiffs do not dispute that the VRA actually requires the drawing of District 4A.

Tribal Defendants—not Plaintiffs—are entitled to summary judgment because Plaintiffs do not dispute that the VRA actually requires the drawing of District 4A. As Tribal Defendants explained in their motion for summary judgment, and as the expert reports of Dr. Collingwood, Dr. McCool, and Dr. Magargal show, all three *Gingles* preconditions are satisfied with respect to District 4A and the totality of circumstances factors establish that Section 2 of the VRA requires the drawing of District 4A. ***Plaintiffs do not contend otherwise*** and offer no contrary expert testimony or evidence. Instead, Plaintiffs contend that they are nevertheless entitled to a district that dilutes Native American votes so long as the Court concludes that the legislature lacked sufficient evidence of the *Gingles* preconditions "**at the time of imposition.**" ECF No. 99 at 29 (emphasis in original); *id.* at 32 (contending that submission of VRA expert reports in this case is "irrelevant" because they were not part of the legislative record). In Plaintiffs' view, whether or not the VRA *actually requires* the district's configuration is "irrelevant" if proof of that requirement is not included in the legislative record but instead is established after the fact. *Id.* at 32.

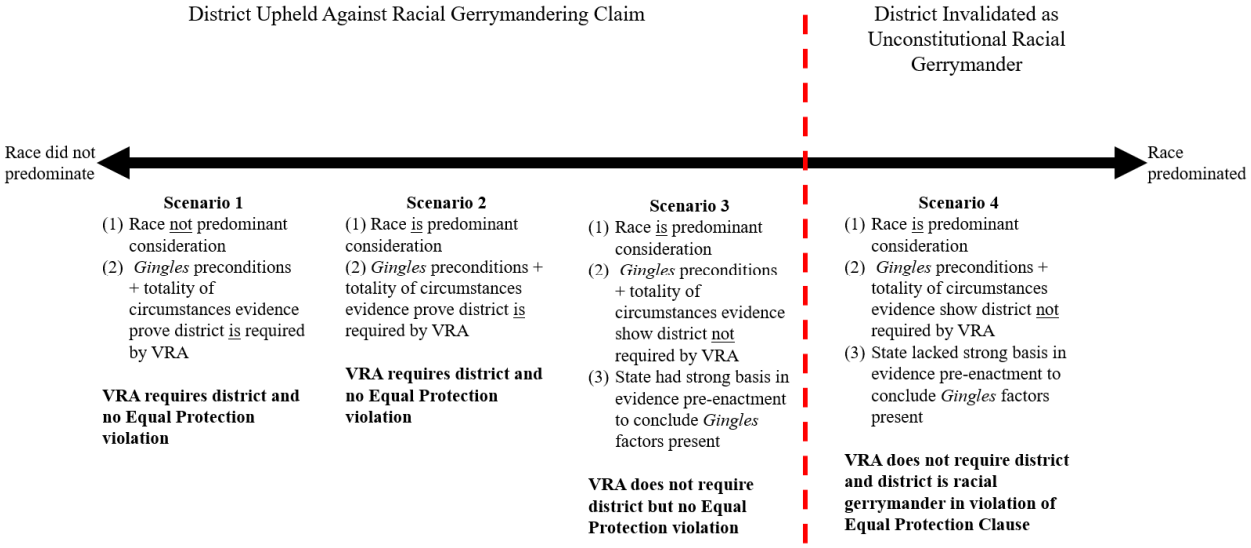
Contrary to Plaintiffs' conception of the law, the VRA's requirements are *never* "irrelevant." *Id.* Plaintiffs have plucked from its context the "strong basis in evidence" standard that affords leeway to states that *mistakenly* draw a race-based district that the VRA *did not* require. In *Wisconsin Legislature v. Wisconsin Elections Comm'n*, the Supreme Court explained that

> States have 'breathing room' to make reasonable mistakes; we will not fault a State just because its 'compliance measures . . . may prove, *in perfect hindsight*, not to have been needed.' But that 'leeway' does not allow a State to adopt a racial gerrymander that the State does not, at the time of imposition, 'judg[e] necessary under a proper interpretation of the VRA.'

142 S. Ct. 1245, 1250 (2022) (quoting *Cooper v. Harris*, 137 S. Ct. 1455, 1464, 1472 (2017) (bracket in original) (emphasis added). Here, hindsight has shown that District 4A *is required* by the VRA—and Plaintiffs do not contend otherwise. They have proffered no expert analysis to dispute Tribal Defendants' showing with respect to the *Gingles* preconditions or the totality of evidence factors. Plaintiffs identify no genuine dispute of material fact that the VRA necessitates the drawing of District 4A. As such, there is no need to afford the state "leeway" because *it did not err* in determining that compliance with the VRA was necessary when drawing District 4A.

Race-conscious districting can be assessed along a continuum as shown below.

Figure 1



A district is an unconstitutional racial gerrymander only if it falls within Scenario 4 and three things are true: (1) race predominated in the district's design, (2) the *Gingles* preconditions or the totality of circumstances evidence are lacking, and (3) the legislature lacked a strong basis in evidence to excuse as good faith its mistaken race-conscious line drawing. Here Plaintiffs do not dispute that the *Gingles* preconditions are met and the totality of circumstances demonstrates that the VRA actually requires District 4A. Thus, this case falls under either Scenario 1 or Scenario 2 and regardless of whether race predominated—it did not, *see* ECF No. 108 at 18-22—District 4A

is not an unconstitutional racial gerrymander. The quantity and quality of *ex ante* evidence in the legislative record is irrelevant—it only comes into play when determining whether to excuse a *mistaken* drawing of a district in which race predominated.[3] It is thus not surprising that Plaintiffs cite *zero* cases in which courts follow them on their proposed paradoxical path of invalidating a district all parties agree is mandated by the VRA.

