

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

TURTLE MOUNTAIN BAND OF CHIPPEWA
INDIANS, *et al.*,

Plaintiffs,

v.

MICHAEL HOWE, in his official capacity as Secretary
of State of the State of North Dakota,

Defendant.

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

PLAINTIFFS' MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

Pursuant to Federal Rule 15(a)(2), Plaintiffs respectfully seek leave to file their First Amended Complaint. *See* Ex. A. Plaintiffs have included a redline showing changes introduced by the First Amended Complaint. *See* Ex. B. The Secretary has already informed the Court of his opposition to Plaintiffs' ability to amend their complaint and pursue their case on remand.

As explained in Plaintiffs' Memorandum of Law in Support of their Motion for Leave to File First Amended Complaint, Rule 15(a)(2) embodies a liberal policy where "leave to amend 'shall be freely given when justice so requires.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962) (quoting Fed. R. Civ. P. 15(a)(2)); *see Cheeks v. Belmar*, 162 F.4th 899, 907 (8th Cir. 2025). In accordance with this liberal policy, both the Supreme Court and the Eighth Circuit have held that it is an abuse of discretion to deny leave to amend without a recognized basis for the denial, "such as undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies . . . , undue prejudice to the non-moving party, or futility of amendment." *Kozohorsky v. Harmon*, 332 F.3d 1141, 1144 (8th Cir. 2003) (quoting *Thompson-El v. Jones*, 876 F.2d 66, 67 (8th Cir. 1989));

Foman v. Davis, 371 U.S. 178, 182 (1962) (“[O]utright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.”). As further explained in Plaintiffs’ Memorandum of Law, there is no recognized basis to deny Plaintiffs’ leave to file their First Amended Complaint.

For the foregoing reasons, Plaintiffs’ Motion for leave to amend their complaint should be granted.

August 28, 2026

/s/ Leonard R. Powell

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CERTIFICATE OF SERVICE

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

/s/ Mark P. Gaber

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Exhibit A

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

TURTLE MOUNTAIN BAND OF
CHIPPEWA INDIANS, SPIRIT LAKE
TRIBE, WESLEY DAVIS, ZACHERY S.
KING, and COLLETTE BROWN,

Plaintiffs,

v.

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

Defendant.

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

THREE-JUDGE COURT REQUESTED

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Pursuant to 52 U.S.C. § 10310 and 42 U.S.C. § 1983, Plaintiffs file this action challenging North Dakota’s 2021 legislative redistricting as a violation of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. The 2021 redistricting law dilutes the voting strength of Native American voters from the reservations of the Turtle Mountain Band of Chippewa Indians and the Spirit Lake Tribe by packing and cracking those voters, reducing from two to one the number of state house seats in which Native American voters in this region of the state have an opportunity to elect their candidate of choice. This was intentional in its design and race predominated in the decision to diminish Native American voting strength.

INTRODUCTION

1. On November 11, 2021, Governor Doug Burgum signed into law House Bill No. 1504 (“HB 1504”), redrawing North Dakota’s state legislative districts to account for population shifts captured by the 2020 Census. H.B. 1504, 67th Leg., Spec. Sess. (N.D. 2021).

2. HB 1504 establishes an effective Native American voting majority for two state house seats; however, the Voting Rights Act (“Voting Rights Act” or “VRA”) requires the establishment of an effective Native American voting majority for three state house seats and one senate seat that will allow Native American voters to elect the candidate of their choice.

3. North Dakota has 47 state legislative districts, and traditionally one senator and two state representatives are elected at large from each district. However, North Dakota law permits state house representatives to be elected either at-large *or* from subdistricts within a given senatorial district. N.D.C.C. 54-03-01.5(2).

4. HB 1504 contains two house subdistricts in which Native Americans have a meaningful opportunity to elect candidates of their choice to the North Dakota State House. Those are House District 9A and House District 4A. Residents of each subdistrict elect only a single representative to the state house.

5. House District 4A covers the Fort Berthold Indian Reservation of the Mandan, Hidatsa, and Arikara (MHA) Nation.

6. HB 1504’s redistricting plan places the Turtle Mountain Reservation into District 9 (divided into subdistricts 9A and 9B) and the Spirit Lake Reservation into District 15 (with no subdistricts).

7. By subdividing District 9 and keeping Spirit Lake out of District 9, the plan simultaneously packs a substantial number of Turtle Mountain Band of Chippewa Indians members into one house district, and cracks both the remaining Turtle Mountain Band of Chippewa Indian members and Spirit Lake Tribe members out of any majority Native legislative district.

8. The packing of Native American voters in northeastern North Dakota into a single state house subdistrict, and the cracking of nearby Native American voters into two other districts dominated by white voters who bloc vote against Native American's preferred candidates, unlawfully dilutes the voting rights of Turtle Mountain and Spirit Lake Native Americans in violation of Section 2 of the VRA.

9. In order to comply with the VRA, North Dakota must implement a redistricting plan in which Native American voters on the Turtle Mountain and Spirit Lake Reservations comprise an effective, geographically compact majority in a single legislative district. Such a plan can be configured without the use of race and while satisfying all of the State's legitimate districting objectives, is legally required, and would provide those Native American voters the opportunity to elect their preferred candidates to both at-large state house seats and the state senate.

10. A legislative district that joins the Turtle Mountain and Spirit Lake Reservations is in fact the natural consequence of following the State's redistricting criteria. A configuration like the 2021 enacted map would *not* be expected to arise by merely following the State's nonracial redistricting criteria. Indeed, a configuration that separates the Turtle Mountain and Spirit Lake Reservations is a statistical outlier from randomly generated maps that result from following the State's redistricting standards and criteria. This indicates that the extreme, 20-point reduction in District 9's Native American voting age population from the prior decade's map and the packing and cracking of Districts 9, 9A, 9B, and 15 was a purposeful device to "abridge" Native Americans' "right to vote . . . on account of race," U.S. Const. amend. XV, and deny them equal protection, U.S. Const. amend. XIV.

JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 1357, 42 U.S.C. § 1983, and 52 U.S.C. § 10301, *et seq.* Plaintiffs’ action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202, as well as Rules 57 and 65 of the Rules of Civil Procedure. The three-judge court has jurisdiction pursuant to 28 U.S.C. § 2284. Jurisdiction for Plaintiffs’ claim for costs and attorneys’ fees is based upon Rule 54, 42 U.S.C. § 1988, and 52 U.S.C. § 10310(e).

12. This court also has jurisdiction pursuant to 28 U.S.C. § 1362, which provides that “district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.”

13. The Court has personal jurisdiction over Defendant, who resides in this district.

14. Venue is proper in this Court under 28 U.S.C. §§ 1391(b) and (e). Defendant resides in the State of North Dakota, and Defendant is a state official performing official duties in Bismarck, North Dakota. Plaintiff Tribes and Individual Plaintiffs are located within the State of North Dakota.

PARTIES

Plaintiff - Spirit Lake Tribe (Mni Wakan Oyate)

15. Plaintiff Spirit Lake Tribe - Mni Wakan Oyate is a federally recognized Tribe with an enrollment of 7,559 members as of 2022. 86 Fed. Reg. 7557.

16. The Spirit Lake Tribe is located on the Spirit Lake Reservation. The Tribal Headquarters are located at 816 3rd Ave. North, Fort Totten, ND 58335.

17. The Spirit Lake Reservation is in east central North Dakota, and covers approximately 405 square miles, primarily in Benson County and Eddy County, with parts extending into Nelson, and Ramsey Counties. The Spirit Lake Reservation was established in 1867 through a treaty between the Sisseton Wahpeton Sioux Bands and the United States. The Treaty forced the relocation of the Sisseton Wahpeton Sioux Bands from a more expansive territory in present-day Minnesota and the Northern Plains onto the Reservation with the Sisseton, Wahpeton and the Cuthead Bands of the Yanktonais, who had already been forced onto the Reservation. These Bands make up the present-day Spirit Lake Tribe.

18. Approximately 3,459 Spirit Lake members live on the Spirit Lake Reservation as of 2022, with more living in surrounding areas. This includes a sizeable population of eligible voters.

19. HB 1504 places the Spirit Lake Reservation, except the small portion that extends into Nelson County, into Legislative District 15, which is comprised of one single-member state senate district and a two-member at-large state house district.

Plaintiff - Turtle Mountain Band of Chippewa Indians

20. Plaintiff Turtle Mountain Band of Chippewa Indians is a federally recognized Tribe with an enrollment of more than 30,000 members as of 2022. 86 Fed. Reg. 7557.

21. Today, the Turtle Mountain Band of Chippewa Indians is located on the Turtle Mountain Indian Reservation. Many Turtle Mountain citizens live on the Reservation and in the surrounding areas, including on lands held in trust for the Tribe by the federal government outside the boundaries of the reservation. The Tribal Headquarters are located at 4180 Highway 281, Belcourt, ND 58316.

22. The Turtle Mountain Reservation covers 72 square-miles in north central North Dakota, located entirely within Rolette County. It is one of the most densely populated reservations in the United States, with a population of 5,113 in 2020 according to the United States Census Bureau. This includes a sizeable population of eligible voters. Substantial populations of tribal citizens also live in the areas surrounding the Reservation, including Rolla, St. John, Dunseith, and Rolette.

23. HB 1504 places the Turtle Mountain Indian Reservation into Senate District 9 and House District 9A. Lands held in trust for the Turtle Mountain Band of Chippewa Indians are located in House District 9B.

24. A substantial population of Turtle Mountain citizens live in House Districts 9A and 9B.

Individual Voter Plaintiffs

25. Plaintiffs also include individual Native American voters (“Individual Plaintiffs”) who reside in the districts that violate Section 2 of the Voting Rights Act and the Constitution.

26. Individual Plaintiffs’ votes are diluted in violation of Section 2 of the Voting Rights Act because they are either: (a) cracked into districts where Native Americans make up less than a majority of the voting age population and their voting power is overwhelmed by a white bloc voting in opposition to their candidates of choice, as in District 15; or (b) packed into a subdistrict with an excessively high number of Native voters—well above what is necessary to afford them an equal opportunity to elect their preferred candidate—as in House District 9A.

27. Plaintiff Wesley Davis is Native American and a citizen of the Turtle Mountain Band of Chippewa Indians. Mr. Davis resides on the Turtle Mountain Reservation and within State Senate District 9 and House District 9A under HB 1504. Mr. Davis has lived at his residence for

14 years, has lived on the Turtle Mountain Reservation for 34 years, and is a regular voter in North Dakota elections. Mr. Davis intends to vote in 2026 and future elections.

28. Plaintiff Zachary S. King is Native American and a citizen of the Turtle Mountain Band of Chippewa Indians. Mr. King resides on the Turtle Mountain Reservation and within State Senate District 9 and House District 9A under HB 1504. Mr. King has lived at this residence for 39 years and is a regular voter in North Dakota elections. Mr. King intends to vote in 2026 and future elections.

