No. 23-969

IN THE

Supreme Court of the United States

CHARLES WALEN AND PAUL HENDERSON,
Plaintiffs-Appellants,

v.

DOUG BURGUM, *ET AL.*,
Defendants-Appellees,

THE MANDAN, HIDATSA, AND ARIKARA NATION; CESAR ALVAREZ; AND LISA DEVILLE,
Defendants-Intervenors-Appellees.

On Appeal from the United States District Court
for the District of North Dakota

MOTION TO DISMISS OR AFFIRM OF INTERVENORS-APPELLEES MHA NATION, ET AL.

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QUESTIONS PRESENTED

1. Whether this Court lacks Article III jurisdiction over this appeal because Plaintiffs do not have standing?
2. Whether the district court's judgment should be affirmed because the undisputed record confirms that the legislature did not subordinate traditional districting principles to racial considerations in drawing subdistrict 4A?
3. Whether the district court's judgment should be affirmed because it is undisputed that Section 2 of the Voting Rights Act requires the drawing of subdistrict 4A?
4. Whether the district court's judgment should be affirmed because it correctly held that the legislature had good reasons to think Section 2 of the Voting Rights Act required subdistrict 4A?

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INTRODUCTION

Plaintiffs seek to dismantle two state house subdistricts drawn by the North Dakota Legislature in 2021 based on the denial of a nonexistent right to multi-member representation in the North Dakota state house. Plaintiffs do so notwithstanding the fact that they do not dispute that subdistrict 4A is necessary to ensure Native American voters in North Dakota have an equal opportunity to elect candidates to the state legislature. Pursuant to Supreme Court Rule 18.6, Defendant-Intervenors the Mandan, Hidatsa, and Arikara Nation ("MHA Nation"), Cesar Alvarez, and Lisa DeVille, respectfully move to dismiss Plaintiffs' appeal, or to affirm the ruling below.

The Court should dismiss Plaintiffs' appeal for lack of jurisdiction because they failed to establish any legally cognizable injury under the Equal Protection Clause, much less one redressable by this Court. Even if Plaintiffs had standing, the Court should summarily affirm with respect to house subdistrict 4A. The undisputed record confirms that the North Dakota Legislature did not subordinate traditional redistricting criteria to race in drawing subdistrict 4A. Moreover, it is undisputed that subdistrict 4A is necessary to comply with the Voting Rights Act, such that Plaintiffs' requested relief—a return to multi-member at-large elections for the state house in District 4—would itself violate federal law. Finally, the district court correctly determined, based on the undisputed legislative record, that the legislature had

good reasons to think subdistrict 4A was required by the Voting Rights Act.

This appeal is meritless. The Court should dismiss the appeal or in the alternative summarily affirm the ruling below.

JURISDICTION

This Court has appellate jurisdiction over an appeal from a three-judge court under 28 U.S.C. § 1253. The Court lacks Article III jurisdiction over this appeal because Plaintiffs lack standing.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

In addition to the Equal Protection Clause of the United States Constitution, this appeal involves Section 2 of the Voting Rights Act of 1965, 52. U.S.C. 10301.

STATEMENT OF THE CASE

I. The North Dakota legislative redistricting process

The North Dakota Constitution provides that the state shall be divided into legislative districts from which one senator and two representatives are elected to four-year terms. N.D. Const. art. IV, § 2. The Constitution authorizes the legislature to "provide for the election of senators at large and representatives at large or from subdistricts from those districts." *Id.*; *see also* N.D. Cent. Code § 54-03-01.5(2).

Following the 2020 Census, the legislature created the Legislative Council Redistricting

Committee ("Redistricting Committee") to develop a redistricting plan. *See* H.B. 1397, 67th Leg. Reg. Sess. (N.D. 2021). The Redistricting Committee began meeting in July 2021 and continued with substantive meetings after the Census Bureau released the redistricting census data in August 2021. ECF Nos. 101-1, 101-3. The legislature's Tribal and State Relations Committee also conducted meetings in this timeframe, during which redistricting was discussed. ECF No. 109-13.

The Redistricting Committee received training on traditional redistricting principles, the application of the Voting Rights Act, and the need to comply with the Equal Protection Clause's prohibition on racial gerrymandering. ECF Nos. 109-1, 109-2, 109-3.

The Redistricting Committee heard substantial testimony about the need to respect the interests of Tribal Nations. E.g., ECF Nos. 100-1, 100-2, 100-7. The Committee heard testimony about the need to respect reservation boundaries and avoid splitting reservations, the sovereign status of Tribal Nations, and the importance of treating Tribal Nations as communities of interest in redistricting. *Id.*; ECF No. 104-14 at 29.

Moreover, the Committee heard testimony about the increased Native American population in District 4, home to the MHA Nation's Fort Berthold reservation, which meant that Native American voters could form the majority of eligible voters in a single-member state house subdistrict within the larger District. ECF No. 100-7 at 3-5. On behalf of the

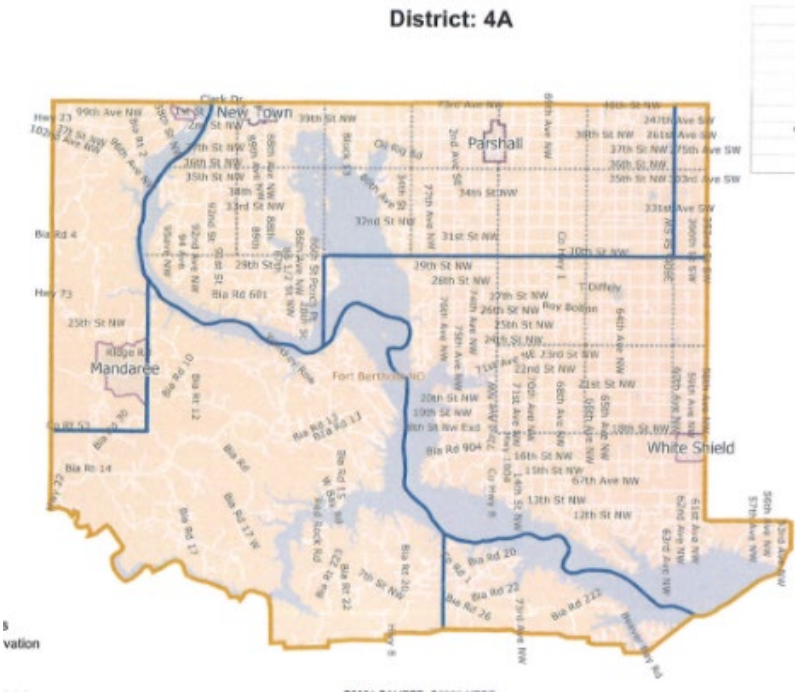
MHA Nation, a Defendant-Intervenor here, Tribal Chairman Mark Fox submitted a proposed map containing a subdistrict (subdistrict 4A) in which Native American voters constituted roughly 67% of the eligible voters, and explained that Section 2 of the Voting Rights Act required such a district. ECF No. 104-10 at 4. The district followed the borders of the MHA Nation reservation and its population was nearly ideal for a single-member subdistrict. ECF No. 104-10 at 4.

