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' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs' response in opposition to Intervenor-Defendants' ("Tribal Defendants") motion for summary judgment fails to meet their burden under Rule 56 to establish a material dispute of fact sufficient to preclude summary judgment in favor of Tribal Defendants. Plaintiffs rely solely on the allegations in their complaint rather than provide competent evidence necessary to meet their burden of proving standing. Further, Plaintiffs fail to carry their demanding burden to show that race predominated in the drawing of Subdistrict 4A. Finally, Plaintiffs misconstrue Supreme Court precedent in support of their claim that they are entitled to permanently dilute the votes of Native American voters in District 4A via the court-ordered dismantling of a district Plaintiffs do not dispute is necessary under the Voting Rights Act ("VRA").

I. Plaintiffs Lack Standing

"The party invoking federal jurisdiction bears the burden of establishing [standing]." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Since the elements demonstrating standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Id*. Thus, "[i]n response to a summary judgment motion . . . the plaintiff can no longer rest on . . . 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts.'" *Id*. (internal citations omitted).

A. Plaintiffs Offer No Evidence to Support Their Claimed Injury.

Plaintiffs have failed to establish standing because they cannot point to any evidence supporting their assertion that they are injured by the challenged subdistricts, and the undisputed record shows that Plaintiffs have not suffered the injuries alleged in their complaint. First, Plaintiffs do not dispute that Plaintiff Henderson does not live in either District 4A or District 9A, and they point to no record evidence that District 9 or District 9B—where Plaintiff Henderson indisputably resides—were drawn on the basis of race. Nor is there any such evidence in the record. Instead, the record shows, at most, that the Legislature was aware of race and its obligations under the VRA when it drew Districts 4A and 9A. *See, e.g.*, Pls. Opp'n to Tribal Defs. Mot. at 5, ECF No. 115 (quoting Representative Shauer discussing the Native American population of District 4A and District 9A); *see also id*. at Parts II and III (discussing District 4A's compliance with traditional redistricting criteria and the application of the *Gingles* factors to District 4A and omitting any reference to District 4B or District 4 as a whole); *cf.* Tribal Defs. Opp'n to Pls. Mot. at 3, ECF No. 113 (noting that "[w]hile 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."). Instead, Plaintiffs rely solely on the broad allegations in their complaint and their own conclusory statements that "race predominated [in] the drawing of Districts 4 and 9." Pls. Opp'n to Tribal Defs. Mot. at 13; *see also id*. at 20 (claiming Plaintiffs have standing based solely on the allegations in their Complaint). At this stage, however, "mere allegations" are insufficient to support Plaintiffs' standing. *Lujan*, 504 U.S. at 561. Since the undisputed evidence demonstrates that neither Plaintiff lives in challenged District 9A, Plaintiffs lack standing to challenge that district.

The undisputed record is also clear that neither Plaintiff asserts any individualized injury based on racial classifications. *Cf.* Pls. Opp'n to Tribal Defs. Mot. at 21-22. Plaintiffs each gave sworn testimony that the only injury they have suffered is the lack of multimember representation. *See* Tribal Defs. Mot. at 12, 15-16, ECF No. 108. Again, Plaintiffs do not cite to any record evidence to rebut this fact. Instead, Plaintiffs claim that as "lay persons with no legal training" this Court should disregard their sworn testimony. Pls. Opp'n to Tribal Defs. Mot. at 22. But Plaintiffs have had multiple opportunities to put forth evidence to support the alleged constitutional injury outlined in their Complaint. At no point during these proceedings have Plaintiffs introduced *any* evidence that they were "personally subjected to a racial classification," or are "represented by a legislator who believes his [or her] primary obligation is to represent only the members of a particular racial group," *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015), whether by deposition testimony, affidavit, or otherwise. Indeed, Plaintiff Henderson is represented by his wife. *See* Tribal Defs. Mot., Ex. 21, Henderson Dep. at 19:4-12, ECF No. 109-21. Instead, Plaintiffs rely solely on the allegations in their complaint—which are contradicted by their sworn testimony—for the proposition that they have met their burden to establish standing sufficient to survive summary judgment. *See* Pls. Opp'n to Tribal Defs. Mot. at 22 ("The

Complaint clearly alleges each Plaintiff lives in a racially gerrymandered voting district, and therefore each plaintiff has suffered a direct constitutional injury"); *but see* Tribal Defs. Mot., Ex. 21, Henderson Dep. at 28:5-29:17, ECF No. 109-21; *Id.*, Ex. 20, Walen Dep. at 23:4-24:1, ECF No. 109-20 (Plaintiffs testifying that the only harm they suffered as a result of the plan was that they now vote for a single subdistrict House member instead of two at-large House members). At this stage, Plaintiffs must do more to support their claim than make allegations of injury. *Lujan*, 504 U.S. at 561. They have not done so. Tribal Defendants are entitled to summary judgment.

