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

Civil No: 1:22-CV-00031

Charles Walen, an individual; and Paul Henderson, an individual,

Plaintiffs

vs.

Doug Burgum, in his official capacity as Governor of the State of North Dakota; Michael Howe, in his official capacity as Secretary of the State of North Dakota,

Defendants

and

The Mandan, Hidatsa and Arikara Nation; Lisa DeVille, an individual; and Cesareo Alvarez, Jr., an individual.

Defendants-Intervenors

DEFENDANTS DOUG BURGUM AND MICHAEL HOWE'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

*** *** ***

Defendants[1] request the Court grant them summary judgment on Plaintiffs' lawsuit claims challenging Subdistricts they contend were drawn based on race in violation of Equal Protection. The undisputed facts demonstrate Plaintiffs lack the necessary Article III standing to challenge the subdistricting in one of the two Subdistricts, as neither Plaintiff resides there and neither has suffered personal harm. Moreover, the undisputed evidence confirms the redistricting was

[1] Defendants Doug Burgum, in his official capacity as Governor of the State of North Dakota and Michael Howe, in his official capacity as Secretary of State of North Dakota ("Defendants") submit this memorandum in support of *[] Motion for Summary Judgment* (Doc. 101) and in reply to *Plaintiffs' Memorandum in Response to Defendants' Motion for Summary Judgment* (Doc. 114) ("Plaintiffs Response"). Defendants request the Court dismiss the lawsuit of Plaintiffs' Charles Walen and Paul Henderson ("Plaintiffs") pursuant to Fed. R. Civ. P. 56 and Local Civil Rule 7.1.

conducted using traditional race-neutral redistricting principles, or, so as to comply with the VRA, either of which is a complete defense. Lastly, Defendants are entitled to summary judgment because Plaintiffs' requested remedy would itself violate the VRA.

The evidence and controlling law confirm Defendants are entitled to judgment as a matter of law, and the Court should grant summary judgment to Defendants.

DISCUSSION[2]

In their Response, Plaintiffs make essentially four arguments why Defendants are not and they themselves are entitled to summary judgment, all of which are legally and factually incorrect or based upon an artificially narrow reading of the evidence in the record and a fundamental misreading of the controlling case law. Those arguments are:

1. Plaintiffs have Article III standing to challenge the subdistricting in Subdistrict 9A because Plaintiff Henderson resides in District 9 and he challenges the entire District 9 map;
2. The Legislature did not consider traditional redistricting principles because it "invoked, the VRA" in drawing the challenged subdistricts;
3. The State did not perform any of the required pre-vote expert and statistical analysis allegedly required by controlling case law and thus cannot invoke the safe harbor of compliance with Section 2 of the VRA; and
4. The Equal Protection clause requires the removal of the subdistricts.

See generally Plaintiffs' Response (Doc. 114). As more fully set forth below and in Defendants' prior briefing, Plaintiffs' arguments do not pass muster when the controlling legal standard is applied to the undisputed material facts. Plaintiffs' arguments should therefore be rejected.

I. *Plaintiffs Lack Article III Standing to Challenge Subdistrict 9A.*

[2] Defendants incorporate by reference herein the undisputed material facts, law and analysis contained in their *Memorandum in Support of Defendants' Motion for Summary Judgment* (Doc. 102), as well as the *affidavit* (Docs. 103-106) and supporting papers filed therewith, and incorporate by reference the law and analysis contained in their *[] Memorandum In Opposition To Plaintiffs' Motion For Summary Judgment* (Doc. 111).

Although the Court need not and cannot evaluate the merits of the case if Plaintiffs have not first met their Article III standing burden, Plaintiffs nevertheless save their question-begging arguments about standing until the end of their Response. In their Response, while ignoring the controlling law that requires the challenger to reside in the alleged gerrymandered majority-minority district and to provide proof of the "deni[al] equal treatment" due to the challenged redistricting, Plaintiffs argue instead that Plaintiff Henderson *must have* standing because he resides in the same District out of which the challenged Subdistrict 9A is drawn. Plaintiffs further argue they have standing because "Representatives from Districts 4 and 9 are no longer elected at-large, but are instead elected only by citizens in their respective Subdistrict." Response at 33.[3] Both arguments show at most generalized grievances that are insufficient to confer standing.

First, it is clear that the minority-majority district that Plaintiffs attack in this lawsuit is not District 9 *generally* but rather is Subdistrict 9A *specifically*, which they contend and the evidence shows is largely drawn around Reservation boundaries. Response at 22 ("The circumstantial evidence of the design of the Subdistricts to follow Reservation boundaries and to create a majority population of Native American voters establishes race was the predominant factor in creating the Subdistricts."). Although they now quibble, Plaintiffs concede the claimed racially gerrymandered portion of District 9 is Subdistrict 9A – not Subdistrict 9B where Plaintiff Henderson resides. (Doc. 105-4). Plaintiff Henderson's place of residence in Subdistrict 9B, a majority white district (doc. 104-17), is not sufficient to provide him with the kind of personal harm that would confer standing to attack the neighboring majority-minority Subdistrict 9A, and the controlling case law agrees.