The facts demonstrating the VRA's applicability are not in dispute. Plaintiffs' entire legal claim arises from a fundamental misunderstanding of the law governing this case. Because it is undisputed that the VRA requires District 4A, Tribal Defendants—not Plaintiffs—are entitled to summary judgment.

III. Plaintiffs' cherry-picked legislator quotes do not establish that race predominated.

The Court does not need to, and should not, examine the legislative record in this case because the undisputed summary judgment evidence shows that the VRA requires District 4A. But even if the Court were to consider the legislative record, Plaintiffs have not shown that race predominated in the drawing of District 4A. Rather, Plaintiffs have merely cherry-picked quotes of legislators demonstrating an awareness of race and of the VRA's obligations. "A legislature will 'almost always be aware of racial demographics' during redistricting, but evidence of such awareness does not show that the legislature violated equal protection." *Cooper*, 581 U.S. at 330 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). A plaintiff alleging a racial gerrymander carries a "heavy evidentiary burden," *id.*, through "direct evidence of legislative intent,

[3] To be sure, when the question of the VRA's application is disputed, a court may resolve the issue by satisfying itself that the legislature had a substantial basis in evidence for its race-conscious districting. But where the VRA is proven in court to apply—or, as here, where its application is *not disputed*—no judicial effort is saved by wading through the legislative record.

circumstantial evidence of a district's shape and demographics,' or a mix of both." *Id.* at 291 (internal quotation marks omitted).

The mere fact that legislators were aware of Native Americans and considered the VRA obligations does not show that race was the predominant consideration in how the actual boundaries of District 4A were drawn. As Tribal Defendants have shown, a host of non-racial factors were considered, and the district is exceedingly regular in its shape and adherence to traditional districting principles. ECF No. 108 at 32. A district can be drawn to comply with the VRA *and* not include or exclude voters predominantly on the basis of race. Plaintiffs have offered no expert testimony—no demographic data, no mapping expert, *nothing*—to carry their burden to prove that the actual district lines include or exclude voters on the basis of race. While District 4A follows boundaries of the MHA Reservation, that is not the equivalent of a racial divide. Plaintiff Walen illustrates as much—he is a white man living on the Reservation close to the border of Districts 4A and 4B. ECF No. 109-20 at 14:25, 25:12-26:3 (Walen Dep.). To the extent the Court even considers the legislative record—which it need not—Plaintiffs have fallen far short of their burden, particularly at the summary judgment stage.

IV. Even if Plaintiffs were correct, the Court cannot enjoin the concept of subdistricts.

Even if the Court were to conclude that Plaintiffs are correct (they are not), Plaintiffs' requested relief—that the Court simply order the elimination of the subdistrict division within Districts 4 and 9—is impermissible. When a redistricting plan is invalidated, the Court must provide the legislature "the first opportunity to submit a remedial plan." *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1022 (8th Cir. 2006). Plaintiffs suggest that elimination of the subdistrict lines is a "minor or obvious adjustment," which this Court can undertake in lieu of the duly authorized state legislature. ECF No. 99 at 33 (internal quotation marks and citation omitted). But there is nothing

unlawful about the *concept* of subdistricts, and subdistricts are not *per se* racial gerrymanders. Even if the Court were to somehow conclude that Plaintiffs (1) have standing and (2) have shown that race, without compelling justification, predominated, then the legislature would remain free to propose a new District 4A. Indeed, the legislature would be required to do so in order to meet its undisputed obligations under the VRA. Plaintiffs' general policy objection to subdistricts does not authorize this Court to broadly enjoin the legislature from adopting them, particularly where the failure to create a subdistrict would otherwise violate federal law.

CONCLUSION

For the foregoing reasons—and for the reasons set forth in detail in Tribal Defendants' motion for summary judgment—Plaintiffs' motion for summary judgment should be denied and Tribal Defendants' motion for summary judgment should be granted.

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Respectfully submitted,

/s/ Michael S. Carter
Michael S. Carter
OK Bar No. 31961
Matthew Campbell
NM Bar No. 138207, CO Bar No. 40808
mcampbell@narf.org
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80301
Telephone: (303) 447-8760

Samantha Blencke Kelty
AZ Bar No. 024110, TX Bar No. 24085074
kelty@narf.org
NATIVE AMERICAN RIGHTS FUND
950 F St. NW, Ste. 1050
Washington, DC 20004
Telephone: (202) 785-4166

/s/ Mark P. Gaber
DC Bar No. 988077
mgaber@campaignlegal.org
Molly E. Danahy
DC Bar No. 1643411
mdanahy@campaignlegal.org
Nicole Hansen
NY Bar 5992326
nhansen@campaignlegal.org
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Ste. 400
Washington, DC 20005
Telephone: (202) 736-2200
Fax: (202) 736-2222

Bryan Sells (admitted *pro hac vice*)
GA Bar No. 635562
bryan@bryansellslsaw.com
THE LAW OFFICE OF BRYAN L. SELLS, LLC

PO Box 5493
Atlanta, GA 31107-0493
Telephone: (404) 480-4212

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
Mark P. Gaber

Counsel for Plaintiffs