B. Plaintiffs' Claim Is Not Redressable

As Plaintiffs concede, they are not challenging the state statutory or constitutional provisions that authorize subdistricts. Pls. Opp'n to Tribal Defs. Mot. at 26. Instead, they are "challenging the configuration" of particular districts. *Id*. But Plaintiffs do not dispute that District 4A is actually necessary to comply with the VRA, regardless of what evidence was before the legislature when the plan was enacted. *Cf. id*. at 27 (contending only that the legislature failed to consider sufficient evidence that Subdistrict 4A was required to comply with the VRA). As such, the remedy they request—the intentional dismantling of a performing VRA district in support of a general interest in multimember representation to which they have no right under state or federal law—itself violates not only the VRA but likely the Equal Protection Clause. *Cf., e.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (holding that the intentional destruction of performing minority opportunity districts "would raise serious questions under both the Fourteenth and Fifteenth Amendments."). Plaintiffs offer no authority for their assertion that either the Constitution or this Court must sanction their expressed intent to discriminate against Native American voters by intentionally diluting their votes. Because Plaintiffs are not entitled to a remedy they concede is unlawful, their claim is not redressable.

II. Plaintiffs Have Not Shown Race Predominated.

To succeed on a racial gerrymandering claim, a plaintiff must establish that race was not "simply . . . 'a motivation for the drawing of a majority-minority district,' but 'the *predominant factor*.'" *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (quoting *Bush v. Vera*, 517 U.S. 952, 959 (1996) (emphasis in original). The evidentiary burden is a "demanding" one, and plaintiffs "must show at a minimum that the 'legislature subordinated traditional race-neutral districting principles . . . to racial considerations.'" *Id.* at 241 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). Here, Plaintiffs wrongly contend that the mere invocation of the need to comply with the VRA by the legislature is sufficient to show that race predominated and strict scrutiny applies. Pls. Opp'n to Tribal Defs. Mot. at 2. Not so. The fact that the necessity of VRA compliance was *a* consideration does not *ipso facto* make race the predominant factor. *See Easley*, 532 U.S. at 241. Plaintiffs must prove racial predominance, not consideration of the VRA, and have made no attempt to do so here. Moreover, Tribal Defendants' undisputed evidence demonstrates that race did not predominate in the drawing of District 4A because the district complies with traditional redistricting criteria. Tribal Defs. Mot. at 19-22.

III. District 4A Withstands Strict Scrutiny Because It Is Required by the VRA.

Even if race predominated the drawing of Subdistrict 4A—it did not, *see id*., *see also* Tribal Defs. Opp'n to Pls. Mot. at 5-7—District 4A would still pass constitutional muster because it is required by Section 2 of the VRA. As Tribal Defendants have explained, 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 the circumstances establishes that the drawing of District 4A was necessary to comply with Section 2 of the VRA. *See id*. Plaintiffs do not dispute and have never disputed that Section 2 actually requires the drawing of District 4A and

offer no contrary expert testimony or evidence. Instead, they misapply the Supreme Court's "strong basis in evidence" precedent—which allows States to make reasonable mistakes about the VRA's application in drawing districts—to argue that a state legislature that *has not made a mistake* must also have its legislative process examined for its district to be upheld. *See* Pls. Opp'n to Tribal Defs. Mot. at 14-17. Plaintiffs' conclusion that they are entitled to a district that dilutes Native American voting strength so long as this Court concludes that the Legislature lacked sufficient evidence of the *Gingles* preconditions "at the time of imposition," *id*., is plainly contrary to Supreme Court precedent and federal law.