The Redistricting Committee discussed how the proposed district would satisfy the first *Gingles* precondition relevant to Section 2 of the Voting Rights Act ("VRA"). ECF Nos. 100-6 at 21-23, 100-7 at 34-36. Chairman Fox testified about racially polarized voting in the region and how it had resulted in the defeat of Native American candidates. ECF No. 104-10 at 2. In particular, he presented testimony about two recent Native American candidates for District 4 state house seats who easily won the voting precincts with large Native American populations on the MHA Nation reservation but nevertheless lost district-wide. ECF No. 104-10 at 2. The Committee discussed racially polarized voting in District 4. ECF Nos. 100-3 at 77-81, 100-5 at 81, 104-14 at 29-30. Members of the legislature testified about their observations that Native American voters in the region preferred different candidates than white voters, and the inability of Native American candidates generally to prevail. ECF Nos. 100-8 at 32, 45-46, 100-9 at 29-30. Moreover, the Committee heard testimony about the history of discrimination against Native Americans in

North Dakota and the inability of Native American candidates to succeed in past elections. ECF Nos. 100-1 at 164-65, 100-3 at 52, 62-63, 100-5 at 65-77.

The Committee also received information about South Dakota's previous redistricting litigation, in which the Eighth Circuit upheld the use of subdistricts to remedy dilution of Native American voting strength—including a subdistrict encompassing portions of the Standing Rock Sioux Tribe's reservation, which geographically overlaps with both South and North Dakota. *See Bone Shirt v. Hazeltine*, 461 F.3d 1011 (8th Cir. 2006); ECF No. 107-1 at 20.

Ultimately, the Committee advanced a redistricting plan that, among other changes, created two at-large senate districts with state house subdistricts, including subdistrict 4A, which followed the boundaries of the MHA Nation reservation, and subdistrict 9A, containing the Turtle Mountain Band of Chippewa Indians reservation in the northeastern part of the state. Subdistrict 4A is shown below:



ECF No. 106-4 at 2.

II. *Walen v. Burgum* lawsuit

Plaintiffs Charles Walen and Paul Henderson filed suit on February 16, 2022, alleging that subdistricts 4A and 9A were racial gerrymanders. ECF No. 1. MHA Nation and two of its members (residents of subdistrict 4A), Lisa DeVille and Cesar Alvarez, intervened as defendants. ECF No. 17. Plaintiffs sought a preliminary injunction in advance of the November 2022 election, which the district court denied. ECF No. 37. Plaintiffs noticed an appeal to this Court but voluntarily dismissed their appeal a short time later. ECF No. 46. Defendant-Intervenor

Lisa DeVille, who is Native American, won election to the subdistrict 4A house seat in November 2022. ECF No. 109-8 at 1-2.

A. Plaintiffs Walen and Henderson

Mr. Walen, a non-Native man, resides in subdistrict 4A. ECF Nos. 109-20 at 14-15; 106-4 at 2. At the time the complaint was filed, Mr. Henderson, a non-Native man, resided outside of subdistrict 9A in subdistrict 9B. ECF No. 109-21 at 27, 36.[1]

Mr. Walen and Mr. Henderson testified at their depositions that their only injury was the use of single-member house subdistricts (with half the total population) rather than multi-member at-large districts. For example, Mr. Walen testified:

> Q. So that's your complaint, that you think you should be able to have two representatives, not just one?
>
> A. Yes, that is the complaint.
>
> Q. Is there anything else about the redistricting plan that you object to?
>
> A. No.
>
> Q. And the extent of the unequal treatment that you think the plan has is that you're represented by one person rather than two?
>
> A. Correct.

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[1] Mr. Henderson no longer resides in a subdistrict. *See infra* Part III.

> Q. And that's the sole reason why you'd like to see the district changed to be one full district?
>
> A. Correct.

ECF No. 109-20 at 23-24; *See also* ECF No. 109-21 at 28-29 (Mr. Henderson, testifying the same). Neither Plaintiff identified the legislature's consideration of race as the basis for their alleged injury. Moreover, subdistrict 9B is represented in the state house by Mr. Henderson's wife, Donna Henderson, and he testified that he was "excited" about the creation of the subdistrict because of the political opportunities it created for them. ECF No. 109-21 at 23.

B. MHA Nation's summary judgment motion

Plaintiffs, the state defendants ("the State"), and MHA Nation all moved for summary judgment. In support of their motion, MHA Nation submitted an unrebutted expert report from Dr. Loren Collingwood establishing the presence of the three *Gingles* preconditions with respect to subdistrict 4A, and unrebutted expert reports from Dr. Daniel McCool and Dr. Kate Magargal regarding the totality of circumstances factors courts consider in assessing a Section 2 claim. ECF Nos. 109-8, 109-18, & 109-19.

1. The unrebutted *Gingles* prong one evidence

Dr. Collingwood reported that subdistrict 4A demonstrated that a reasonably configured single-member house district comprised of a majority of

Native American eligible voters could be created in the area. ECF No. 109-8 at 3. Subdistrict 4A has a Native American voting age population of 67.2%, and "scores very high on measures of compactness" reflecting "a very compact district." ECF No. 109-8 at 3. Plaintiffs offered no contrary evidence, and do not contend on appeal that *Gingles* prong one is unsatisfied.

2. The unrebutted *Gingles* prong two evidence.

Dr. Collingwood presented substantial evidence establishing that Native American voters in subdistrict 4A are politically cohesive. Dr. Collingwood analyzed 35 contests across five election cycles and found that Native American voters were highly cohesive in each contest—often providing more than 90% of their votes for the same candidate. ECF No. 109-8 at 7-12.[2] Dr. Collingwood also found that elections featuring Native American candidates revealed how "race, not partisanship, motivates racially polarized voting in the region." ECF No. 109-8 at 16. As an example, in a 2016 contest for District 4 state representative, Native American voters cast

[2] Dr. Collingwood analyzed the full District 4 to be statistically sound, but over 99% of the Native American population in District 4 is in subdistrict 4A. ECF No. 109-8 at 7-8. Thus Dr. Collingwood's analysis isolates Native American political cohesion within subdistrict 4A. *See* ECF No. 109-8 at 7; *see also* N.D. Legislature, Final Maps Approved by the Committee, https://perma.cc/MK7G-YD7R (Sept. 29, 2021) (noting subdistrict 4B's Native American voting age population of 2.34%).

twice as many votes for the Native American Democratic candidate as they did for the white Democratic candidate. ECF No. 109-8 at 16. Likewise, twice as many white voters cast a ballot for the white Democratic candidate as did for the Native American Democratic candidate. ECF No. 109-8 at 13.

Plaintiffs offered no evidence to dispute Dr. Collingwood's analysis showing that the second *Gingles* precondition was satisfied.