29. Plaintiff Collette Brown is Native American and a citizen of the Spirit Lake Tribe. Ms. Brown resides on the Spirit Lake Reservation and within Legislative District 15 under HB 1504. Ms. Brown has lived at this residence for 23 years, has resided on the Spirit Lake Reservation for 47 years and is a regular voter in North Dakota elections. In 2024, Ms. Brown was elected as a state representative to District 9 in the remedial map imposed by this Court and is a candidate for that position in the November 2026 election. Ms. Brown intends to vote in 2026 and future elections.

Defendant

30. Defendant Michael Howe is sued in his official capacity as Secretary of State of North Dakota. The North Dakota Secretary of State is the State's supervisor of elections and is responsible for "supervis[ing] the conduct of elections," and "publish[ing] . . . a map of all legislative districts." N.D.C.C. §§ 16.1-01-01(1) & (2)(a). He is tasked with "maintain[ing] the central voter file," which "must contain . . . the legislative district . . . in which the [voter] resides." N.D.C.C. §§ 16.1-02-01 & -12(6).

LEGAL BACKGROUND

31. Section 2 of the Voting Rights Act, 52 U.S.C. § 10301(a), prohibits any “standard, practice, or procedure” that “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color” 52 U.S.C. § 10301(a). A violation of Section 2 is established if it is shown that “the political processes leading to [a] nomination or election” in the jurisdiction “are not equally open to participation by [minority voters] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” *Id.* § 10301(b).

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

33. In *Gingles*, the Supreme Court identified three necessary preconditions (“the *Gingles* preconditions”) for a claim of vote dilution under Section 2 of the Voting Rights Act: (1) the minority group must be “sufficiently large and geographically compact to constitute a majority in a single-member district”; (2) the minority group must be “politically cohesive”; and (3) the majority must vote “sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.” 478 U.S. at 50-51.

34. In *Louisiana v. Callais*, 146 S. Ct. 1131 (2026), the Court “update[d]” the *Gingles* framework. With respect to the first *Gingles* precondition, the Court held that “plaintiffs cannot use race as a districting criterion” in producing illustrative maps. *Id.* at 1159. The Court also held that “illustrative maps must meet all the State’s legitimate districting objectives, including traditional districting criteria and the State’s specified political goals.” *Id.* With respect to the

second and third *Gingles* preconditions, “plaintiffs must provide an analysis that controls for party affiliation. In other words, they must show that voters engage in racial bloc voting that cannot be explained by partisan affiliation.” *Id.* As one example, the Court observed that racially polarized voting within a party’s primary election serves to satisfy the updated *Gingles* two and three preconditions. *Id.*

35. After the preconditions are established, the statute directs courts to assess whether, under the totality of the circumstances, members of the racial minority group have less opportunity than other members of the electoral to participate in the political process and to elect representatives of their choice. 52 U.S.C. § 10301(b). The Court has directed that the Senate Report on the 1982 amendments to the Voting Rights Act be consulted for its non-exhaustive factors that the court should consider in determining if, in the totality of the circumstances in the jurisdiction, the operation of the electoral device being challenged results in a violation of Section 2.

36. The Senate Factors include: (1) the history of official voting-related discrimination in the state or political subdivision; (2) the extent of which voting in the elections of the state or political subdivision is racially polarized; (3) the extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group; (4) the exclusion of members of the minority group from candidate slating processes; (5) the extent to which the minority group bears the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; and (7) the extent to which members of the minority group have been elected to public office in the jurisdiction.

37. Nevertheless, “there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.” S. Rep. No. 97-417, 97th Cong. 2d Sess. (1982) at 29.

38. In *Callais*, the Court explained that the totality of circumstances analysis “must focus on evidence that has more than a remote bearing on . . . present-day intentional racial discrimination regarding voting.” *Id.* at 1160. The Court explained that “[d]iscrimination that occurred some time ago, as well as present-day disparities that are characterized as the ongoing effects of societal discrimination are entitled to much less weight.” *Id.* (internal quotation marks and citation omitted). “Far more germane are current data and current political conditions that shed light on current intentional discrimination.” *Id.* (internal quotation marks and citation omitted).

39. In providing one example of evidence that gives rise to a strong inference of intentional discrimination and thus demonstrates a violation of Section 2 under the totality of the circumstances, the *Callais* Court identified the scenario in which application of the State’s districting criteria yields numerous majority-minority maps that stand in contrast to the State’s enacted map. “In such a situation, the inference of racial motivation is strong, and § 2 of the Fifteenth Amendment permits the imposition of liability [under Section 2 of the VRA] without demanding that the courts engage in the fraught enterprise of attempting to determine whether the state legislature as an institution, as opposed to certain individual members or the State’s hired mapmaker, was motivated by race.” *Callais*, 146 S. Ct. at 1156.

40. Courts have found violations of Section 2 where district maps “pack” minority voters into a district where they constitute a significant supermajority, diluting their ability to elect a candidate of their choice in surrounding districts. *See Boneshirt v. Hazeltine*, 461 F.3d 1011, 1018 (8th Cir. 2006).

41. Likewise, courts have found Section 2 violations occur where district maps “crack” compact minority populations between districts, thwarting their ability to elect a candidate of choice in a district encompassing the entire minority population. *See Gingles*, 478 U.S. at 46 n.11; *See also Johnson v. De Grandy*, 512 U.S. 997,1007 (1994).

42. Intentional packing and cracking of Native American voters in redistricting violates the Fourteenth and Fifteenth Amendments. Racial discrimination is unconstitutional if it was just one among many purposes, even if not the primary motivating factor. “[R]acial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been *a* motivating factor in the decision,” there is a constitutional violation. *Vill. of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 428 U.S. 252, 265 (1977) (emphasis added). “[D]iscriminatory intent need not be proved by direct evidence.” *Rogers v. Lodge*, 458 U.S. 613, 618 (1982). Although discriminatory purpose “implies more than intent as volition or intent as awareness of consequences,” *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 379 (1979), the Supreme Court has explained that “the inevitability or foreseeability of consequences . . . bear[s] upon the existence of discriminatory intent,” *id.* at 379 n.25. Where “the adverse consequences of a law upon an identifiable group” are clear, “a strong inference that the adverse effects were desired can reasonably be drawn.” *Id.*

43. “Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence as may be available.” *Arlington Heights*, 429 U.S. at 266. “The impact of the official action[,] whether it ‘bears more heavily on one race than another,’ may provide an important starting point.” *Id.* (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). From there, the Court “set out five non-exhaustive factors to determine whether a particular decision was made with a discriminatory

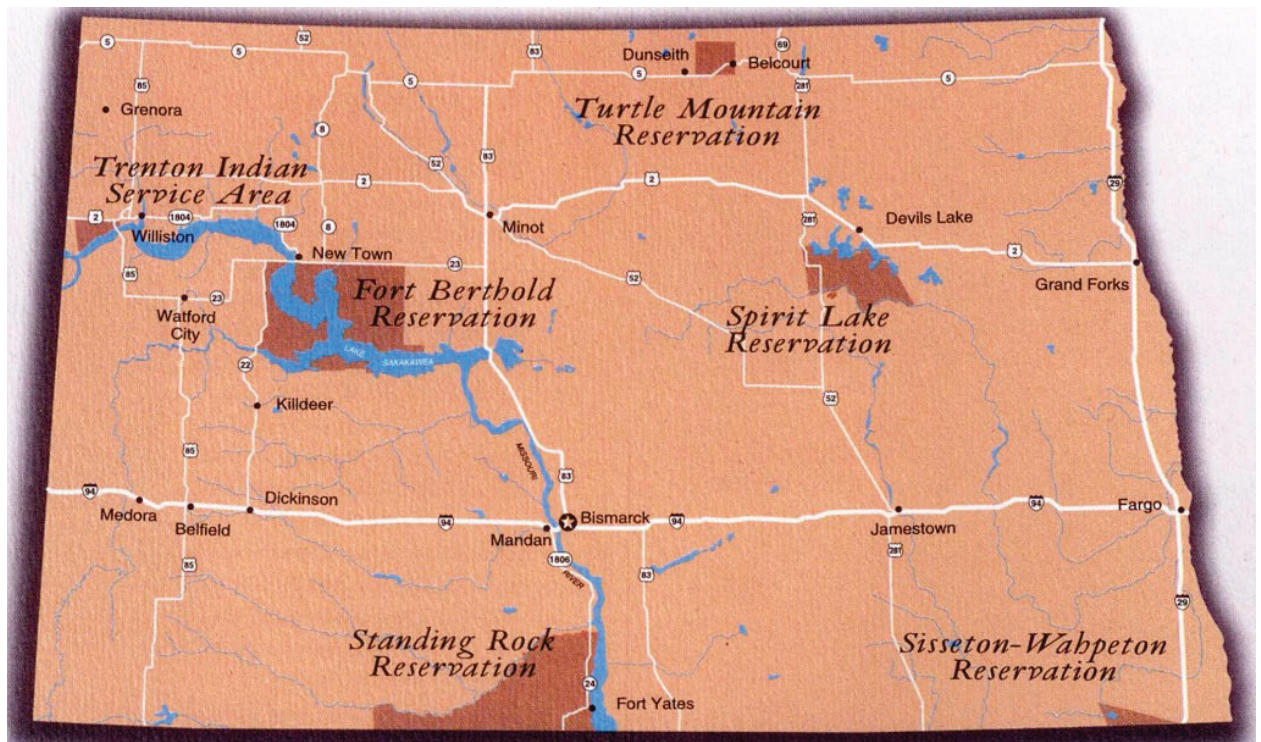
purpose: (1) “the historical background of the decision,” (2) “the specific sequence of events leading up to the decision,” (3) “departures from the normal procedural sequence,” (4) “substantive departures,” and (5) legislative history, especially where there are contemporary statements by members of the decision-making body.” *Veasey*, 830 F.3d at 231 (quotation marks omitted); *Arlington Heights*, 429 U.S. at 267–68. Where alternative maps following a state’s redistricting criteria and without consideration of race demonstrate a different racial balance than the challenged map, “the inference of racial motivation is strong.” *Callais*, 146 S. Ct. at 1156.

44. Separately, the Equal Protection Clause of the Fourteenth Amendment prohibits a governing body from “separat[ing] its citizens into different voting districts on the basis of race” without sufficient justification. *Miller v. Johnson*, 515 U.S. 900, 911 (1995). Plaintiffs may prove racial gerrymandering in violation of the Fourteenth Amendment by showing “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.” *Miller*, 515 U.S. at 916; *see also Cooper*, 581 U.S. at 291; *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 187 (2017). “[R]ace may predominate even when a reapportionment plan respects traditional principles.” *Bethune-Hill*, 580 U.S. at 189; *see also Miller*, 515 U.S. at 913, 916. Heightened requirements for plaintiffs to demonstrate that race, not partisanship, was the predominant motivating factor apply only “when the State raises a partisan-gerrymandering defense.” *Alexander*, 144 S. Ct. at 1235; *see also Cooper*, 581 U.S. at 308 (explaining how courts assess evidence differently “where no one has raised a partisanship defense”).