At the outset, the "strong basis in evidence" standard is not the threshold requirement that Plaintiffs make it out to be. *See, e.g.*, Pls. Opp'n to Tribal Defs. Mot. at 16 (incorrectly concluding "that 'breathing room' still requires a race-based district to meet the *Gingles* preconditions 'at the time of imposition'"). Rather it acts as a fallback to "give[] States 'breathing room' to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed." *Cooper v. Harris*, 581 U.S. 285, 292–93 (2017). In other words, states may use race as a predominate factor in drawing a district that mapdrawers have "good reason to believe" is required by Section 2 "even if a court does not find that the actions were necessary for statutory compliance." *Ala. Legislative Black Caucus*, 575 U.S. at 278 ("This standard . . . does not demand that a State's actions actually be necessary to achieve a compelling state interest in order to be constitutionally valid.") (internal quotations omitted). This safety net exists to allow map drawers to navigate the "'competing hazards of liability'" arising from the Constitution's bar on certain unjustifiable considerations of race and Section 2's mandate that districts may not dilute the voting strength of politically cohesive minorities. *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018) (quoting *Bush*, 517 U.S. at 977 (plurality opinion)); *see also Bethune-Hill v. Virginia State Bd. of Elections*,

580 U.S. 178, 196 (2017) ("The State did have good reasons under these circumstances. Holding otherwise would afford state legislatures too little breathing room, leaving them 'trapped between the competing hazards of liability' under the Voting Rights Act and the Equal Protection Clause.").

The test does not apply in this case because it is undisputed that the legislature *did not err* in concluding that the VRA required District 4A. Defendants need not rely upon the breathing room afforded a legislature that gathers sufficient evidence *ex ante* because the undisputed evidence shows that the legislature *got it right* in drawing District 4A, regardless of the content of the legislative record. A test developed to afford leeway for states that make reasonable mistakes has no place in a case in which the state made *no mistake at all*.

Wisconsin Legislature v. Wisconsin Elections Commission did not change this. In that case, the Supreme Court concluded that the "strong basis" standard had not been satisfied where the state supreme court—tasked with imposing a map to remedy unconstitutionally malapportioned districts in the context of a deadlock between the governor and the legislature—determined only that the VRA "*might*" require an additional majority-minority district, "not that the statute required it." 142 S. Ct. 1245, 1249 (2022) (emphasis added). In so concluding, the Court explained that the mapdrawer must believe its action to be required by the VRA, not merely that the VRA might require it. *Id.* Moreover, the Court found the evidence submitted to the state supreme court by the parties was insufficient to establish the three *Gingles* preconditions and thus remanded to the state supreme court, emphasizing that the court on remand was "free to take additional evidence" regarding the *Gingles* factor if it wished to reimpose the same map. *Id*. at 1251.

Here, the legislature did not conclude that the VRA *might* require District 4A—it concluded that it *did* require it. Indeed, Plaintiffs recognize that many legislators concluded as much at the time the Subdistrict was enacted. *See* Pls. Opp'n to Tribal Defs. Mot. at 4-5 (collecting quotes by

legislators who determined Subdistrict 4A was required by the VRA). Moreover, Plaintiffs have not identified any shortcoming in Dr. Collingwood's *Gingles* analysis—they have instead ignored it entirely, casting it aside as irrelevant because it comes in the context of an *ex post* judicial proceeding rather than a submission during the legislative session. But this misunderstands the legal framework, as discussed above.

Plaintiffs' reliance on *Wisconsin Legislature* is especially peculiar because the *Gingles* evidence the Supreme Court found wanting in that case was submitted *as part of a judicial proceeding*—not as part of the legislative record. After concluding that the evidence in the judicial record was insufficient to conclude that the VRA required the district at issue, the Supreme Court remanded and invited the state supreme court to "take additional evidence" on the issue and potentially reimpose the same map on the basis of that evidence. *Id.* at 1251. The glaring and dispositive difference between *Wisconsin Legislature* and this case is that the Supreme Court found the judicial record in *Wisconsin Legislature* lacked evidence showing the district was required by the VRA. So of course the Supreme Court had no choice but to remand the map for additional VRA evidence. Here, the judicial record overwhelmingly proves that District 4A is required by the VRA, obviating the need to send the map back to the legislature or to outright violate the VRA by judicially eliminating District 4A. The Supreme Court's actual disposition of *Wisconsin Legislature* cannot be squared with Plaintiffs' contention that this Court must blind itself to the undisputed robust evidence submitted by Tribal Defendants' experts Dr. Collingwood, Dr. McCool, and Dr. Magargal establishing that District 4A is required by Section 2 of the VRA.[1]

[1] In *Wisconsin Legislature*, the Court held that as the entity creating the map, it was insufficient for the state supreme court to rely on the undisputed nature of the *Gingles* evidence in the case. *Id.* at 1250. But here, this Court is not in the position of a mapmaker. It is adjudicating cross-motions for summary judgment regarding a district enacted by the legislature and signed into law by the Governor. As the party opposing Tribal Defendants' motion for summary judgment on the grounds

Proof in a judicial proceeding that the VRA in fact requires the drawing of a particular district dispenses with the need to grade the quality of the legislature's *ex ante* VRA analysis.