3. The unrebutted *Gingles* prong three evidence.

Dr. Collingwood also found that, without subdistrict 4A, white bloc voting would usually defeat Native American preferred candidates in District 4. Indeed, of the 34 contests across five election cycles analyzed, Dr. Collingwood found that Native American voters' candidate of choice lost 100% of the District 4 contests. ECF No. 109-8 at 21.

Plaintiffs offered no evidence to dispute Dr. Collingwood's analysis showing that the third *Gingles* precondition was satisfied.

4. The unrebutted totality of the circumstances evidence.

MHA Nation offered the expert reports of Dr. Daniel McCool and Dr. Kate Magargal, who opined regarding the presence of the totality of the circumstances factors that implicate Section 2 obligations. Dr. McCool provided evidence regarding the "significant and prolonged history of official and *de facto* discrimination against Native Americans" in

North Dakota, "significant socio-economic differences between Native people and non-Native North Dakotans, and a lack of electoral success for Native Americans." ECF No. 109-18 at 82. Dr. Magargal provided a quantitative analysis of the stark disparities between Native Americans and white North Dakotans in areas such as employment, educational attainment, poverty, and income. ECF No. 109-19 at 13-14. Plaintiffs offered no contrary evidence.

C. Plaintiffs' summary judgment motion

Plaintiffs contended on summary judgment that race had predominated in the creation of subdistrict 4A because the legislature had not *proven* the application of the *Gingles* preconditions with a full statistical analysis prior to enacting the redistricting plan. ECF No. 115 at 16-17. The legislative record in the case was undisputed, and Plaintiffs did not dispute that the VRA *actually required* the legislature to create subdistrict 4A, did not depose MHA Nation's experts, and offered no rebuttal evidence or expert testimony. ECF No. 115 at 17. Instead, Plaintiffs contended that the only question that mattered was whether a sufficient pre-enactment analysis occurred, notwithstanding the fact that the legislature's analysis led to the correct conclusion that the failure to draw subdistrict 4A would violate Section 2. ECF No. 118 at 8-10.

D. The district court grants summary judgment in favor of the State and MHA Nation

On November 2, 2023, the district court granted the State's and MHA Nation's motions for summary judgment and denied Plaintiffs' motion. The court concluded that there were disputed facts as to whether race had been the *predominant* consideration in enacting the challenged districts, App. A15, but that regardless, the undisputed record showed that the legislature had good reasons to believe the subdistricts were required by Section 2 of the Voting Rights Act. App. A16-27. Moreover, the court reasoned that the State and MHA Nation had proffered "compelling and unrefuted evidence that as to District 4, without the subdistrict, Native American voters would in fact have a viable Section 2" claim, that granting the relief Plaintiffs sought with respect to District 4 "would be itself a violation of the VRA and federal law," and that this too demonstrated that the legislature had a compelling interest in creating subdistrict 4A. App. A27.

III. *Turtle Mountain Band of Chippewa Indians v. Howe*

Shortly after the three-judge district court in this case granted the State's and MHA Nation's motions for summary judgment, a single-judge district court entered judgment after a full trial on the merits permanently enjoining the configuration of Districts 9, 9A, 9B, and 15 in northeastern North Dakota. *Turtle Mountain Band of Chippewa Indians v. Howe*,

No. 3:22-cv-22, 2023 WL 8004576, at *17 (D.N.D. Nov. 17, 2023). The district court concluded that the *Gingles* preconditions and totality of circumstances factors were satisfied and that the *Turtle Mountain* plaintiffs had established that the enacted map reduced from three to one the number of legislators Native American voters in the region had an equal opportunity to elect. *Id.* at *4, 16. It did this by packing Native American voters into subdistrict 9A while cracking a substantial neighboring Native American population into subdistrict 9B and District 15. *Id.* at *4.

After the legislature failed to adopt a remedial map, the district court imposed a remedy that eliminated the subdistricts and reconfigured District 9 such that Native American voters have an equal opportunity to elect all three legislative positions. *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 3:22-cv-22, 2024 WL 493275 (D.N.D. Jan.8, 2024). The defendant Secretary of State did not object to the remedial map. *Id.* The Secretary had previously sought a stay of the district court's liability order—contending that 42 U.S.C. § 1983 did not provide a cause of action to enforce Section 2 of the Voting Rights Act—but the Eighth Circuit denied the stay and the remedial map will govern the November 2024 election. *See Turtle Mountain Band of Chippewa Indians v. Howe*, No. 23-3655, 2023 WL 9116675, at *1 (8th Cir. Dec. 15, 2023). That appeal is pending.

REASONS TO DISMISS OR AFFIRM

I. The Court should dismiss this appeal because Plaintiffs lack standing.

Plaintiffs must establish three elements to have standing to invoke a federal court's Article III jurisdiction. First, they "must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). Second, the injury must be "fairly . . . trace[able] to the challenged action of the defendant." *Id.* (internal citation omitted; brackets in original). Third, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision." *Id.* at 561 (internal citation omitted).

These elements "are not mere pleading requirements" and "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* At the summary judgment stage, "the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' which for purposes of the summary judgment motion must be taken to be true." *Id.* (quoting Fed. R. Civ. P. 56(e)).

A. Plaintiffs have no cognizable injury.

Plaintiffs have offered no evidence of an injury tied to their racial gerrymandering claim. The "nature

of the harms that underlie a racial gerrymandering claim . . . are personal. They include being 'personally . . . subjected to [a] racial classification,' as well as being represented by a legislator who believes his 'primary obligation is to represent only the members' of a particular racial group." *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015) (quoting *Bush v. Vera*, 517 U.S. 952, 957 (1996) and *Shaw v. Reno*, 509 U.S. 630, 648 (1993)). Plaintiffs testified, however, that their only objection to the enacted map—*i.e.*, their only injury and their sole claim of unequal treatment—is that they now are represented by one state representative elected from a single-member district rather than two state representatives elected from a multi-member district with twice the total population. ECF Nos. 109-20 at 23-24, 109-21 at 28-29. Plaintiffs disclaimed any other injury as a result of the configuration of the subdistricts within Districts 4 and 9. Indeed, Mr. Walen testified that the "sole reason" he was harmed by the enactment of subdistrict 4A is his desire to vote in a multi-member, rather than a single-member, house district. ECF No. 109-20 at 23-24.

Moreover, at the time he filed his complaint, Mr. Henderson did not even live in subdistrict 9A—the district he alleged was racially gerrymandered. "[A] plaintiff who alleges that he is the object of a racial gerrymander—a drawing of district lines on the basis of race—has standing to assert only that his own district has been so gerrymandered." *Gill v. Whitford*, 585 U.S. 48, 66 (2018). "A plaintiff who complains of gerrymandering, but who does not live in a

gerrymandered district, 'assert[s] only a generalized grievance against governmental conduct of which he or she does not approve.'" *Id.* (quoting *United States v. Hays*, 515 U.S. 737, 745 (1995)). That is so even if a plaintiff lives in a neighboring district whose borders were affected by the racial gerrymandering of another district, because such a person is not personally subject to the harms of a racial gerrymander. *See Sinkfield v. Kelley*, 531 U.S. 28, 29 (2000) (holding that plaintiffs lacked standing to challenge their white-majority district even though some of its borders were affected by a neighboring racially gerrymandered district).