45. Plaintiffs can overcome the presumption of good faith by demonstrating, through alternative map evidence, that different racial characteristics would be expected from following the state's redistricting criteria. *Alexander v. S.C. Conference of the NAACP*, 602 U.S. 1, 10 (2024).

FACTS

46. All or part of five Indian reservations are within the boundaries of the State of North Dakota. This includes the entirety of the Fort Berthold Indian Reservation, where the MHA Nation is located, the Spirit Lake Reservation, where the Spirit Lake Tribe is located, and the Turtle Mountain Reservation, where the Turtle Mountain Band of Chippewa Indians is located, as well as northern portions of the Standing Rock Reservation, where the Standing Rock Sioux Tribe is located, and the Lake Traverse Reservation, where the Sisseton Wahpeton Oyate is located. A map of the North Dakota reservations is below.



<https://www.indianaffairs.nd.gov/tribal-nations>.

47. According to the 2020 Census, North Dakota has a total population of 779,094, of whom 636,160 (81.7%) are non-Hispanic White, 55,727 (7.2%) are Native American (alone or in combination), and 87,207 (11.2%) are members of other racial or ethnic groups.

48. According to the 2020 Census, North Dakota has a voting-age population of 596,093, of whom 503,153 (84.4%) are non-Hispanic White, 35,031 (5.9%) are Native American (alone or in combination), and 57,909 (9.7%) are members of other racial or ethnic groups.

49. The North Dakota legislature commenced its redistricting process following the 2020 U.S. Census in August 2021. Redistricting was driven by the North Dakota Legislative Council Redistricting Committee (the “Redistricting Committee”), a subcommittee of the legislature comprised of eight state house representatives, including the chairman, and eight state senators, including the vice chairman. H.B. 1397, 67th Leg., Reg. Sess. (N.D. 2021).

50. The Redistricting Committee was charged with developing a legislative redistricting plan to submit to the legislative assembly and implemented in time for use in the 2022 primary election. *Id.* Throughout the process, the Redistricting Committee held hearings in which it received testimony from the public and state legislators regarding legislative plans.

51. Many of the requests of tribal leaders and native organizations were ignored in the process, including requests to hold Redistricting Committee meetings on or near reservations to allow tribal members to participate.

52. Chairman Douglas Yankton of the Spirit Lake Tribe and other official representatives of the Spirit Lake Tribe, including Gaming Commission Executive Director Collette Brown (who is also an Individual Plaintiff), provided testimony to the Redistricting

Committee on August 26, 2021,¹ September 15, 2021,² and September 29, 2021,³ stating the Spirit Lake Tribe's official position that the Spirit Lake Reservation should be placed into a single state house subdistrict that would improve tribal citizens' representation in the State Legislature.

53. At no point did the Turtle Mountain Band of Chippewa Indians nor its representatives request that the Tribe's reservation be placed into a single-member state house subdistrict.

54. On September 29, 2021, the Redistricting Committee adopted its draft final statewide legislative plan and for the first time indicated the Committee's intent to split District 9 into two state house subdistricts. The final draft plan included 47 state legislative districts, with two divided into single-member state house subdistricts, Districts 4 and 9.

55. District 9, which comprises the boundaries of Senate District 9 (SD 9), is divided into single-member House Districts: 9A (HD 9A) and 9B (HD 9B). The Turtle Mountain Indian Reservation is located entirely in HD 9A, while some of the Tribe's trust land and members are located in HD 9B.

¹ *Aug. 26 Meeting of the Redistricting Committee*, 2021 Leg., 67th Sess. (N.D. Aug. 26, 2021), <https://www.legis.nd.gov/assembly/67-2021/interim/23-5024-03000-meeting-minutes.pdf> (minutes); *Testimony of Collette Brown at Aug. 26 Meeting of the Redistricting Committee*, 2021 Leg., 67th Sess. (N.D. Aug. 26, 2021), https://www.legis.nd.gov/files/committees/67-2021/23_5024_03000appendixh.pdf.

² *Sep. 15 Meeting of the Redistricting Committee*, 2021 Leg., 67th Sess. (N.D. Sep. 15, 2021), <https://www.legis.nd.gov/assembly/67-2021/interim/23-5061-03000-meeting-minutes.pdf> (minutes); *Testimony of Collette Brown at the Sep. 15 Meeting of the Redistricting Committee*, 2021 Leg., 67th Sess. (N.D. Sep. 15, 2021), https://www.legis.nd.gov/files/committees/67-2021/23_5061_03000appendixd.pdf (testimony).

³ *Sep. 28-29 Meeting of the Redistricting Committee*, 2021 Leg., 67th Sess. (N.D. Sep. 28-29, 2021), <https://www.legis.nd.gov/assembly/67-2021/interim/23-5063-03000-meeting-minutes.pdf> (minutes); *Testimony of Douglas Yankton at the Sep. 28-29 Meeting of the Redistricting Committee*, 2021 Leg., 67th Sess. (N.D. Sep. 28-29, 2021), https://www.legis.nd.gov/files/committees/67-2021/23_5063_03000appendixc.pdf (testimony).

56. The plan did not establish a single-member state house district encompassing the Spirit Lake Reservation. Instead, the Spirit Lake Reservation (aside from the portion that extends into Nelson County) was located in District 15, which encompasses a single-member state senate district and a two-member at-large state house district.

57. After reviewing the Redistricting Committee's final proposed plan, officials from the Spirit Lake Tribe and Turtle Mountain Band of Chippewa Indians determined that the best way to prevent the votes of citizens of the Tribal Nations from being diluted and to ensure compliance with the Voting Rights Act would be for the Legislature to adopt a joint legislative district that includes both the Spirit Lake Tribe and the Turtle Mountain Band of Chippewa Indians.

58. On November 1, 2021, Spirit Lake Chairman Yankton and Turtle Mountain Chairman Azure issued a joint letter to Governor Doug Burgum, House Speaker Kim Koppelman, House Majority Leader Chet Pollert, House Minority Leader Joshua Boschee, Senate Majority Leader Rich Wardner, and Senate Minority Leader Joan Heckman detailing the Tribal Nations' concerns about the proposed map and indicating the Tribal Nations' request to be placed into a single legislative district encompassing both Tribes' reservations.

59. The letter also put each of these officials on notice that the proposed District 9, which includes HD 9A and HD 9B, as they are currently drawn, would violate the Voting Rights Act and provided an analysis of racially polarized voting in North Dakota.

60. Along with the letter, the Chairmen delivered a proposed draft of a district encompassing their two Tribal Nations as well as a draft map.

61. On November 8, 2021, the Redistricting Committee held a hearing during the special legislative session to finalize its plan.

62. At that meeting on November 8, 2021, Senator Richard Marcellais, who represented District 9, proposed an amendment to the Committee's final legislative map, which would have created a joint legislative district containing the Turtle Mountain Reservation and Spirit Lake Reservation.

63. During the meeting, the committee heard testimony from Chairman Azure, Chairman Yankton, Senator Marcellais, and Representative Marvin Nelson of District 9 regarding the proposed amendment. Both Chairmen again indicated their Tribal Nations' position that the tribes' reservations should be placed into the same district.

64. The Committee failed to adopt the amendment, as did the full Senate. Rather, on November 10, 2021, the North Dakota State Legislature passed HB 1504. Governor Burgum signed the bill into law the following day.

Native Americans' Voting Strength Is Diluted by the Configuration of Districts 9A, 9B, and 15

65. HB 1504 packs Native American voters in District 9A, while cracking other Native American voters in Districts 9B and 15.

66. House District 9A has a Native Voting-Age Population of 79.79 percent and is centered in Rolette County.

67. House District 9B has a Native American Voting-Age Population of 32.23 percent, cracking apart Native American populations near St. John and Turtle Mountain Trust lands from those in District 9A.

68. Spirit Lake's Native American population is submerged into neighboring District 15, which has a Native American Voting-Age Population of 23.08 percent.

Gingles Prong 1: Native American Voters Form a Geographically Compact Majority in an Alternative Multimember District

69. Native Americans living on and around the Spirit Lake Reservation and Turtle Mountain Reservation are sufficiently numerous and geographically compact to constitute a majority in an undivided legislative district that combines both reservations.

70. The Native American population on and around the Turtle Mountain and Spirit Lake reservations is geographically compact.

71. The Spirit Lake and Turtle Mountain reservations are a mere 55 miles apart—a roughly one-hour drive between the reservations. The geographic distance of a district that combines both reservations is on par—or smaller—than many legislative districts in North Dakota, which often extend great distances on account of low population density in the rural state.

72. Alternative district configurations exist that, without using race as a criterion in their development, combine the Spirit Lake Reservation and the Turtle Mountain Reservation into a single district while at the same time meeting all the State’s legitimate districting objectives. Indeed, such a configuration naturally arises *because of* the State’s districting criteria.

73. The Legislature adopted redistricting criteria by law when it enacted HB 1397. That bill provided a process by which a legislative redistricting committee would be created and provided that “[t]he committee shall ensure any legislative redistricting plan submitted to the legislative assembly for consideration must be of compact and contiguous territory and conform to all constitutional requirements with respect to population equality. The committee may adopt additional constitutionally recognized redistricting guidelines and principles to implement in preparing a legislative redistricting plan for submission to the legislative assembly.”⁴

⁴ N.D. Leg. Assembly, 67th Leg. Assembly, Reg. Sess., HB 1397, <https://ndlegis.gov/assembly/67-2021/documents/21-0909-04000.pdf>.

74. Although the legislative redistricting committee did not formally adopt additional redistricting principles, it stated in its committee report upon the passage of HB 1504 that preserving political subdivisions was a priority and indicated that preserving the boundaries of Native American reservations took precedence over preserving county boundaries. Likewise, the committee's report explained that "[f]actors other than population and preserving political subdivision boundaries which were considered in proposed plans presented to the committee included preservation of the cores of existing districts, protection of incumbents, and preservation of communities of interest. Committee members also identified district boundaries using major streets and other easily identifiable geographic features when possible."⁵

75. Memoranda prepared for the Redistricting Committee by the North Dakota Legislative Council concede that "the compactness" of a district that combines the Turtle Mountain and Spirit Lake reservations "meets the standards used by the committee when drawing the existing district map."⁶

76. Neither the redistricting committee nor the Legislative Assembly stated any partisan political objectives that motivated the configuration of districts in HB 1504. Indeed, although Republicans have a supermajority in the North Dakota Legislative Assembly, HB 1504 actually increased by one the number of districts carried by Joe Biden, the Democratic candidate for President in 2020, compared to the prior decade's map. The strongest statewide Democratic

⁵ N.D. Leg. Assembly, Government Administration Comm. Report at 19, 28-29, <https://ndlegis.gov/sites/default/files/resource/67-2021/legislative-management-final-reports/2021ssfinalreport.pdf>

⁶ N.D. Leg. Council, Plaintiff's Proposed Map #1 at 2, <https://ndlegis.gov/sites/default/files/resource/committee-memorandum/25.9175.01000.pdf> (emphasis added); N.D. Leg. Council, Plaintiff's Proposed Map #2 at 2, <https://ndlegis.gov/sites/default/files/resource/committee-memorandum/25.9176.01000.pdf>; N.D. Leg. Council, Proposed Map 3, <https://ndlegis.gov/sites/default/files/resource/committee-memorandum/25.9190.01000.pdf>.

candidate in recent years, former Senator Heidi Heitkamp, carried the same number of districts under both the prior decade's map and HB 1504. Republican partisan gain does not explain the Legislative Assembly's redistricting choices.