Finally, even if the "strong basis" standard governed this case, the Legislature and Redistricting Committee's conduct would meet this standard. The Supreme Court has repeatedly declared that it "'do[es] not . . . require States engaged in redistricting to compile a comprehensive administrative record.'" *Bethune-Hill*, 580 U.S. at 195 (quoting *Bush*, 517 U.S. at 966). Rather, "[s]tate legislators should be able to rely on their own experience, not only prepared reports." *Bush*, 517 U.S. at 1026. Under this permissive standard, the Redistricting Committee's consideration of population data and testimony from relevant stakeholders, including testimony of Chairman Fox and other witnesses detailing prior elections and racially polarized voting on the Fort Berthold Reservation and testimony describing the State's non-responsiveness to the interests of MHA Citizens, is plainly sufficient. *See Bush*, 517 U.S. at 1026 ("To the extent that the presence of obvious communities of interest among members of a district explicitly or implicitly guided the shape of District 30, it amounts to an entirely legitimate nonracial consideration."); Tribal Defs. Mot., Ex. 5, Final Redistricting Committee Report at 29, ECF No. 109-5 (noting that the Redistricting committee received testimony "multiple Native American candidates have had unsuccessful campaigns for membership in the House" and that "a history of racial bloc voting has prevented Native American voters from electing their candidates of choice"); *Id.*, Ex. 12, Fox Testimony, Sept. 23, 2021, ECF No. 109-12; *Id.*, Ex. 14, Fox Testimony, Sept. 29, 2021, ECF No.

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that the VRA requires District 4A, it is incumbent upon Plaintiffs to present contradictory evidence to defeat Tribal Defendants' motion. *See* Fed. R. Civ. P. 56. *Wisconsin Legislature* did not alter the summary judgment standard. But in any event, the evidence in the record establishes—regardless of the undisputed nature of the issue—that the VRA requires District 4A.

109-14; *Id.*, Ex. 15, Finley-DeVille Testimony, ECF No. 109-15; *Id.*, Ex. 16, Donaghy Testimony, ECF No. 109-16; *Id.*, Ex. 17, Gion Testimony, ECF No. 109-17.

This wealth of evidence in support of the conclusion that District 4A is required by Section 2 stands in stark contrast with cases Plaintiffs cite where the Supreme Court has found that the "strong basis in evidence" standard was not satisfied. For instance, in *Cooper*, "electoral history provided no evidence that a § 2 plaintiff could demonstrate the third *Gingles* prerequisite[.]" 581 U.S. at 302. This is because for the 20 years preceding redistricting, Black voters had constituted a minority in the challenged district, but it remained an "extraordinarily safe district" for the preferred candidate of Black voters due to white crossover voting. *Id.* By contrast, Native-preferred candidates in North Dakota's District 4 have suffered consistent losses throughout the past decade. *See, e.g.*, Tribal Defs. Mot., Ex. 8, Collingwood Report, ECF No. 109-8; *Id.* Ex. 9, 2020 Election Results, ECF No. 109-9; *Id.*, Ex. 11, 2016 Election Results, ECF No. 109-11; *Id.* Ex. 12, Fox Testimony, Sept. 23, 2021, ECF No. 109-12; *Id.*, Ex. 14, Fox Testimony, Sept. 29, 2021, ECF No. 109-14; *Id.*, Ex. 15, Finley-DeVille Testimony, ECF No. 109-15.

Plaintiffs' approach would yield an unworkable result. Under their proposed standard, this Court would conclude that Subdistrict 4A is required by Section 2—a fact that Plaintiffs do not dispute—but issue an order invalidating the district. Any such injunction would necessarily conflict with federal law. Because it is undisputed that the VRA requires District 4A, Tribal Defendants are entitled to summary judgment.

CONCLUSION

For the foregoing reasons, Tribal Defendants' motion for summary judgment should be granted.

April 4, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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