[3] The Complaint contains the same generalized grievance as follows: "The creation of these Subdistricts deprives the citizens of Districts 4 and 9 from multi-member representation in the House of Representatives, as each citizen is now only represented by a single Representative elected in the Subdistrict in which they reside. All other North Dakota citizens retain the benefit of multi-member representation in the House of Representatives." Complaint at ¶ 41.

In *Sinkfield v. Kelley*, 531 U.S. 28, 30-31 (2000), the Court held there was no standing for white plaintiffs residing in "various majority-white districts" that are "adjacent to majority-minority districts" as plaintiffs allegations were at most generalized grievances that lacked evidence they were "personally subjected to a racial classification.". Likewise in *U.S. v. Hays*, 515 U.S. 737, 739 (1995), the Court found there was no standing for plaintiffs who resided in District 5 that neighbored the allegedly gerrymandered majority-minority District 4, and the Court furthermore rejected the plaintiffs' argument as "irrelevant" that they "challenged [the redistricting map] in its entirety, not District 4 in isolation."). Plaintiffs here make essentially the same arguments made in *Sinkfield* and in *Hays* that they are challenging the redistricting in District 9 in its entirety, not just the majority-minority Subdistrict 9A. Because *Sinkfield* and *Hays* rejected the arguments of almost identically situated plaintiffs, the Court should likewise reject Plaintiffs' arguments here.

Secondly, the standing analysis further requires the plaintiff to show he was "personally subjected to a racial classification", for example by showing proof that his elected representative will not advocate for the plaintiff's interests but only for the interests of the other racial group. This was explained by the U.S. Supreme Court in 2015, as follows:

> Our district-specific language makes sense in light of the nature of the harms that underlie a racial gerrymandering claim. Those harms are personal. They include being "personally ... subjected to [a] racial classification," *Vera,* [], as well as being represented by a legislator who believes his "primary obligation is to represent only the members" of a particular racial group, *Shaw I* []. They directly threaten a voter who lives in the *district* attacked. But they do not so keenly threaten a voter who lives elsewhere in the State. Indeed, the latter voter normally lacks standing to pursue a racial gerrymandering claim. *Hays*[.]

Alabama Legislative Black Caucus v. Alabama, 575 U.S. 254, 263 (2015) (cleaned up) (quoting *Bush v. Vera*, 517 U.S. 952, 957 (1996)) and *Shaw v. Reno*, 509 U.S. 630, 648 (1993) (*Shaw I*). Justice Stevens' dissent in *Shaw* describes the type of concrete harm that may give rise to standing:

"[A]n equal protection violation may be found only where the electoral system *substantially disadvantages certain voters in their opportunity to influence the political process effectively.*" *Shaw*, 509 U.S. at 662–63 (*Stevens dissenting*) (cleaned up, emphasis in original)).

Under the controlling standard that requires a plaintiff to be "personally subjected to a racial classification", neither Plaintiff has met or can meet the burden. Because Plaintiff Henderson is represented by his wife in his own majority white Subdistrict 9B (doc. 106), there is simply no way he can prove being personally subjected to a racial classification, no way he can prove his elected representative (his wife) is advocating only for members of another racial group, and no way he can prove he has been "substantially disadvantaged in his opportunity to influence the political process." Plaintiff Henderson's grievances about the neighboring majority-minority Subdistrict 9A (as well as Plaintiff Walen's grievances about District 9) are of the generic variety the U.S. Supreme Court has unequivocally declared to be inadequate to confer standing. As such, all of the Plaintiffs' lawsuit claims challenging the subdistricting of District 9 should be dismissed.

II. *"Invocation" of the VRA is a Red Herring: Traditional Race-Neutral Considerations Predominated.*

Another fallacy in Plaintiffs' reasoning is that the Legislature "invoked the VRA" in adopting the Challenged Subdistricts, and thus it can be assumed race *must have* predominated over traditional redistricting principles. This is an attempt to turn the legal standard on its head. The burden of proof to show raced predominated cannot be assumed but rather is squarely on the plaintiff challenging the redistricting decision. *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 187 (2017). Nor is alleged "invocation of the VRA" evidence that race predominated as Plaintiffs argue. It is entirely natural and not inherently suspect for a legislature to discuss race and to discuss compliance with the VRA in redistricting decisions. *Cooper v. Harris*, 581 U.S. 285, 347 (2017) (Alito S., concurring) (stating in part, "[A]ny mention of race by the decisionmakers