Gingles Prong 2: Voting in the Region is Racially Polarized, with Native American Voters Demonstrating Political Cohesion

77. Native American voters in North Dakota, including those living on and around the Spirit Lake Reservation and Turtle Mountain Reservation, vote cohesively and overwhelmingly support the same candidates.

78. This strong pattern of Native American cohesion is illustrated by both the endogenous state legislative contests and exogenous statewide elections, with Native American candidates strongly preferring the same candidates. The 2022 endogenous elections are especially illustrative, with Native American voters cohesively supporting Native American state senate candidate Richard Marcellais in District 9 and Collette Brown in District 15, Native American state house candidates Heather Lawrence-Skadsem in District 15 and Jayme Davis in District 9A, and candidate Marvin Nelson in District 9B. The same pattern holds in exogenous statewide elections.

79. Notably, this cohesion persists when partisanship is controlled, demonstrating that it is not explained by partisanship.

80. For example, the 2022 Democratic primary for District 9A featured a white candidate, Tracy Boe, and a Native American candidate, Jayme Davis. The voting in the primary was racially polarized. District 9A consists of three precincts—two with voting age populations that are substantially Native American and one with a voting age population that is substantially white. Rolette County Precinct 9-03 had a 93.7% Native American voting age population and Ms.

Davis carried it 87.14% to 12.86%. Rolette County Precinct 9-04 had a 78.3% Native American voting age population and Ms. Davis carried it 78.17% to 21.83%.

81. *Nonpartisan* county elections held in Rolette County, which constitutes 75.4% of District 9's total population, exhibit stark racially polarized voting patterns in contests featuring Native American and white candidates. Nonpartisan election contests control for partisanship in assessing voter behavior because they show how voters cast their ballots when no partisan labels or information is provided on the ballot.

82. For example, in the 2022 election for Rolette County Commissioner at large for an unexpired two-year term, white candidate Cameron Mickelson faced Native American candidate Alice Lunday. Rolette County Precinct 9-03 had a Native American voting age population of 93.7% and Ms. Lunday carried the precinct 79.98% to 19.90%. By contrast, the precinct with the largest share of white voters was Rolette County Precinct 9-05, with a white voting age population of 70.9%. Mr. Mickelson carried the precinct 80.59% to 19.41%.

83. Similarly, in the 2022 nonpartisan election for Rolette County Auditor, white candidate Valerie McCloud faced Native American candidate Farrah Gourneau. In Precinct 9-03 Ms. Gourneau prevailed 66.83% to 33.17% while in precinct 9-05 Ms. McCloud prevailed 81.92% to 18.08%.

84. Likewise, in the 2022 nonpartisan election for two positions on the Rolette County Commission, Native American candidate Craig J. Poitra faced three white candidates (Kent Abrahamson, Lars W. Mathiason, and Doug Lemieux). Mr. Poitra and Mr. Abrahamson were both elected. In Precinct 9-03, Mr. Poitra received the most votes with 60.34% while Mr. Abrahamson came in third with 11.06%. By contrast, in Precinct 9-05, Mr. Abrahamson placed first with

34.15% while Mr. Poitra came in fourth with 7.12%. The three white candidates combined for over 90% of the vote.

85. The same is true for Benson County. In the 2014 nonpartisan election for sheriff, Native American candidate Leon L. LaRoque Sr. faced white candidate Steven J. Rohrer. In the Fort Totten precinct, with over 90% Native voting age population, LaRoque received 70.1% of the vote. But he received just 28.3% of the vote countywide because of polarized white voting against him. For example, Rohrer received the following vote shares in predominantly white precincts: 97.8% in Knox, 83.7% in Leeds, 81.9% in Maddock, 70.4% in Oberon, and 82.3% in Esmond.

86. The strong cohesive voting by Native Americans is not explained by partisanship. In nonpartisan election (where voters see no party label identifier) and in intra-party contests, Native American voters are strongly cohesive in their choices.

Gingles Prong 3: White bloc voting usually defeats Native Americans' candidates of choice

87. White bloc voting in Districts 9, 9B, and 15 usually results in the defeat of Native Americans' candidates of choice in the absence of special circumstances.

88. The candidates preferred by white voters almost always defeat the candidates preferred by Native American voters in Districts 9B and 15 and usually defeat the candidates preferred by Native American voters in District 9, as this Court already found. District 9A is packed with Native American voters and always saw the Native American preferred candidates prevail; its elections are not relevant to the *Gingles* Prong 3 analysis.

89. The 2022 endogenous contests for state legislature are especially probative. In those contests, Native Americans' candidates of choice were all defeated by white bloc voting. Native American state senator Richard Marcellais was defeated by white candidate Kent Weston in District 9, Native American state senate candidate Collette Brown was defeated by Judy Estenson

in District 15, Native American state house candidate Heather Lawrence-Skadsem was defeated by white candidates in District 15, and Marvin Nelson was defeated in District 9B.

90. This pattern of white bloc voting defeating Native American voters' preferred candidates is likewise the usual result in exogenous elections and all elections combined, as this Court has already concluded, with respect to Districts 9, 9B, and 15.

91. Bloc voting by white voters cannot be explained by partisanship. The 2022 Democratic primary for District 9A is illustrative. In that election, Native American voters strongly supported the Native American candidate, Jayme Davis, as discussed above. But Rolette County Precinct 9-05 was 70.9% white and Mr. Boe, the white candidate, carried it 71.28% to 28.72%. Native American Democrats supported the Native American candidate and white Democrats supported the white candidate. "This type of intraparty racial-bloc voting pattern helps to demonstrate that the minority plaintiffs have 'less opportunity' than their majority counterparts because of race, not just because of partisan affiliation." *Callais*, 146 S. Ct. at 1159.

92. Likewise, in nonpartisan elections in Rolette and Benson County where voters have no partisan identifiers on the ballot, white voters strongly support white candidates over Native American candidates, as discussed above. White voters' polarized voting cannot be explained on partisan grounds.

93. Racially polarized voting that is not explained by partisanship is a central feature of voting patterns in Districts 9, 9A, 9B, and 15.

The Totality of Circumstances Demonstrates that Native American Voters Have Less Opportunity than Other Members of the Electorate to Participate in the Electoral Process and Elect Representatives of Their Choice

94. A review of the totality of the circumstances reveals that Native American voters in North Dakota have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. *See* 52 U.S.C. § 10301(b).

Exclusion of Native Americans from the 2021 Redistricting Process

95. The North Dakota Legislature, including the Redistricting Committee, failed to actively and effectively engage tribal citizens in the 2021 Redistricting process.

96. The Redistricting Committee failed to hold a single committee hearing on tribal lands, despite repeated requests from the Tribal Nations within North Dakota's borders to do so. Instead, all public hearings were held at substantial distances from tribal lands, making attendance and testimony impossible for most tribal citizens, and especially the many tribal citizens without reliable private transportation.

97. Even when official representatives of the Tribal Nations were able to attend hearings of the Redistricting Committee, they were met with hostility by some legislators.

98. For example, at a final meeting of the Redistricting Committee on November 8, Turtle Mountain Chairman Azure and Spirit Lake Chairman Yankton testified before the Committee. The Chairman requested their respective communities of interest be included together in a single legislative district.

99. Despite the Tribal leaders' requests, legislators repeatedly suggested that they better understood the Tribal Nations' concerns than the Tribes' own Chairmen.

100. With the Chairmen still at the meeting, a Representative and member of the Redistricting Committee stated of the Chairmen's request, "I feel . . . that if we had come up with this plan, it would look we were trying to pack them all into one district and to marginalize them

and so it's hard for me to listen to them ask to be marginalized, in my opinion.”⁷ Other legislators made similar comments.

101. Representative Terry Jones made statements at a Tribal and State Relations Committee meeting with the Spirit Lake Tribe on September 1, 2021 that sought to discourage Tribes from exercising their right to request single-member house districts by his equating the request to “the definition of racism” because, in his view, the request for single-member districts means “that in order for [him] to be able to properly represent them [tribal members] that [his] skin had to be brown.”⁸

102. The legislators’ comments are illustrative of the atmosphere of hostility toward the concerns of Tribal Nations during the 2021 redistricting process. These unfortunately are not unusual comments from legislators. For example, former State Senator Judy Estenson, who represented District 15 from 2023 to 2025 (including the Spirit Lake reservation), commented in 2023 that—referring to Spirit Lake members—“I can represent those people better than . . . whatever would be their preferred candidate.”

Discrimination in Voting Against Native Americans

103. As this Court has repeatedly recognized, North Dakota has a long history of both denying Native Americans the right to vote and diluting Native voting strength. *See, e.g., Spirit Lake Tribe v. Benson Cnty.*, No. 2:10-cv-095, 2010 WL 4226614, at *3 (D.N.D. 2010); Consent Judgment and Decree, *United States v. Benson Cnty.*, Civ. A. No. A2-00-30 (D.N.D. Mar. 10, 2000); *see also State ex rel. Tompton v. Denoyer*, 72 N.W. 1014, 1019 (N.D. 1897).

⁷ Nov. 8 *Hearing of the Joint Redistricting Committee*, 67th Leg., 1st Spec. Sess. 3:40:29 (N.D. Nov. 8, 2021), <https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20211108/-1/22649>.

⁸ Sep. 1 *Meeting of the Redistricting Committee*, 2021 Leg., 67th Sess. 10:38:07 (N.D. Sep. 1, 2021), <https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20210901/-1/21581>.

104. Until 1922, North Dakota explicitly barred most Native Americans from voting. Until 1897, Native Americans were statutorily denied the right to vote in North Dakota “unless they had entirely abandoned their tribal relations, and were in no manner subject to the authority of any Indian chief or Indian agent.” *Denoyer*, 72 N.W. at 1019. After that law was struck down by the North Dakota Supreme Court as violating the state constitution, the legislature amended the Constitution to allow only “[c]ivilized persons of Indian descent” who “severed their tribal relations two years next preceding” an election to vote. N.D. Const., art. V § 121 (1898). Native Americans were denied the right to vote unless they could show that they “live[d] just the same as white people.” *Swift v. Leach*, 178 N.W. 437, 438 (N.D. 1920).

105. The North Dakota Constitution of 1898 also established a literacy test as a qualification for voting. N.D. Const. art. II, §§ 121, 127 (ratified by vote on Nov. 8, 1898). This practice was commonly used to disenfranchise minority voters and is prohibited by the Voting Rights Act of 1965. 52 U.S.C. § 10303; *see also South Carolina v. Katzenbach*, 383 U.S. 301, 312, 316 (1966) (discussing the discriminatory use of literacy tests and the Voting Rights Act’s ban on such tests).