Mr. Henderson testified that he resided in subdistrict 9B in the enacted map[3]—a white-majority district that neighbors the subdistrict that Mr. Henderson's complaint alleges was racially gerrymandered (subdistrict 9A). ECF No. 109-21 at 27, 36. Mr. Henderson neither alleged, nor offered any evidence that he was harmed by the configuration of subdistrict 9A or that subdistrict 9B was itself a racial gerrymander.

In addition, because Plaintiffs have no right—constitutional or otherwise—to multimember representation, they have no Article III standing to vindicate that "right" in federal court. North Dakota law expressly authorizes the legislature to create either single-member subdistricts or multimember

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[3] Following the *Turtle Mountain* remedial order, subdistrict 9B no longer exists. Mr. Henderson now resides in District 15, which elects both house and senate members at large.

districts, N.D. Const. art. IV, § 2; N.D. Cent. Code Ann. § 54-03-01.5(2). Plaintiffs do not—and could not—contend that they suffer a one-person, one-vote injury. Their single-member districts provide the same representational equality as the multimember districts with twice the population. *See Reynolds v. Sims*, 377 U.S. 533, 579 (1964). Plaintiffs lack standing to vindicate a right that does not exist. *See, e.g.*, *Noem v. Haaland*, 41 F.4th 1013, 1018 (8th Cir. 2022) (holding that plaintiff lacked standing to sue to vindicate a non-existent right to shoot off fireworks at Mount Rushmore); *Barhoumi v. Obama*, 234 F. Supp. 3d 84, 86 (D.D.C. 2017) ("[A]n interest is not 'legally protected' or cognizable for the purpose of establishing standing when its asserted legal source—whether constitutional, statutory, common law or otherwise—does not apply or does not exist."). Because the "right" Plaintiffs seek to vindicate does not exist, they lack standing and cannot create standing by pleading a cause of action their testimony refutes.

The district court nevertheless concluded that Plaintiffs had shown a sufficient injury for standing purposes. With respect to Mr. Walen, the district court concluded that this was so because he resides in subdistrict 4A. The district court concluded that it was a "closer call," with respect to Mr. Henderson, App. A11, but that Mr. Henderson alleged a sufficient injury because his complaint alleged that he was placed in a single-member, rather than a multi-member, district due to the racial gerrymander of the neighboring district. App. A11.

The district court erred by permitting Plaintiffs to rest on "mere allegations" of racial injury rather than the standard governing summary judgment, where plaintiffs must adduce actual evidence supporting standing. *See Lujan*, 504 U.S. at 561. Although Plaintiffs' complaint alleges they were harmed by a racial classification, both Plaintiffs testified to the contrary—asserting that their only harm was being placed in *any* single member district, not the use of racial classifications in configuring the districts. *See supra*. At the summary judgment stage, a plaintiff who disclaims any race-based injury in sworn testimony cannot rely upon the complaint's contrary allegations to prove standing.

Because Plaintiffs proffered no evidence of an injury related to racial gerrymandering—and testified to the contrary—and because Mr. Henderson does not even reside in a district alleged to be racially gerrymandered, neither has established a sufficient injury for Article III standing.

B. Plaintiffs' injury is not redressable.

Plaintiffs also lack standing because they failed to adduce any evidence that the purported denial of multimember representation—the sole injury they testified to—is redressable.

Redressability looks at the "causal connection between the alleged injury and the judicial relief requested." *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984). Plaintiffs must demonstrate that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S.

at 561. "If, however, a favorable judicial decision would not require the defendant to redress the plaintiff's claimed injury, the plaintiff cannot demonstrate redressability." *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018).

Plaintiffs adduced no evidence to show that it would be lawful to return to at-large house elections in District 4. Indeed, the district court found based on undisputed evidence that eliminating subdistrict 4A would violate the law. Thus, the sole injury they asserted in sworn testimony is unredressable by judicial relief.

Although the district court concluded otherwise, it did so by again relying exclusively on the "mere allegations," *Lujan*, 504 U.S. at 561, of a racial classification injury in Plaintiffs' complaint rather than—as it was required to—their sworn testimony that the harm suffered was the denial of multi-member representation. Because the sole injury for which Plaintiffs proffered evidence at summary judgment is not redressable by a federal court order, Plaintiffs lack standing and this Court lacks Article III jurisdiction over this appeal.

II. Summary judgment was appropriate because subdistrict 4A undisputedly complies with traditional redistricting principles.

Summary judgment was appropriate because it is undisputed that the legislature did not subordinate traditional districting principles to racial considerations in creating subdistrict 4A. To trigger

strict scrutiny, "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). "[C]ourts must . . . recognize these principles, and the intrusive potential of judicial intervention into the legislative realm, when assessing under the Federal Rules of Civil Procedure the adequacy of a plaintiff's showing at the various stages of litigation and determining *whether to permit discovery or trial to proceed*." *Id.* at 916-17 (quoting Fed. R. Civ. P. 12(b) and (e), 26(b)(2), and 56) (emphasis added).

It is undisputed that the legislature did not subordinate traditional districting principles to racial considerations in creating subdistrict 4A. Plaintiffs do not—and could not—dispute that the district is compact and contiguous. *See* ECF No. 109-8 at 3, 106-4 at 2. Nor do Plaintiffs dispute that subdistrict 4A, by aligning with the boundaries of MHA Nation's reservation, demonstrates "respect for political subdivisions or communities defined by actual shared interests." *Miller*, 515 U.S. at 916.

It is well established that Tribal Nations were "self-governing sovereign political communities" long before the establishment of the United States. *Denezpi v. United States*, 596 U.S. 591, 598 (2022) (citing *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978)); ECF No. 109-12 (Tribal members are "part of a distinct political status that legally distinguishes

them[.]"). And the basic policy that Tribal Nations are separate sovereigns "has remained." *Williams v. Lee*, 358 U.S. 217, 219 (1959); 25 U.S.C. § 5301 (noting the Congressional policy of Tribal Nation "self-government"); Exec. Order No. 14112, 88 Fed. Reg. 86021 (Dec. 11, 2023) (noting policy of protecting "Tribal sovereignty and self-determination."); Cohen's Handbook of Federal Indian Law § 1.07 (Nell Jessup Newton ed., 2023).

Because of the political nature of Tribal Nations, courts have had little trouble finding that respecting the boundaries of Tribal Nation reservations in redistricting is a traditional districting principle that derives from respect for Tribal Nations as sovereign political entities, and not race-based decision-making. *See, e.g.*, *Allen v. Milligan*, 599 U.S. 1, 20 (2023) (noting Alabama's policy of respecting communities of interest in redistricting, including "tribal" areas); *Wattson v. Simon*, 970 N.W.2d 42, 49 (Minn. 2022) ("In recognition of the sovereignty of federally recognized American Indian tribes within Minnesota's borders, these districts preserve and do not divide the tribes' contiguous reservation lands."); *c.f.* Enabling Act of Feb. 22, 1889, Pub. L. No. 50-180, § 4, 25 Stat. 676, 676-77 (recognizing "Indians not taxed" are of a unique status in the United States and therefore North Dakota can make such distinctions); *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1218 (5th Cir. 1991) (*citing Washington v. Confederated Bands of Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979)) (holding that states may enact legislation beneficial to Native Americans

without violating equal protection when doing so pursuant to Congressional authorization). Respecting the boundaries of Tribal Nations is no different than respecting any other political boundary when a state undertakes redistricting.