may be cause for suspicion. We have said, however, that that is not so in the redistricting context [. . .] [A]ll legislatures must also take into account the possibility of a challenge under § 2 of the Voting Rights Act claiming that a plan illegally dilutes the voting strength of a minority community. (citations omitted)). Interestingly, Plaintiffs contend *Cooper* controls because of the testimony of co-chairmen of North Carolina's redistricting committee in which they apparently argued the majority-minority districts were required to comply with the VRA and the Court considered such testimony to show race predominated. Plaintiffs' Response at 17-18. Yet, a cursory view of the challenged redrawn districts in *Cooper* confirm that case does not assist Plaintiffs' position about traditional race-neutral redistricting principles in this case. *Cooper*, 581 U.S. at 310 & Appendix (describing unusual and obviously gerrymandered shapes of challenged districts that were held to have been drawn impermissibly based on race). The Court should reject the invalid assumptions about "invoking the VRA" and the Court should evaluate the entire record, which demonstrates traditional considerations predominated over racial ones.

In fact, the controlling legal standard in this regard requires the Court to proceed with "extraordinary caution," to "assume" the State's redistricting was enacted in "good faith," and requires the Court to evaluate whether the State has "defeat[ed] a claim that a district has been gerrymandered on racial lines" such that summary judgment to the State may be appropriate. The following discussion from the U.S. Supreme Court illustrates these points:

> The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race. The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-

> neutral districting principles, [] to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can defeat a claim that a district has been gerrymandered on racial lines. These principles inform the plaintiff's burden of proof at trial. Of course, courts must also 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.

Miller v. Johnson, 515 U.S. 900, 916–17 (1995) (citations and quotations omitted). Plaintiffs ask the Court to disregard this legal standard entirely, and in the same spirit refuse to concede any traditional redistricting principles were considered or applied at all. But that is obviously untrue when the evidentiary record is considered.

In the furtherance of their extreme position, Plaintiffs present essentially "negative proof" arguing that since there is no committee or floor testimony to show for example that statistical compactness or contiguity analyses were ever performed, therefore it never happened. They insist, that in order for the State to prove it considered traditional redistricting principles, some Legislative representative would have been required to announce, for example: "We are now considering compactness . . ." and the like. Plaintiffs provide no controlling authority for their position that N.D.'s Legislature was required to waste its time and resources on such matters. Indeed, the controlling law demonstrates these sorts of arguments about what is required to be in the legislative record are a distraction, as the U.S. Supreme Court has held, "we do not ... require States engaged in redistricting to compile a comprehensive administrative record." *Bethune-Hill*, 580 U.S. 178 at 195 (citing *Bush v. Vera*, 517 U.S. 952, 966 (1996)).

As described at length in Defendants' prior summary judgment briefing (docs. 102 & 111), there is overwhelming evidence traditional race-neutral redistricting principles factored heavily in the map that was adopted, including in drawing the Challenged Subdistricts. The Legislature

indeed considered and applied those principles, most especially with regard to the principles of compactness, contiguity, preserving political subdivisions and communities of shared interests, and preservation of cores of prior districts. Plaintiffs cherry picking of the record is woefully inadequate to prove otherwise. Additionally, Plaintiffs briefing ignores the proof that is the maps themselves. (Doc. 105-4); *see also* https://www.ndlegis.gov/assembly/67-2021/special/approved-legislative-redistricting-maps (last visited April 4, 2023). The maps *per se* demonstrate compactness and contiguity, as well as demonstrating preservation of political subdivision boundaries, preserving communities of shared interest (coinciding with Reservation boundaries), and preservation of the cores of prior districts. With the maps that were actually drawn and based on the record, Plaintiffs have not met and cannot as a matter of law meet their burden to show race predominated over traditional race-neutral principles. The Legislature's discussions about compliance with the VRA was completely normal, not unexpected, and is not inherently suspect.

Therefore, the Court can and should decide at the summary judgment stage that race did not predominate as a matter of law in the adoption of the Challenged Subdistricts.

III. *Pre-vote Expert Reports and Statistical Analyses are not Part of the Safe-Harbor.*

Plaintiffs also argue that the Legislature was required to conduct pre-vote technical and statistical analyses prior to adopting the Challenged Subdistricts. Absent such pre-vote activities, Plaintiffs maintain the State is not protected by the VRA's safe harbor. This argument is also disposed of by the U.S. Supreme Court's holding that states are not required to "compile a comprehensive administrative record." *Bethune-Hill*, 580 U.S. 178 at 195 (citation omitted). This means statistical analyses and expert reports are not a strict requirement. Nor does other controlling case law require any particular pre-vote analysis, but rather the applicable analysis is whether the State had a "strong basis in evidence" or "good reasons" to believe its actions were necessary to

comply with Section 2 of the VRA. *Cooper*, 581 U.S. at 293 ("[T]he State must establish that it had 'good reasons' to think that it would transgress the Act if it did not draw race-based district lines. [] That "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."); *Wisconsin Legis. v. Wisconsin Elections Comm'n*, 142 S. Ct. 1245, 1249 (2022) (same).