106. Discrimination against Native American voters continues in North Dakota today. Over the past three decades, the State has continued to enact laws and adopt practices that discriminate against eligible Native voters.

107. Prior to 1992, Benson County elected its county commissioners—a nonpartisan office—from single member districts and in 1988, the Spirit Lake-based district elected a Native American commissioner (Priscilla Cavanaugh) for the first time in the county’s history. In response, the County Commission switched to at-large elections and Ms. Cavanaugh was defeated by white bloc voting when she ran for re-election at large in 1992.

108. In 2000, the Justice Department filed an action against Benson County, North Dakota alleging that the county's at-large elections system for electing county commissioners denied Native American voters the opportunity to participate meaningfully in the political process. *See* Consent Judgment at Preamble, *Benson Cnty.*, Civ. A. No. A1-00-30. The parties entered into a consent decree in which Benson County admitted that its at-large system discriminated against Native American voters. The County agreed to adopt a five-district election system, with two majority Native American districts. *Id.* ¶ 6, 15.

109. Nevertheless, and in violation of the 2000 consent decree, the Benson County Commission voted just months before the 2004 primary election to switch back to an at-large method of electing commissioners.

110. When then-Chairman Yankton of Spirit Lake and a representative of North Dakota Native Vote informed the Commission of its violation of the 2000 consent decree prior to the 2021 redistricting, the Commission disregarded them and instead voted to continue electing commissioners at large.

111. On October 7, 2022, Spirit Lake Tribe, Collette Brown, and Lois Leben filed suit against Benson County, contending that the at-large system violated both Section 2 of the Voting Rights Act and that its actions in knowingly defying the 2000 consent decree constituted intentional discrimination in violation of the Fourteenth and Fifteenth Amendments. *See Spirit Lake Tribe, et al. v. Benson County, N.D., et al.*, No. 3:22-cv-161 (D.N.D. 2022)

112. On April 24, 2023, a consent decree was entered to resolve the lawsuit. The parties agreed that the 2000 consent decree remained in full force an effect and its terms were reincorporated in the new consent decree. The parties agreed that the County's use of at-large elections was inconsistent with the 2000 consent decree, that the factual circumstances that gave

rise to the 2000 consent decree still existed, and the County agreed to switch to district-based elections. The Court entered the consent decree. *Id.*, ECF No. 37.

113. In 2010, the Spirit Lake Tribe sued Benson County to prevent the removal of a polling place on the reservation, some 100 years after the Tribe first sued to establish the reservation polling place. In considering the challenge, this Court recognized “[t]he historic pattern of discrimination suffered by members of the Spirit Lake [Tribe],” and found that the removal of the Spirit Lake polling place likely violated Section 2 of the VRA. *Spirit Lake Tribe*, 2010 WL 4226614, at *3. The polling place was then reestablished on the reservation. *Id.* at *3.

114. Beginning in 2013, the North Dakota legislature adopted a series of discriminatory voter identification laws targeting Native Americans.

115. In both 2013 and 2014, the North Dakota legislature amended its voter ID law to restrict the acceptable forms of identification and eliminate certain fail-safe mechanisms for voters who lacked a qualifying ID. Specifically, the law required voters to present identification containing the voter’s name, date of birth, and residential street address. *See* H.B. 1332, 63rd Leg. Assembly; Reg. Sess. § 5 (2013); Order Granting Motion for Preliminary Injunction at *2-3, *Brakebill v. Jaeger*, No. 1:16-cv-008, 2016 WL 7118548, (D.N.D. Aug. 1, 2016). It also eliminated alternative options that had historically been available for voters without ID. *Id.* The North Dakota Legislature passed these discriminatory voter ID laws even after repeated warnings that the identification and residential address requirements would lead to the disenfranchisement of Native Americans.

116. At the time, many Native American voters living on reservations had not been assigned residential addresses. And though the law purported to include tribal identification cards as qualifying IDs, most tribal IDs included a P.O. Box rather than the tribal citizen’s non-existent

residential address. As such, the residential address requirement disproportionately affected Native American voters and prevented them from relying on their tribal IDs for voting. *Brakebill*, No. 1:16-cv-008, 2016 WL 7118548, at *4.

117. In 2016, this Court found that the amended voter ID law discriminated against Native Americans.

118. Specifically, it found that Native Americans “face substantial and disproportionate burdens in obtaining each form of ID deemed acceptable under the [2013] law,” and that eligible Native voters had been disenfranchised because of it. *Brakebill*, No. 1:16-cv-008, 2016 WL 7118548, at *9, 16-17.

119. Concluding that the Native American plaintiffs were likely to succeed on a challenge to the law under the Equal Protection Clause of the Fourteenth Amendment, this Court enjoined the Secretary of State from enforcing the law in the November 2016 Election without a fail-safe provision for voters who lack a qualifying ID. *Brakebill*, No. 1:16-cv-008, 2016 WL 7118548, at *22. The state did not appeal that decision.

120. In 2017, the North Dakota Legislature again amended the State’s voter identification law to eliminate the fail-safe provision for voters who lack a qualifying ID listing their residential street address.

121. In the lead up to the November 2018 election, Spirit Lake Tribe, Standing Rock Sioux Tribe, and various individual Native American voters—including two members of the Spirit Lake Tribe and two members of the Turtle Mountain Band of Chippewa Indians—challenged the law in federal court as discriminating against Native voters. *Spirit Lake Tribe v. Jaeger*, No. 1:18-cv-00222-DLH-CRH (2018). The State had failed to assign them valid residential street addresses or otherwise maintained addresses in its database that did not match their physical residence—a

problem that was endemic across North Dakota’s reservations but not across the predominantly white areas of the State.

122. As a consequence, the *Spirit Lake* plaintiffs either had their absentee ballot applications for the November 2018 election denied or faced the threat that their right to vote would be denied at the polling station on election day.

123. While the Court denied the motion for a temporary restraining order under the *Purcell* doctrine, it noted that “[t]he allegations in the complaint, the motion for a temporary restraining order, and the attached affidavits give this Court great cause for concern” and that “[t]he litany of problems identified in this new lawsuit were clearly predictable and certain to occur as the Court noted in its previous orders in *Brakebill v. Jaeger*.” *Spirit Lake Tribe v. Jaeger*, No. 1:18-cv-00222-DLH-CRH (Nov. 1, 2018), ECF No. 33. Later, the Court issued an order mandating that each of the individual plaintiffs “shall be permitted to vote in the November 6, 2018 General Election.” *See id.* ECF No. 35.

124. In 2020, the State finally agreed to enter into a consent decree. Under the consent decree, the Secretary of State must recognize tribal IDs as valid voter identification and ensure that Native American voters retain an effective fail-safe voting option, including by ensuring that otherwise eligible voters who lack an ID listing their residential address are provided with their address and corresponding documentation sufficient to allow them to vote. Order, Consent Decree, and Judgment, *Spirit Lake Tribe v. Jaeger*, No. 1:18-cv-00222-DLH-CRH (D.N.D. Apr. 27, 2020), ECF No. 97. The Legislature has taken no steps to codify these provisions to undo, as a matter of state law, the discriminatory provisions that necessitated the consent decree.

125. The long and recent history of voting discrimination targeting Native Americans in North Dakota has had a predictable toll. Native American voter turnout in North Dakota routinely

lags far behind white voter turnout. For example, in H.B. 1504’s version of District 9, Native American voters are just over a majority of eligible voters but white voters ordinarily constitute a super majority of its voter turnout. White voters constitute 67% of its electorate in 2014, 63% in 2016, 50% in 2018, 63% in 2020, and 60% in 2022. Only because of a massive national effort to boost Native American voter turnout in North Dakota in 2018, in response to the state’s discriminatory voter ID law, did Native American turnout reach 50% in District 9 in 2018. The Supreme Court’s observation that “the racial gap in voter . . . turnout had largely disappeared” for Black voters in south does not apply to Native American voters in North Dakota. *Callais*, 146 S. Ct. at 1157-58.

126. North Dakota’s voting restrictions and their substantial and disproportionate burdens on Native American voters occurred only a few years before the 2021 redistricting challenged here and placed the State on notice that Native American voters continued to face distinct barriers to equal participation in North Dakota’s political process. The Legislature’s subsequent decisions concerning the political representation of those same voters must be considered against that contemporary backdrop. These recent events therefore form part of the ‘current data and current political conditions’ bearing on whether the challenged districts reflect present-day intentional racial discrimination in voting. See *Callais*, 146 S. Ct. at 1160.

127. The contemporary history of North Dakota thus includes substantial examples of voting discrimination against Native Americans.

Historic Discrimination Against Native Americans in Other Areas

128. Native Americans in North Dakota face discrimination in other arenas, which exacerbates the barriers to their effective participation in the political process.

129. Throughout the nineteenth and early twentieth centuries, the United States carried out official federal policy targeted at forcibly assimilating Native Americans into European-American culture. *See Bear Lodge Multiple Use Ass’n v. Babbitt*, 175 F.3d 814, 817 (10th Cir. 1999). Forced assimilation included suppression and attempted destruction of Indigenous religions, languages, and culture.

130. Assimilationist policies commonly brought violence in the Northern Plains. “In 1890 for example, the United States Cavalry shot and killed 300 unarmed Sioux [Lakota] men, women and children en route to an Indian religious ceremony called the Ghost Dance[.]” *Bear Lodge Multiple Use Ass’n*, 175 F.3d at 817.

131. Native Americans in North Dakota were a direct target of these discriminatory policies and practices.

132. Christian and government boarding schools were established throughout North Dakota beginning in the late nineteenth century and persisting through the mid-twentieth century. Native American children were removed from their families and tribes and sent to the boarding schools to be “civilized” and indoctrinated into Christianity. *See e.g.* U.S. Dep’t of Interior, *Extracts from the Annual Report of the Secretary of the Interior for the Fiscal Year, 1927* 54 (1927); Native American Rights Fund, *Let All That Is Indian Within You Die!*, 38(2) NARF L. Rev. 1 (2013). These children routinely suffered physical and emotional abuse and neglect. At the same time, they were banned from speaking Indigenous languages and practicing their cultures and religions.

133. The boarding school policy was incredibly harmful and its effects, including disparities in education and literacy between Native Americans and non-Native Americans, have persisted in North Dakota long after its official end. *See* Lewis Merriam, Tech. Dir. for Inst. for

Gov't Research, *The Problem of Indian Administration, Report of a Survey made at the request of Hubert Work, Secretary of the Interior and submitted to him Feb. 21, 1928*; Native American Rights Fund, *Let All That Is Indian Within You Die!*, 38(2) NARF L. Rev. 1 (2013).