The Redistricting Committee also heard ample testimony that Tribal Nations are communities of interest that should be maintained together in a district—another traditional districting principle. ECF Nos. 109-5 at 30, 109-12 at 3, 109-14 at 1, 109-16 at 3. The Redistricting Committee honored that request with respect to subdistrict 4A.

By creating a compact, contiguous district that adheres to the boundaries of a federally recognized Indian reservation, the legislature did not subordinate traditional districting principles to racial considerations.

Plaintiffs' only response is that the legislature considered and debated whether Section 2 of the Voting Rights Act also required subdistrict 4A. But simply considering compliance with federal law is not synonymous with racial predominance. And Plaintiffs offered no evidence or arguments in the district court or in their Jurisdictional Statement that subdistrict 4A departs from any traditional districting principles. Nor could they, as a mere glance at the district reveals. *See supra* at 6.

"[T]his Court to date has not affirmed a predominance finding, or remanded a case for a determination of predominance, without evidence that some district lines deviated from traditional

principles." *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 190 (2017). The Court should not chart a different course here. The undisputed characteristics of subdistrict 4A foreclose Plaintiffs' request to proceed beyond summary judgment and impose the costs of an "intrusive" trial upon Defendants and three federal judges for a meritless case. *Miller*, 515 U.S. at 916-17.

III. This Court should summarily affirm because it is undisputed that Section 2 requires subdistrict 4A.

This Court should summarily affirm the judgment below because Plaintiffs do not dispute that Section 2 in fact requires subdistrict 4A. Section 2 liability has two components. First, there must be a showing that (1) the minority population can constitute the majority of eligible voters in a reasonably configured district; (2) the minority population is politically cohesive; and (3) white bloc voting usually defeats the minority preferred candidates in the relevant district. *Thornburg v. Gingles*, 478 U.S. 30, 48-50 (1986). Second, the totality of the circumstances must show that minority voters have less opportunity to elect their candidates of choice. *See* 52 U.S.C. § 10301(b). The totality of circumstances is generally assessed using the nonexclusive factors set forth in the Senate Report accompanying the 1982 amendments to Section 2 (the "Senate Factors"). *Gingles*, 478 U.S. at 36-38.

MHA Nation proffered undisputed evidence that all three *Gingles* preconditions were satisfied and that

the Senate Factors established vote dilution in District 4 under the totality of circumstances.

For the first *Gingles* precondition, Dr. Collingwood showed that subdistrict 4A has a Native American voting age population of 67.2% and is reasonably geographically compact. ECF No. 109-8 at 3. MHA Nation Chairman Fox also testified before the Redistricting Committee regarding the need to maintain MHA Nation as a community of interest. ECF No. 100-5 at 63. For the second *Gingles* precondition, Dr. Collingwood's unrefuted analysis showed that Native Americans in the district are very cohesive, often voting for the same candidates over 90% of the time across 35 analyzed elections over the past decade. ECF No. 109-8 at 1, 8-14. Similarly, Dr. Collingwood proved that subdistrict 4A satisfied the third *Gingles* precondition by showing that the Native American candidate of choice lost 100% of the 34 analyzed elections over the past decade, and won only in the sole election that occurred in subdistrict 4A itself. ECF No. 109-8 at 1-2, 21.

For the totality-of-circumstances inquiry, Dr. McCool and Dr. Magargal submitted detailed reports. ECF Nos. 109-8, 109-18, & 109-19. Dr. McCool submitted qualitative analysis evaluating the Senate Factors. After establishing the history of discrimination faced by MHA Nation tribal members, and lack of electoral success for Native American candidates of choice in the region, Dr. McCool's report concluded:

> 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 creation of Sub-District 4a on the Fort Berthold Reservation is a stark exception to this list of factors . . .

ECF No. 109-18 at 82.

Dr. Magargal's report focused specifically on the fifth Senate Factor: "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." S. Rep. No. 97-417, 97th Cong. 2d Sess. (1982). Dr. Magargal's quantitative analysis found stark disparities between the Native American and non-Native American populations in the region in areas such as employment, educational attainment, poverty, and income. Dr. Magargal concluded:

> These disparities are systemic – meaning they reach into multiple aspects of day-to-day life – and hinder the ability of AIAN [American Indian/Alaska Native] tribal members to participate effectively in the North Dakota political process (Senate Report 1982).

ECF No. 109-19 at 14.

Taken together, the unrebutted reports of Dr. Collingwood, Dr. McCool and Dr. Magargal provided the district court with ample evidence that subdistrict 4A satisfied the *Gingles* preconditions and the totality of the circumstances test. The district court thus correctly concluded that "[t]aking [the] unopposed evidence as true, granting [Plaintiffs] the relief they seek as to district 4—eliminating the subdistrict—would be itself a violation of the VRA and federal law." ECF No. 128 at 20.

Plaintiffs did not dispute any of this evidence, as was their burden at summary judgment. *See* Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (explaining nonmoving party's obligation to respond with evidence showing a "genuine issue for trial"). On appeal they devote a single footnote to MHA Nation's unrebutted proof—and the district court's finding of Section 2 liability—contending that it is "inappropriate" to ascertain whether Section 2 actually requires subdistrict 4A. *See* J.S. 26 n.16.[4] In Plaintiffs' view it is irrelevant that Section 2 actually requires the district—all that matters is whether the legislature's pre-enactment analysis was rigorous enough to provide it with good reasons to think Section 2 applied before adopting the districts. ECF No. 115 at 17.

Plaintiffs misunderstand this Court's precedent. The purpose of the "good reasons" standard is to

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[4] Notwithstanding Plaintiffs' contrary assertion, the district court expressly found that Section 2 required subdistrict 4A. App.A27.

provide "breathing room" for a state to avoid racial gerrymandering liability when it "adopt[s] reasonable compliance measures that may prove, in perfect hindsight, *not to have been needed*" under Section 2. *Cooper v. Harris*, 581 U.S. 285, 293 (2017) (emphasis added). Where, on the other hand, hindsight establishes that Section 2 *required* the compliance measure adopted by the state, it serves no purpose for the Court to assess the adequacy of the legislature's pre-enactment analysis. A state that has *not made a mistake* with respect to its Section 2 obligations needs no breathing room to avoid racial gerrymandering liability because it faces no racial gerrymandering liability, having *complied with*, rather than violated, federal law.