For the proposition that pre-vote statistical analysis is a strict requirement to invoke the VRA's safe harbor, Plaintiffs rely on *Growe v. Emison*, *League of Latin American Citizens v. Perry*, *Thornburg v. Gingles*, and other cases. Response at 23-24. However, none of those cases supports Plaintiffs' position, and all are distinguishable.[4] For example, all of those cases are legally and procedurally different in that they are VRA cases (not Equal Protection cases) and none actually holds that pre-vote statistical analysis is a hard and fast requirement that must be present to justify legislative action in every instance. On the contrary, the legal standard set forth in all cited cases requires the Court to simply consider the *evidence* supporting or disproving the *Gingles* preconditions, and to consider the Senate Factors under the "totality of the circumstances", but the type of evidence that will suffice is not strictly defined. *E.g.*, *Growe*, 507 U.S. 25 at 42 (citing

[4] *Growe v. Emison*, 507 U.S. 25 at 41 (VRA case: scrutinizing court drawn map containing "super-majority districting remedy" obviously drawn on the basis of race alone); *League of Latin American Citizens v. Perry*, 548 U.S. 399, 427 (2006) (concerning claimed vote dilution under VRA in a former majority Latino district that upon redistricting "includes seven full counties" in "a long, narrow strip that winds its way from McAllen and the Mexican-border towns in the south to Austin, in the center of the State and 300 miles away."); *Thornburg v. Gingles*, 478 U.S. 30, 52-53 (1986) (black residents in VRA action challenging numerous redrawn districts; court considered (but did not require) statistical and other evidence to establish racially polarized voting); *Buckanaga v. Sisseton Indep. Sch. Dist., No. 54-5, S. Dakota*, 804 F.2d 469, 470 (8th Cir. 1986) (VRA case); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 980 (D.S.D. 2004) (VRA case); *Sanchez v. State of Colo.*, 97 F.3d 1303, 1305 (10th Cir. 1996) (same); *Missouri State Conf. of the [NAACP] v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1015 (E.D. Mo. 2016), aff'd, 894 F.3d 924 (8th Cir. 2018) (same).

Gingles for the proposition a court can indeed consider "statistical and anecdotal evidence" but that the "plaintiffs must prove" a Section 2 violation).

As analyzed at length in Defendants' prior briefing, Defendants have fully met their safe harbor showing based on the record evidence with respect to the Challenged Subdistricts.

IV. *Plaintiffs' Requested Remedy - Removal of the Subdistricts – Would Offend both the VRA and Equal Protection.*

While Plaintiffs request the Court simply remove the Challenged Subdistricts, all record evidence shows this would itself result in a violation of Section 2 of the VRA. Defendants' expert has authored a report essentially concluding Plaintiffs' remedy violates the VRA, as has Intervenors' expert in relation to District 4.[5] On the other hand, Plaintiffs have not provided any competing expert or other showing to validate their drastic remedy requesting judicial removal of the Challenged Subdistricts. *See Growe*, 507 U.S. 25 at 34 (cautioning against preempting states' legislatures in apportionment matters) (citation omitted)). The Court should reject such a drastic remedy as the undisputed evidence shows the remedy would simply spawn additional claims.

CONCLUSION

For the foregoing reasons, Defendants request the Court grant summary judgment in their favor, dismissing the Plaintiffs' Complaint (doc. 1) in its entirety with prejudice.

Dated this 4th day of April, 2023.

By: *<u>/s/ Bradley N. Wiederholt</u>*
David R. Phillips (# 06116)

[5] Hood (Doc. 106-2) at 7 ("Given the presence of racially polarized voting in the district ("LD 9"), it is unlikely that the Native American candidate of choice would be regularly elected if the district did not contain a majority Native American voting age population."); *Id.* at 10 ("[I]t is highly unlikely that a Native American preferred candidate of choice would be elected within the geographic boundaries of LD 4 as a whole."); Collingwood (Doc. 106-3) at 21 ("Sub-District 4A thus affords Native American voters the opportunity to elect their candidates of choice that they otherwise lack in the absence of the sub-district.").

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS DOUG BURGUM AND MICHAEL HOWE'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was on the 4th day of April, 2023, filed electronically with the Clerk of Court through ECF:

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