134. Native children attending state public schools in the mid-twentieth century also faced significant discrimination, including being subjected to humiliating stereotypes and language discrimination. *See Indian Education: A National Tragedy – A National Challenge*, Special Subcomm. on Indian Educ., 91st Cong., S.R. No. 91-501 (1969). Native students often reported feeling powerless, experiencing depression, and generally feeling alienated from their own cultures. Dropout rates among Native children attending public schools were higher than those for non-native children, while reading levels were lower. At the same time, Native people were generally prevented from serving on school boards. *Id.* at 23-31. Higher dropout rates amongst Native students persisted throughout the end of the twentieth century. *Educational Condition*, N.D. Dep't of Pub. Education, https://web.archive.org/web/20151225031658/https://www.nd.gov/dpi/SchoolStaff/IME/Programs_Initiatives/IndianEd/resources/EducationalCondition/.

135. Native Americans in North Dakota, including the Plaintiff Tribes, were also subjected to discriminatory land allotment policies. Throughout the early-to mid-1900's, millions of acres of tribal land were transferred to private ownership, largely by non-Indians. These allotment policies dramatically reduced the land bases for many tribes, including those in North Dakota. These policies also created a confusing “checkerboard” of state, tribal, and federal jurisdiction, leading to reduced and inconsistent enforcement of criminal laws by non-tribal law enforcement agencies. *See Keepseagle v. Vilsack*, 118 F. Supp. 3d. 98 (D.D.C. 2015), *appeal denied* 2015 WL 9310099 (D.C. Cir. 2015).

136. The State of North Dakota has played an active role in discrimination against Native Americans since its inception.

137. Significantly, the State, through the North Dakota Indian Affairs Commission, embraced the discriminatory and harmful forced assimilation and relocation policies of the federal government.

138. Historic discrimination has hindered the ability of the Native American population in North Dakota to participate effectively in the political process.

Modern Effects of Discrimination

139. Native Americans in North Dakota continue bear the effects of the state and federal government's discriminatory policies and practices in income and poverty, education, employment, and health, which hinders their ability to participate effectively in the political process.

140. Native Americans in North Dakota are three times more likely than the general population of North Dakota and nearly four times more likely than are whites in the state to live in poverty. According to the 2015-2019 American Community Survey Estimates, the poverty rate for Native Americans in North Dakota is 32.2 percent (nearly 1 in 3), compared 10.7 percent for the state's total population and only 8.2 percent amongst North Dakotans who are white alone.

141. Approximately half of all Native American children in North Dakota live in poverty—a rate more than five times higher than any other racial group in the state. North Dakota Interagency Council on Homelessness, *Housing the Homeless: North Dakota's 10-Year Plan to End Long-Term Homelessness* ii (October 2018), <https://www.ndhfa.org/wp-content/uploads/2020/07/HomelessPlan2018.pdf>.

142. Native Americans in North Dakota face a higher rate of homelessness than any other racial group in the state. In 2017, the North Dakota Interagency Council on Homelessness estimated that Native Americans account for at least 21 percent of North Dakota's homeless population, despite making up only 5 percent of the state's population. *Id.* at 17.

143. This 2017 study likely underestimated the actual number of Native Americans who are effectively homeless because it failed to account for the many individuals who live temporarily with family and other tribal members. *Id.* at 17.

144. Native Americans in North Dakota also fare worse than white North Dakotans in education. Native Americans over the age of 25 are two and a half times as likely as whites to lack a high school diploma. According to the 2019 American Community Survey, approximately 15 percent of Native Americans lack a high school diploma, compared to 6 percent of whites.

145. Native American students in North Dakota are 4.2 times more likely than white students to be suspended from school. At the same time, white students are 4.3 times more likely than Native students to be enrolled in Advanced Placement classes. ProPublica, *Miseducation: North Dakota*, <https://projects.propublica.org/miseducation/state/ND> (last accessed Sep. 16, 2021).

146. Native Americans in North Dakota also suffer worse health outcomes than the State's overall population, on average. For example, Native Americans report being in poor or fair health at a rate almost double that of North Dakota's total population. North Dakota Dep't of Health, *North Dakota American Indian Health Profile*, Table 21 (Jul. 18, 2014), <http://www.ndhealth.gov/HealthData/CommunityHealthProfiles/American%20Indian%20Community%20Profile.pdf>. Similarly, Native people in North Dakota aged 18-64 are more than twice as likely as the overall population to have a disability. *Id.* at Table 8. The infant death rate and child

and adolescent death rate amongst Native Americans in North Dakota is approximately 2.5 times that of the State's total population. *Id.* at Table 13.

147. Native Americans in North Dakota are also overrepresented in the state's prison and jail population. According to the Prison Policy Initiative, Native Americans in North Dakota are incarcerated at a rate 8 times that of the state's white population. Prison Policy Initiative, *North Dakota Profile*, <https://www.prisonpolicy.org/profiles/ND.html> (last accessed Sep. 16, 2021).

148. These and other socioeconomic factors related to the history of discrimination compound the political disempowerment of Native Americans in North Dakota caused by the discriminatory legislative districting scheme.

Racially Polarized Voting and the Limited Success of Native American Candidates

149. Voting in North Dakota is racially polarized between white and Native voters. As explained above, this is true when an analysis controls for partisanship, with stark racial polarization appearing in nonpartisan contests and intra-party contests.

150. Native Americans have had little success in being elected to state office in North Dakota outside of the previously Native American-majority District 9 or as a result of the remedial redistricting map ordered in this case.

151. Upon information and belief, there has never been a Native American statewide elected official.

152. HB 1504 results in a lack of proportionality for Native American voters; the number of state house and senate districts in which they can election their candidate of choice is lower than their share of the state's voting age population.

The Packing and Cracking of Districts 9, 9A, 9B, and 15 was intentional and the Legislature's predominant purpose in configuring District 9 was to make its Native American population as small as possible

153. The packing and cracking of Districts 9, 9A, 9B, and 15 was an intentional device to minimize the voting strength of Native American voters.

154. This is evidenced by a comparison between the 2021 map and the range of maps that would be expected to arise from adhering to the State's specified districting criteria in the absence of any consideration of race. Such maps naturally result in a district that combines the Turtle Mountain and Spirit Lake reservations rather than the packing and cracking that pervades Districts 9, 9A, 9B, and 15 under HB 1504. Indeed, the 2021 map is a statistical outlier that gives rise to a strong inference that District 9's substantial decrease in its Native American voting age population, and the concentration of the region's Native American voting power into a single state house subdistrict, was purposeful.

155. The factors set forth in *Arlington Heights* further support a finding of intentional discrimination.

156. H.B. 1504 bears more heavily on Native Americans than on white North Dakotans by reducing the number of legislative seats in which Native American voters can expect to elect their candidates of choice while increasing such numbers for white North Dakotans in a manner disproportionate to their population shares.

157. The historical background of the decision also points to a discriminatory purpose in the configuration of districts because "it reveals a series of official actions taken for invidious purpose," *Arlington Heights*, 429 U.S. at 267, such as the recent series of discriminatory voter ID laws discussed above.

158. The specific sequence of events leading to the enactment of H.B. 1504 also points to a discriminatory purpose. Among other things, this includes refusing to hold redistricting committee hearings at reservations, ignoring requests by certain Tribes for subdistricts while

placing a Tribe that did not request a subdistrict into one, and the hostility displayed towards the Tribes when they requested a combined legislative district that satisfied the districting criteria used by the redistricting committee. Moreover, while an analysis reveals that a race-blind mapdrawing process following the Legislature’s criteria would naturally result in a district configuration that joins the Turtle Mountain and Spirit Lake reservations, legislators repeatedly accused the Tribes of improper motivations in proposing such a map—apparently *because* they were Native Americans seeking a district combining the Spirit Lake and Turtle Mountain reservations. By contrast, a configuration like H.B. 1504’s version of District 9, which reduced its Native American voting age population of District 9 by approximately 20%, is a statistical outlier with a severe racial effect that is explainable only on account of racial considerations.

159. Procedural departures from the norm, such as the committee stating that it would await feedback from the Turtle Mountain Tribe before configuring District 9 and then doing so without that feedback and rejecting that feedback when it arrived point to a discriminatory purpose.

160. Substantive departures also suggest a discriminatory purpose. This is especially illustrated because “the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached,” *Arlington Heights*, 429 U.S. at 564-65, in that a map that combines the Turtle Mountain and Spirit Lake reservations would be expected to arise from adherence to the State’s specified districting criteria, while the configuration in H.B. 1504 would not.

161. Finally, the legislative history reveals statements by legislators revealing hostility to the Tribes’ proposed legislative district.

162. Moreover, the evidence shows that race was also the predominant purpose in configuring these districts and was used to *violate* the Voting Rights Act—something that cannot

be a compelling state interest. This includes, *inter alia*, (1) the fact that a race-neutral mapdrawing process following the Legislature’s redistricting criteria would not result in the substantial 20 point drop in District 9’s Native American population, (2) a race-neutral mapdrawing process following the Legislature’s redistricting criteria would instead naturally result in a district that combines the Turtle Mountain and Spirit Lake reservations and retains a similar demographic profile of the prior decade’s map, and (3) the comments by members of the Redistricting Committee centering race as their rationale for rejecting the map proposed by the Tribes.

CLAIMS FOR RELIEF

COUNT 1

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

163. Plaintiffs incorporate by reference the allegations above as if fully set forth herein.

164. Section 2 of the Voting Rights Act prohibits the enforcement of any qualification or prerequisite to voting or any standard, practice, or procedure that results in the denial or abridgement of the right of any U.S. citizen to vote on account of race, color in a language minority group. 52 U.S.C. § 10301(a).

165. Native American voters in northeastern North Dakota are “cracked” in Districts 9, 9B and District 15 where they constitute a minority of the voting age population. The remaining Native American population is packed into District 9A, where Native Americans constitute a supermajority of the voting age population.

166. The packing and cracking of Native American voters in Districts 9, 9A, 9B, and 15 dilutes the voting strength of Native voters, in violation of Section 2 of the Voting Rights Act.

167. Alternative districts can be configured, without any use of race as a criterion and adhering to all the State’s specified districting criteria, in which Native American voters constitute

a geographically compact majority of eligible voters by joining the Turtle Mountain and Spirit Lake reservation into one multimember district. Such a district provides Native American voters an equal opportunity to elect their candidates of choice, unlike H.B. 1504's configuration.

168. Voting in northeastern North Dakota is racially polarized, Native voters are politically cohesive, and white bloc voters usually defeats Native voters' preferred candidates. That racial polarization is not explained by partisanship.

169. Under the totality of the circumstances, H.B. 1504 denies Native voters an equal opportunity to participate in the political process and to elect their candidates of choice, in violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301.

170. Absent relief from this Court, Defendants will continue to dilute the votes of the individual Plaintiffs and the members of the Plaintiff Tribes in violation of Section 2 of the VRA.

COUNT 2

Intentional Vote Dilution, Fourteenth and Fifteenth Amendments

171. Plaintiffs incorporate by reference the allegations above as if fully set forth herein.

172. At least one purpose in the configuration of Districts 9, 9A, 9B, and 15 was to minimize the voting strength of Native American voters.