Plaintiffs cite *Wisconsin Legislature v. Wisconsin Elections Commission*, 595 U.S. 398 (2022), for support, but they misapprehend that case as well. There, this Court held that the Wisconsin Supreme Court erred because it found "good reasons" to think that a new majority Black legislative district "*may* be required" by Section 2. *Id.* at 404 (emphasis in original). The Court explained that the state must actually believe—"at the time of imposition"—that Section 2 "*demanded*" the racially-constructed district. *Id.* (emphasis in original). The Court likewise found the *Gingles* precondition record evidence lacking, and remanded for the state supreme court to potentially take additional evidence of whether the preconditions were satisfied. *Id.* at 406. *Wisconsin Legislature*, then, was about how to apply the "good

reasons" exception when it has not yet been proven that Section 2 requires a certain district.

Plaintiffs rest their argument on the phrase "at the time of imposition," but misunderstand its operation. *Wisconsin Legislature* does not prohibit subsequent proof in court that the Section 2 compliance measure was in fact necessary. Instead, the case merely articulates the "good reasons" safe harbor standard that excuses *incorrect* predictions of Section 2 liability. Under *Wisconsin Legislature*, a state must actually believe it will incur Section 2 liability under the proper legal test if it fails to draw a race-based district. Plaintiffs here do not even dispute that the North Dakota legislature actually believed Section 2 required subdistrict 4A.

This Court's disposition in *Wisconsin Legislature* would make no sense if parties were precluded from proving Section 2's application in court. There would have been no reason to remand the case to the Wisconsin Supreme Court to potentially take further evidence of Section 2's applicability if all that mattered was the adequacy of the pre-enactment analysis. Moreover, the Redistricting Committee here had data on each of the *Gingles'* factors and *correctly* identified its Section 2 obligations, which was fully proven on summary judgment.

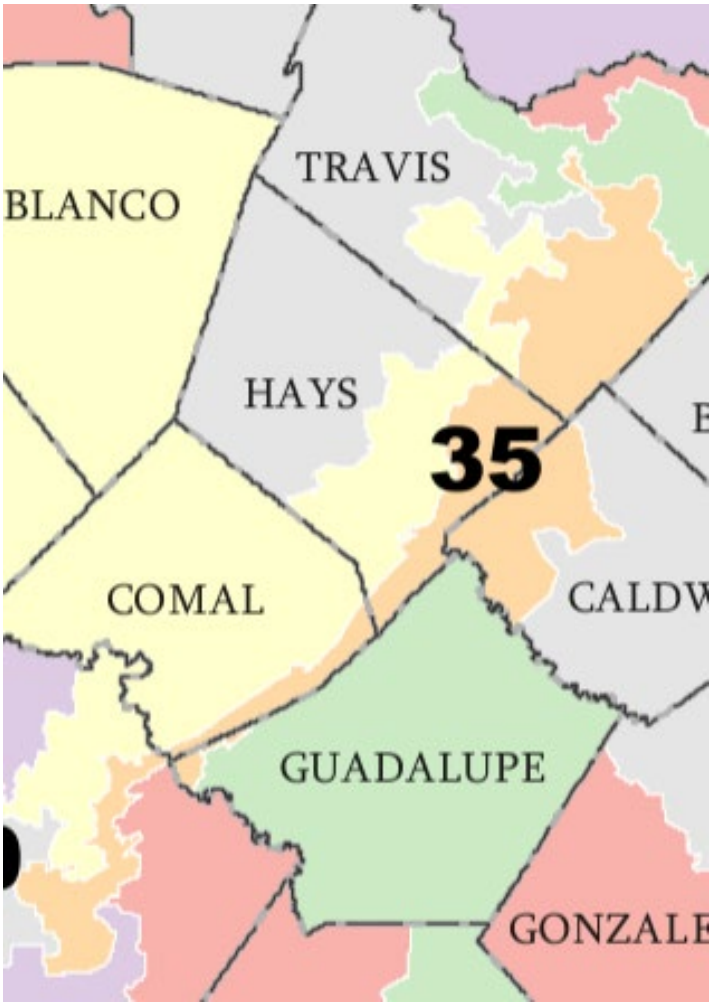
Plaintiffs' narrow focus on the legislative record ignores the district court's finding that subdistrict 4A is required by Section 2, regardless of the abundance of the information evaluated by the legislature. The

district court did not err by declining to grant relief that would violate federal law.

IV. This Court should summarily affirm because the legislature had good reasons to believe Section 2 required subdistrict 4A.

Even if MHA Nation had not proved, with undisputed evidence, that Section 2 *actually requires* subdistrict 4A, the district court correctly concluded that the legislature had good reasons to think it did. App.A1 at 16-27.

In *Abbott v. Perez*, this Court reversed a district court's determination that a Texas congressional district was a racial gerrymander, holding that the legislature had good reasons to believe that the *Gingles* preconditions were satisfied. 585 U.S. 579, 616 (2018). Texas congressional district 35 ("CD35") was drawn to be a Latino-majority district connecting Latino populations in San Antonio and Austin via a thin strip of land along I-35. The district is shown in orange below.



Tex. Legislative Council, Tex. Congressional Districts, 2013-2022, Plan C235 Map Statewide, https://perma.cc/MJ3A-WSJR.

The *Perez* district court reasoned that the legislature lacked good reasons to believe Section 2 required the race-based drawing of CD35 because

"Travis County does not have Anglo bloc voting and thus does not meet the third *Gingles* precondition, which the mapdrawers knew . . . ." *Perez v. Abbott*, 274 F. Supp. 3d 624, 683 (W.D. Tex. 2017), *rev'd in part*, 585 U.S. 579 (2018).

This Court reversed, noting "two serious problems with the District Court's analysis." 585 U.S. at 616. First, the Court explained that the conclusion that the third *Gingles* precondition was unsatisfied was flawed because it "looked at only one, small part of the district, the portion that falls within Travis County." *Id.* But "redistricting analysis must take place at the district level." *Id.* Second, this Court held that "the 2013 Legislature had 'good reasons' to believe that [CD35] was a viable Latino opportunity district that satisfied the *Gingles* factors." *Id.* This was so because

> CD35 was based on a concept proposed by [the Mexican American Legal Defense Fund], and the Latino Redistricting Task Force (a plaintiff group) argued that the district is mandated by § 2. The only *Gingles* factor disputed by the court was majority bloc voting, and there is ample evidence that this factor is met. Indeed, the court found that majority bloc voting exists throughout the State.