173. This purposeful discrimination had its intended effect, with H.B. 1504 bearing more heavily on Native American voters than on white voters.

174. This purposeful vote dilution violates the Fourteenth and Fifteenth Amendments, and absent relief will dilute the votes of individual Plaintiffs and the members of Plaintiff Tribes in violation of the Fourteenth and Fifteenth Amendments.

COUNT 3

Racial Gerrymandering, Fourteenth Amendment

175. Plaintiffs incorporate by reference the allegations above as if fully set forth herein.

176. Race was the predominant factor in configuring Districts 9, 9A, 9B, and 15 to pack Native American voters into District 9A while cracking them across Districts 9, 9B, and 15.

177. No compelling justification supported this, particularly because the configuration violates rather than complies with Section 2 of the Voting Rights Act.

178. This predominant use of race absent compelling justification violates the Fourteenth Amendment.

REQUESTED RELIEF

WHEREFORE, Plaintiffs ask that this Court:

- A. Declare that HB 1504 violates Section 2 of the Voting Rights Act;
- B. Declare that HB 1504 violates the Fourteenth and Fifteenth Amendments;
- C. Preliminarily and permanently enjoin Defendants from administering, enforcing, preparing for, or in any way permitting the nomination or election of members of the North Dakota Legislature from unlawful districts;
- D. Set a reasonable deadline for the legislature to enact a redistricting plan that does not dilute, cancel out, or minimize the voting strength of Native American voters;
- E. If the legislature fails to enact a valid redistricting plan before the Court's deadline, order a new redistricting plan that does not dilute, cancel out, or minimize the voting strength of Native American voters;
- F. Award Plaintiffs their costs, disbursements, and reasonable attorneys' fees incurred in bringing this action, pursuant to 42 U.S.C. § 1988 and 52 U.S.C. § 10310(e); and,

G. Grant such other relief as the Court deems proper.

Respectfully submitted this 28th day of August, 2026.

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

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

TURTLE MOUNTAIN BAND OF CHIPPEWA
INDIANS, *et al.*,

Plaintiffs,

v.

MICHAEL HOWE, in his official capacity as Secretary
of State of the State of North Dakota,

Defendant.

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

**PLAINTIFFS’ MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO
FILE FIRST AMENDED COMPLAINT**

Pursuant to Federal Rule 15(a)(2), Plaintiffs respectfully seek leave to file their First Amended Complaint. *See* Ex. A. Plaintiffs have included a redline showing changes introduced by the First Amended Complaint. *See* Ex. B. The Secretary has already informed the Court of his opposition to Plaintiffs’ ability to amend their complaint and pursue their case on remand.

BACKGROUND

In February 2022, Plaintiffs filed suit against the North Dakota Secretary of State under 42 U.S.C. § 1983 and Section 2 of the Voting Rights Act (“VRA”). *See* Compl., ECF No. 1. Plaintiffs supplemented their complaint once to incorporate allegations concerning the November 2022 election. *See* Mot. for Leave, ECF No. 42; Suppl. Compl., ECF No. 44. In June 2023, this Court held a four-day bench trial and, on November 17, 2023, ruled in Plaintiffs’ favor. *See* Mem. and Op., ECF No. 125. The Court found that Plaintiffs had satisfied all three *Gingles* preconditions and that, under the totality of the circumstances, Native American voters in districts 9 and 15 and

subdistricts 9A and 9B had been deprived of an “equal opportunity to elect candidates of their choice.” *Id.* at 38–39.

The Secretary appealed this Court’s decision. On appeal, the Eighth Circuit did not reach the merits of Plaintiffs’ claims but rather held that Section 2 of the VRA is not privately enforceable through 42 U.S.C. § 1983. *Turtle Mountain Band of Chippewa Indians v. Howe*, 137 F.4th 710, 721 (8th Cir. 2025). Though the Eighth Circuit reversed this Court’s judgment, that mandate was stayed by the U.S. Supreme Court pending any petition for certiorari. *See Turtle Mountain Band of Chippewa Indians v. Howe*, 145 S. Ct. 2876, 2877 (2025) (mem.). Plaintiffs filed their petition for certiorari on September 2, 2025.

On April 29, 2026, the Supreme Court issued its decision in *Louisiana v. Callais*, 146 S. Ct. 1131 (2026). In that decision, the Court “update[d]” the *Gingles* framework and provided new guidance on what is required when analyzing the totality of the circumstances. *Id.* at 1159. The Court made two changes to the first *Gingles* precondition: (1) in drawing illustrative maps, “plaintiffs cannot use race as a districting criterion,” and (2) illustrative maps must meet all the State’s legitimate redistricting goals. *Id.* The Court also modified the second and third *Gingles* preconditions to require that plaintiffs “disentangle race” and partisan affiliation by “provid[ing] [a racially polarized voting] analysis that controls for party affiliation.” *Id.* at 1159-60. Finally, the Court instructed that the totality of the circumstances inquiry must “focus on evidence that has more than a remote bearing on . . . present-day intentional racial discrimination regarding voting.” *Id.* at 1160. As one example, the Court observed that if “application of a State’s districting algorithm yields numerous maps with districts in which the members of a minority group constitute a majority” and “the State cannot provide a legitimate reason for rejecting all those maps,” then “the inference of racial motivation is strong.” *Id.* at 1156.

On May 18, 2026, the Supreme Court granted Plaintiffs’ petition for certiorari in this case, vacated the Eighth Circuit’s decision, and remanded the case “for further consideration in light of *Louisiana v. Callais*, 146 S. Ct. 1131 (2026).” In turn, the Eighth Circuit vacated this Court’s judgment because it had applied “what is now an incorrect legal framework.” Judgment, *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 23-3655, 2026 WL 1972750, at *1 (8th Cir. July 7, 2026). The Eighth Circuit then remanded the case to this Court “for further proceedings in light of *Callais*.” *Id.*

LEGAL STANDARD

Before a judgment has been entered, or after a judgment has been set aside, the standard for leave to amend a complaint is governed by Rule 15(a)(2). *See Boyd v. Sec’y, Dep’t of Corr.*, 114 F.4th 1232, 1237 (11th Cir. 2024). Under that rule, the decision to grant leave is left to the discretion of the district court. *See Popoalii v. Corr. Med. Servs.*, 512 F.3d 488, 497 (8th Cir. 2008). But leave to amend “shall be freely given” *Foman v. Davis*, 371 U.S. 178, 182 (1962) (quoting Fed. R. Civ. P. 15(a)). “If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded the opportunity to test his claim on the merits.” *Id.* In accordance with this liberal policy, the Eighth Circuit has held that it is an abuse of discretion to deny leave to amend without a recognized basis for the denial, “such as undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies . . . , undue prejudice to the non-moving party, or futility of amendment.” *Kozohorsky v. Harmon*, 332 F.3d 1141, 1144 (8th Cir. 2003) (quoting *Thompson-El v. Jones*, 876 F.2d 66, 67 (8th Cir. 1989)).

ARGUMENT

I. Plaintiffs are entitled to amend their complaint to conform to the newly announced *Callais* standard for Section 2 claims.

Plaintiffs are entitled to amend their complaint to conform to the new Section 2 standards announced in *Callais*. Both the Supreme Court and the Eighth Circuit have remanded this case for

further proceedings in light of *Callais*. “Fundamental fairness requires that [Plaintiffs] be granted an opportunity to address comprehensively the post-*Callais* standards.” *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1048 (6th Cir. 1990) (reversing denial of opportunity to present new evidence after intervening change in applicable legal standard); *see also Dixon v. Johanns*, No. CV-05-03740-PHX-NVW, 2006 WL 3390311, at *8 (D. Ariz. Nov. 21, 2006) (“Due process encompasses the right to present evidence under governing legal standards.”). Now that this case has returned to this Court, Plaintiffs are entitled to adjust their pleadings accordingly and develop and present evidence responsive to the new legal landscape. *See Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982) (“When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings.”); *see also Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 262 (2015) (“In light of our opinion, all parties remain free to introduce such further evidence as the District Court shall reasonably find appropriate [on remand].”); *Gill v. Whitford*, 585 U.S. 48, 73 (2018) (remanding to the district court “so that the plaintiffs may have an opportunity to prove concrete and particularized injuries using evidence” consistent with the Court’s new standing analysis).

As Plaintiffs’ proposed Amended Complaint makes clear, Plaintiffs intend to satisfy their burden to again prove a Section 2 violation under the *Callais* updated framework.

Gingles Prong 1. With respect to the first *Gingles* precondition, Plaintiffs intend to show that maps generated by a computer algorithm programmed to (1) comply with the legislature’s stated redistricting criteria and (2) be entirely blinded to racial data yield numerous maps that combine the Turtle Mountain and Spirit Lake reservations. Indeed, the legislature’s stated redistricting criteria inevitably lead to such a configuration when race-neutral maps are generated

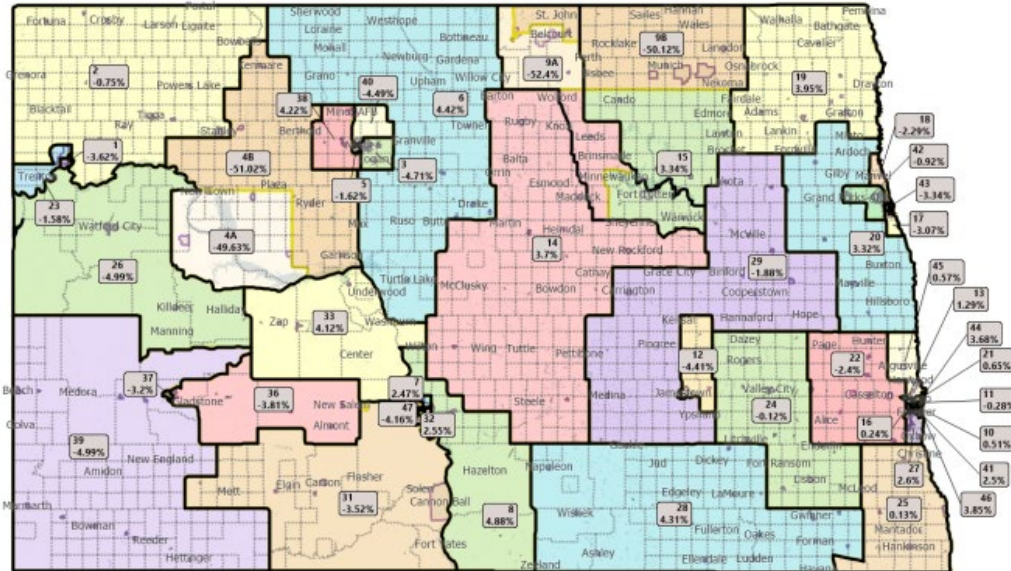
by a computer algorithm. In fact, the 2021 enacted map's configuration is, by contrast, an extreme statistical outlier in its severe degradation in the Native voting age population in District 9, so much so that it gives rise to the conclusion that its configuration is explainable only *on account of* race.