Id.[5]

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[5] Ignoring *Perez*, Plaintiffs incorrectly contend that "[i]n every case involving compliance with Section 2 as a defense to a racial gerrymandering case, the Court has struck down the plan at

Perez controls here. Subdistrict 4A was based upon a proposal submitted by MHA Nation Chairman Mark Fox, which he explained was required by Section 2 of the VRA. *See* ECF No. 109-14; *see also Perez*, 585 U.S. at 616 (noting that CD35 was proposed by Latino advocacy organizations). Plaintiffs do not—and could not—dispute that this submission satisfied the first *Gingles* precondition. Chairman Fox likewise addressed the second and third *Gingles* preconditions, explaining that Native American candidates for the at-large version of District 4 had lost elections in 2016 and 2020 despite having "easily won the precincts on the reservation." ECF No. 109-14 at 3; *see also supra* at 4. The district court likewise cited, App. A22, the Redistricting Committee's report, which discussed the three *Gingles* preconditions and summarized testimony the legislature had received that "[n]oted the growth of the Native American populations in North Dakota," "[u]rged the creation of subdistricts for Native American voters to comply with the federal Voting Rights Act," "[n]oted multiple Native American candidates have had unsuccessful campaigns for membership in the House," "[a]sserted there has been a history of discrimination in North Dakota against

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issue." J.S. 36. *Amici* make the same error, Br.at 4 n.4. But the *Perez* court upheld CD35 against a racial gerrymandering claim because the Texas legislature had "good reasons" to think the *Gingles* preconditions were satisfied. Moreover, several of the *Amici* states defended the race-based drawing of CD35 in *Perez* in a manner wholly irreconcilable with their positions here. *See* J.S. of Texas at 32, No. 17-586, *Abbott v. Perez* (Oct. 17, 2017); Br. of *Amici Curiae* States at 16, No. 17-586, *Abbott v. Perez* (Nov. 20, 2017).

Native Americans," and "[a]sserted a history of racial bloc voting has prevented Native American voters from electing their candidates of choice." ECF No. 104-14 at 29.

As in *Abbott*, the only *Gingles* precondition Plaintiffs dispute is the third—whether white bloc voting usually defeats Native American preferred candidates in the absence of the subdistrict. *See* J.S. 19. With respect to District 4, Plaintiffs contend for the first time here that the 2004 election of Native American candidate Dawn Charging to a single term in the house "provides strong circumstantial evidence that the third *Gingles* precondition cannot be met." J.S. 19.[6] Plaintiffs' argument fails. First, the district court did not err by failing to consider Rep. Charging's election because Plaintiffs never raised it below. Plaintiffs cannot seek reversal based on arguments and evidence that they never proffered. *See* Fed. R. Civ. P. 56(c)(3) ("The court need consider only the cited material . . . ."); Fed. R. Civ. P. 56(e) (authorizing court to grant summary judgment if opposing party fails to support or address a fact); *see also Buck v. Davis*, 580 U.S. 100, 127 (2017) (an argument is waived where it was not advanced below); *Sprietsma v. Mercury Maine*, 537 U.S. 51, 56 n.4 (2002) ("Because this argument was not raised below, it is waived."). Second, Plaintiffs cite a single election from a different iteration of District 4 that existed two

[6] Rep. Charging ran as the sole Republican against two Democratic candidates for two available house seats. *See* N.D. Sec'y of State, Official 2004 General Election Results (Nov. 2, 2004), https://perma.cc/N5LX-NJFZ.

decennial redistricting cycles ago, whereas the legislature had before it two recent loses by Native American candidates despite their success in the reservation voting precincts. *See* ECF No. 104-10 at 2; *see also Thornburg v. Gingles*, 478 U.S. 30, 57 (1986) (noting that a single election does not defeat a vote dilution finding); *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1021 (8th Cir. 2006) ("The more recent an election, the higher its probative value."). Third, Plaintiffs offer no evidence that Ms. Charging was Native American voters' candidate of choice, such as whether she prevailed in the reservation precincts.[7] Fourth, Dr. Collingwood's undisputed analysis shows that white bloc voting has defeated Native American voters' preferred candidates in *every* election contest for the past five election cycles. *See supra* Part III.

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[7] Pursuant to S. Ct. R. 15.2, Defendant-Intervenors note that Plaintiffs, J.S. 19, and *Amici*, Br. at 19, highlight Sen. Marcellais' history of election in District 9 but they omit or misstate key facts. Sen. Marcellais won in the *prior* configuration of District 9 where Native American voters constituted over 74% of eligible voters. *See Turtle Mountain*, 2023 WL 8004576, at *2. After the 2021 redistricting map dropped that number to a bare majority, Sen. Marcellais lost to his white opponent in the November 2022 election—which the *Turtle Mountain* court found probative in finding that District 9 violates Section 2. *Id.* at *6, 12. Plaintiffs' and *Amici's* discussion about District 9—and its subdistricts—is irrelevant in any event because they have been permanently enjoined. *See supra* at 13. Likewise, Plaintiffs' offhand contention, J.S. 21 n.12, that the *Turtle Mountain* case—which involved no constitutional claim—should have been heard by a three-judge district court is contrary to the plain text of 28 U.S.C. § 2284, contrary to the position Plaintiffs took in proceedings below, and irrelevant here.

V. Plaintiffs' remaining arguments are meritless.

Plaintiffs' grab-bag of additional objections to the district court's decision lack any merit.

First, Plaintiffs contend that the "good reasons" standard requires a determination that "the VRA *actually* requires" the configuration of subdistrict 4A in order for the state to avoid liability for racial gerrymandering. J.S. 13. Not so; "[the] 'strong basis' (or 'good reasons') standard gives States 'breathing room' to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed." *Cooper*, 581 U.S. at 293 (quoting *Bethune-Hill*, 580 U.S. at 196). But whether or not the legislature's *pre-enactment* analysis was sufficient, MHA Nation *proved*—with unrebutted testimony—that Section 2 actually required subdistrict 4A. *See supra* Part III. And the district court expressly found as much. App. A27.

Second, Plaintiffs cite *Bethune-Hill*'s discussion of North Carolina District 75 to contend that this Court has only upheld a VRA district against a racial gerrymandering claim where it involves "an existing ability-to-elect district, unlike the brand-new subdistrict created for the first time here." J.S. 16-17. But as Plaintiffs themselves acknowledge, J.S. 36, *Bethune-Hill* involved the invocation of Section 5—not Section 2—to justify District 75's configuration. Section 5's retrogression standard, which examined "ability to elect" districts, is irrelevant here. Moreover,

this Court upheld Texas CD35 based upon a Section 2 defense in *Perez*.

Third, Plaintiffs contend that the district court erred by not considering whether the totality of circumstances provided the legislature with good reasons to believe subdistrict 4A was required by Section 2. J.S. 22-25. But this Court has never required a legislature exercising its "breathing room" to conduct a totality-of-circumstances pre-enactment analysis. To the contrary, this Court has held that "[i]f a State has good reasons to think that all the '*Gingles* preconditions' are met, then so too it has good reasons to believe that § 2 requires drawing a majority-minority district." *Cooper*, 581 U.S. at 302. Requiring legislatures to conduct a totality-of-circumstances pre-enactment analysis would eliminate the "breathing room" this Court has long afforded states. *Cooper*, 581 U.S. at 293.[8] Indeed, this Court did not

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[8] *Amici* incorrectly contend that *Wisconsin Legislature* requires a pre-enactment totality-of-circumstances analysis by a legislature. Br. at 12, 16. There the Court addressed the totality-of-circumstances test only to the extent the state supreme court was the mapdrawer, not the governor. 595 U.S. 398, 403-05 (2022). Regardless of whether it makes sense to require a *court* drawing a map to conduct a more robust analysis, the breathing space afforded to a *legislature* (or governor) requires only good reasons to believe the *Gingles* preconditions are satisfied. *See Cooper*, 581 U.S. at 293.

Likewise, *Amici* invent from whole cloth a requirement that the totality of circumstances analysis be limited to the facts that motivated this Court's decisions in *Whitcomb v. Chavis*, 403 U.S. 124 (1971) and *White v. Regester*, 412 U.S. 755 (1973). Br. at 6-10, 24. But this Court reiterated just last year that the Senate Factors guide the totality of circumstances analysis, not *Amici's*

even mention the totality of the circumstances when it upheld CD35 in *Perez*. The Court should reject Plaintiffs' (and *Amici's*) request to eliminate the "breathing room" this Court has long afforded states.

In any event, MHA Nation established via undisputed evidence from two expert witnesses that under the totality of circumstances Section 2 required the creation of subdistrict 4A—evidence the district court credited in reaching the same conclusion. App. A27. Plaintiffs cannot object to that evidence on appeal having failed to carry their burden to even *respond* to it below. *See* Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324 (holding that on summary judgment the "nonmoving party [must] go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" (quoting Fed. R. Civ. P. 56 (e)). Plaintiffs declined to depose MHA Nation's experts, declined to produce their own expert reports, and otherwise offered *no response* to MHA Nation's "compelling and unrefuted evidence," App. A27, regarding the totality of circumstances.

Fourth, Plaintiffs contend that the district court erred by failing to consider the proportionality of Native American representation within District 4. Plaintiffs assert, citing *Johnson v. De Grandy*, 512 U.S. 997, 1022-23 (1994), that "[p]roportionality is generally measured from a relevant area as opposed

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cramped interpretation of cases that precede the 1982 VRA amendments. *See Milligan*, 599 U.S. at 18, 22-23.

to a statewide basis." J.S. 26. For that reason, Plaintiffs argue that subdistrict 4A affords Native American voters extra-proportional representation because they have an equal opportunity in one of two District 4 house seats while constituting a third of District 4's population. J.S. 26. Plaintiffs are wrong on the law and facts.

In *League of United Latin American Citizens v. Perry*, this Court explained that it viewed proportionality on a regional basis in *De Grandy* solely because "[i]n *De Grandy*, the plaintiffs 'passed upon the opportunity to frame their dilution claim in statewide terms'" and the parties agreed the county level was the appropriate metric for proportionality. 548 U.S. 399, 436-37 (2006) ("*LULAC*"). But in *LULAC* the Court expressly held that—in the context of a statewide redistricting plan—it is proper "to look at proportionality statewide." *Id.* at 437. As the *Turtle Mountain* court found, even with subdistrict 4A and the remedial district imposed in that case, Native American voters fall far short of proportional representation in the North Dakota legislature. 2023 WL 8004576, at *16. Moreover, Plaintiffs disregard the fact that there are *three* legislative positions elected from District 4—one senator and two representatives. Even if district-level proportionality were the appropriate metric (it is not), Native American voters—one third of District 4's population—have an equal opportunity to elect one third of its legislative positions.

Fifth, Plaintiffs take issue with the district court's conclusion that there is evidence to support the State's

and MHA Nation's position that race did not predominate in the drawing of subdistrict 4A. J.S. 29. This is so, Plaintiffs explain, because the only subdistricts created were majority Native American districts. J.S. 29. As discussed *supra* Part II, however, subdistrict 4A complies with traditional redistricting principles and follows political boundaries, not racial lines. And even if the subdistricts indicate consciousness of race, Plaintiffs failed to produce any evidence that the traditional criteria were subordinated to racial considerations. *Cf. Shaw v. Reno*, 509 U.S. at 564. Moreover, the contention that drawing *single member districts* violates traditional redistricting principles turns redistricting jurisprudence on its head.

Sixth, Plaintiffs object that the district court decided the case at summary judgment. Although Plaintiffs agree the legislative record is undisputed, J.S. 31, they believe the district court made improper inferences against them from the written record, J.S. 31-35. Plaintiffs do not articulate what specific inferences were purportedly inappropriate, but even if the district court made inferences, that was proper. This is a non-jury matter and Plaintiffs have indicated that the written legislative record is the sum total of their evidentiary presentation regarding the legislature's pre-enactment analysis.[9] "[I]t makes

[9] Plaintiffs repeatedly reference witnesses and credibility determinations, but they disclosed no witnesses below and the only witness they now seek to cross-examine is the State's expert, whom they did not depose, regarding Districts 9 and 9A, which no longer exist. *See* J.S. 20 n.10; *supra* at 13. Plaintiffs' failure to

little sense to forbid the judge[s] from drawing inferences from the evidence submitted on summary judgment when the same judge[s] will act as the trier of fact, unless those inferences involve issues of witness credibility or disputed material facts." *Matter of Placid Oil Co.*, 932 F.2d 394, 398 (5th Cir. 1991).

This Court has directed federal courts adjudicating racial gerrymandering claims to test the "adequacy of a plaintiff's showing at the various stages of litigation" to "determin[e] *whether to permit discovery or trial to proceed*." *Miller*, 515 U.S. at 916-17 (quoting Fed. R. Civ. P. 12(b) and (e), 26(b)(2), and 56) (emphasis added). Plaintiffs' repeated objection that summary judgment is inappropriate in racial gerrymandering cases runs headlong into *Miller*.

VI. Compliance with Section 2 is a compelling interest that satisfies strict scrutiny, but the Court need not reach the issue in this case.

Plaintiffs take issue with this Court's longstanding treatment of Section 2 compliance as a compelling state interest that can satisfy strict scrutiny when race predominates in the drawing of a district. While this Court had previously only *assumed* this, *see Cooper*, 581 U.S. at 292, the Court necessarily converted that assumption into a holding in *Perez* by upholding CD35 as required by Section 2 without disturbing the district court's finding of racial predominance. 585 U.S. at 616. Neither Plaintiffs nor

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avail themselves of discovery does not warrant a trial before a three-judge court.

the State offer any justification for the Court to depart from *Perez*, which is consistent with its longtime assumption.

Nor is there any such justification. This Court held in in *Milligan* that Section 2 is appropriate Fifteenth Amendment enforcement legislation and rejected the argument that it violates the Constitution to engage in "race-based redistricting as a remedy for state districting maps that violated § 2." *Milligan*, 599 U.S. at 41. If it is constitutional to require race-based remedial redistricting to comply with Section 2, then so too it must be constitutional—and certainly a compelling state interest—for a State to comply with Section 2 in enacting districts.

Regardless, the Court should reject Plaintiffs' invitation to revisit its precedent on this issue. Plaintiffs' appeal fails for a host of reasons—including jurisdictional defects—that make it unnecessary to do more than dismiss or summarily affirm.

CONCLUSION

The Court should dismiss this appeal for lack of jurisdiction under Article III. In the alternative, the Court should summarily affirm the district court's judgment.

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Respectfully submitted,

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