Notably, the Legislative Assembly has conceded that districts that combine the Turtle Mountain and Spirit Lake reservations satisfy the compactness standard the legislative redistricting committee used when drawing the 2021 enacted map. The North Dakota Legislative Council prepared memoranda for the redistricting committee for each of three maps (two proposed by plaintiffs and one proposed by Republican Senator Klein) and conceded the following about each: “[t]he compactness . . . of [Maps 1, 2, and 3] *meet[] the standards used by the committee when drawing the existing district map.*” N.D. Legis. Council, Plaintiff’s Proposed Map #1 at 2, <https://ndlegis.gov/sites/default/files/resource/committee-memorandum/25.9175.01000.pdf> (emphasis added); N.D. Legis. Council, Plaintiff’s Proposed Map #2 at 2, <https://ndlegis.gov/sites/default/files/resource/committee-memorandum/25.9176.01000.pdf>; N.D. Legis. Council, Proposed Map #3 at 2, <https://ndlegis.gov/sites/default/files/resource/committee-memorandum/25.9190.01000.pdf>. A screenshot of this is shown below for the memorandum regarding Plaintiffs’ Map #2, the remedial map imposed by the Court after the legislature failed to adopt its own.

25.9176.01000

Redistricting Committee

In the map below, the boundaries of the Plaintiff's Map #2 are depicted in black, and the existing district boundaries are in yellow. The compactness ([appendix](#)) of Plaintiff's Map #2 meets the standards used by the committee when drawing the existing district map.



This compactness standard (reflected in the linked appendix)—*i.e.*, the standard actually used by the legislative redistricting committee when drawing the enacted map—is the benchmark *Callais* sets for plaintiffs proposing alternative maps. In interpreting the phrase “less opportunity than other members of the electorate to . . . elect representatives of their choice,” *Callais*, 146 S. Ct. at 1154 (quoting 52 U.S.C. § 10301), the Court held that a plaintiff must use the actual redistricting criteria and standards used by the legislature—not some higher post-hoc standard advanced only in litigation:

For example, the legislature might want to minimize changes in the prior map, avoid districts with discontinuous territory, and avoid splitting counties or municipalities. It might impose a *certain standard of compactness*, aim to protect some or all incumbents, or promote the prospects of a particular political party. . . . But in any event, the ‘opportunity’ of these ‘members of the electorate’ to contribute their votes to a winning cause is whatever opportunity results from the application of the State’s combination of permissible criteria. That is what our randomly selected individual voter and group of voters can expect regarding their opportunity to elect a preferred candidate. And under § 2, a minority voter is entitled to nothing less and nothing more.

Id. at 1155 (emphasis added). A plaintiff’s alternative map satisfies the legislature’s compactness standard “just as well,” *id.* at 1159, as the legislature’s enacted map when it satisfies the standard the legislature itself deployed in drawing its districts. Here, the Legislative Assembly has conceded that maps with a district connecting the Turtle Mountain and Spirit Lake reservations do just that. Imposing a higher standard *post hoc* would be to entitle Native Americans to “less” than the equal opportunity of a “randomly selected individual” sorted into districts based upon the legislature’s stated criteria. *Id.* *Callais* does not impose an elevated showing for minority plaintiffs compared to the random non-minority plaintiff sorted into a different district subject to the legislature’s compactness standard. In fact, *Callais* protects against exactly that.

Plaintiffs will also show that maps with districts connecting the Turtle Mountain and Spirit Lake reservations comply just as well or better than the enacted map on all the other stated redistricting criteria, including population equality, contiguity, preserving the cores of prior districts, minimizing county splits, adhering to reservation boundaries, and protecting incumbents.

One criteria the legislature did *not* advance is achieving partisan gain. Here too, a *post hoc* invention of such a goal by the State must be rejected. *See Callais*, 146 S. Ct. at 1162–63 (differentiating Louisiana, which “has been forthright from the beginning that its aim was to protect the State’s most prominent Republican House members” with Alabama, which “did not defend its map on the ground that it was drawn to achieve a political objective”). Indeed, as Plaintiffs allege in their Amended Complaint, the map enacted in 2021 actually *added* a district carried by Democratic presidential candidate Joe Biden and maintained the same number of districts carried by former Democratic Senator Heitkamp. Those are not the hallmarks of a map aimed at benefitting Republicans.

Gingles Prongs 2 and 3. *Callais* requires Plaintiffs to show that racially polarized voting is not explained by partisan voting preferences of voters. *Id.* at 1159. As Plaintiffs allege in their Amended Complaint, they will do just that. For example, Rolette County comprises three-quarters of the population of District 9 under the 2021 enacted map. It has held numerous elections for *nonpartisan* county offices over the past several years where Native American candidates face white candidates. Those elections generally feature stark racially polarized voting, with white voters preferring white candidates and Native American voters preferring Native American candidates. That is, when no partisan labels are attached to the candidates, racially polarized voting persists. This is also true for nonpartisan elections featuring Native American and white candidates in Benson County. As Plaintiffs allege in their Amended Complaint, the same was true in the Democratic primary for subdistrict 9A in 2022, which featured a Native American and a white candidate. This and other evidence will satisfy Plaintiffs’ burden to “provide an analysis that controls for party affiliation.” *Id.*; *see id.* (noting that differing voting patterns of white and minority voters “*within* the Democratic party . . . helps to demonstrate that the minority plaintiffs have ‘less opportunity’ than their majority counterparts because of race, not just because of partisan affiliation”).

Totality of the Circumstances. *Callais* requires Plaintiffs to proffer evidence with “more than a remote bearing on what the Fifteenth Amendment prohibits: present-day intentional racial discrimination regarding voting.” *Id.* at 1160. The Court was adamant that plaintiffs need not *prove* intentional discrimination. Instead, the Court explained that when a plaintiff proves “that a districting scheme denies members of a racial group the same ‘opportunity’ as other voters to elect the candidates they prefer,” they succeed in demonstrating “circumstances [that] give rise to a strong inference of racial discrimination.” *Id.* at 1162. And the central example the Court offered

is when application of the legislature’s stated redistricting criteria leads to a map configuration proposed by the plaintiffs rather than that enacted by the legislature. *See id.* at 1155. As Plaintiffs allege in their Amended Complaint, they will show exactly that. The Legislative Assembly’s stated redistricting criteria naturally yield a map with a district that joins the Turtle Mountain and Spirit Lake reservations, not one that drastically lowers District 9’s Native American voting age population like the enacted map. And because that map is such an extreme statistical outlier, *Callais* teaches that the “strong inference” it requires is established.¹

In any event, this Court has already concluded that the record contains contemporary examples of racial discrimination in voting against Native Americans. And as the Amended Complaint alleges, there are numerous such examples, including a string of recent discriminatory voter ID laws that specifically targeted the legislature’s knowledge that Native Americans possessed IDs without residential street addresses—because the government *failed to assign them*. Likewise, there is Benson County’s knowing violation of a consent decree requiring compliance with the Voting Rights Act, only recently remedied.

Plaintiffs will satisfy their burden under the totality of circumstances.

All of this is to say: Plaintiffs are entitled to amend their complaint to conform to the new framework set forth in *Callais* and they intend to prevail on remand just as they already prevailed in the first trial. Denying Plaintiffs the opportunity to prove their case now that the law has changed would be a violation of due process.

¹ Plaintiffs had no reason to conduct this analysis or present it to the Court at the first trial prior to *Callais*. That this Court declined to criticize the Legislative Assembly’s responsiveness or the tenuousness of its enacted map without the benefit of this evidence is thus unsurprising.

II. Plaintiffs should be granted leave to add their constitutional claims.

The Court should likewise grant Plaintiffs leave to add their constitutional claims. In the time since Plaintiffs filed their lawsuit and this case was tried, the Supreme Court has issued additional precedent on constitutional claims regarding redistricting. *See, e.g., Alexander v. S.C. State Conf. NAACP*, 602 U.S. 1 (2024); *Allen v. Milligan*, 146 S. Ct. 1377 (2026). Together with *Callais*, these cases discuss the importance of alternative maps in demonstrating intent and racial predominance. In doing so, they reversed course from the framework that existed when this case was filed and tried. *Compare Cooper v. Harris*, 581 U.S. 285, 318–22 (2017) (holding that alternative maps are not required to demonstrate legislative motive), *with Alexander*, 602 U.S. at 34–35 (requiring plaintiffs to produce alternative maps to demonstrate legislative motive or face an adverse inference). Following the Court’s discussion in *Callais*, *Alexander*, and *Milligan*, and following Plaintiffs’ analysis in light of those decisions as discussed above, it is apparent that Plaintiffs have strong constitutional claims. Given the developments in the law, and given Rule 15’s liberal standard, Plaintiffs should be permitted to amend their complaint to assert these claims to ensure they have all possible claims before the Court.

Plaintiffs recognize that, under federal law, their assertion of constitutional claims necessitates the appointment of a three-judge panel. When a plaintiff raises constitutional claims against “the apportionment of any statewide legislative body,” the Court must notify the Circuit’s chief judge, who must appoint two additional judges to serve on a three-judge district court panel. 28 U.S.C. § 2284. When constitutional claims are present in a lawsuit, the appellate process likewise shifts; the Eighth Circuit no longer has appellate jurisdiction and appeals instead go directly to the Supreme Court. *See* 28 U.S.C. § 1253. The additional judges on the panel will have the benefit of this Court’s prior opinion and the trial record already produced in this case, as well as the evidence the parties will adduce in the remand proceedings. But the fact that federal law

requires two additional judges once Plaintiffs assert constitutional claims cannot prejudice Plaintiffs from their right to assert all the claims they have in the case nor does it alter the liberal amendment standard under Rule 15(a)(2).

* * *

There is no recognized basis to deny Plaintiffs leave to file their First Amended Complaint. The impetus to amend does not come from any dilatory tactic, bad faith, or deficiency in the operative complaint, but rather from direct instructions by the Supreme Court and Eighth Circuit to address a new legal standard for Section 2 claims, the developments in Supreme Court jurisprudence on constitutional redistricting claims since this case was first filed and decided, and Plaintiffs' analysis in light of these events. And Plaintiffs have not engaged in any delay in following those instructions; in fact, they have moved as swiftly as possible to amend their complaint in light of the *Callais* decision. Nor is there any basis to suggest Plaintiffs' amendments would be futile because the parties and the Court are engaging with a new legal standard in the first instance and Plaintiffs prevailed under the prior standard. The constitutional claims are also viable because the proposed complaint plausibly alleges intentional discrimination and unjustified racial predominance in the challenged districts. Finally, there is no "undue prejudice" to the Secretary because he, too, must deal with the new *Callais* standard and will be provided with every opportunity to defend against Plaintiffs' claims under that standard. Nor will the constitutional claims cause undue prejudice because they challenge the same map, arise from the same redistricting process, and the existing record, to be supplemented in the remand proceedings, is relevant to their resolution. Therefore, Plaintiffs should be granted leave to file their First Amended Complaint.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for leave to amend their complaint should be granted.

August 28, 2026

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CERTIFICATE OF SERVICE

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