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

Charles Walen, an individual; and Paul Henderson, an individual, Plaintiffs vs. Doug Burgum, in his official capacity as Governor of the State of North Dakota; Alvin Jaeger, in his official capacity as Secretary of the State of North Dakota, Defendants and The Mandan, Hidatsa and Arikara Nation; Lisa DeVille, an individual; and Cesareo Alvarez, Jr., an individual. Defendants-Intervenors	)	CIVIL NO: 1:22-CV-00031 **DEFENDANTS' MEMORANDUM IN RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

The 2022 election cycle is well underway in North Dakota, with significant statutory election deadlines having already passed and other deadlines fast approaching. State and county election officials, political parties, and candidates have been hard at work for many months preparing for the upcoming primary election to be held on June 14, 2022, and a general election to be held on November 8, 2022. Briefing on Plaintiff's Motion For Preliminary Injunction (Doc. 9) is scheduled to be concluded only two months before the June primary election (*see* Doc. 14, p. 2). At this late date, Plaintiffs Charles Walen and Paul Henderson (collectively "Plaintiffs") seek a preliminary injunction to enjoin Defendants, Governor Doug Burgum and Secretary of State Alvin Jaeger (collectively "Defendants"), from enforcing or giving effect to the legislative subdistricts duly created by the North Dakota Legislative Assembly and signed into law by Governor Burgum. If Plaintiffs' requested preliminary injunction is granted, it would cause

substantial disruption to the election process and change the rules very late in the election cycle in a manner that could result in otherwise qualified candidates being removed from the ballot. Regardless of the merits of Plaintiffs' allegations in this case, this Court must not allow such significant disruption to the 2022 elections. Additionally, the Court should consider there is another recently filed redistricting case involving some of the same subdistricts. The Court should not issue an early preliminary injunction in the present case and risk a series of multiple successive changes to the legislative district maps in North Dakota. Plaintiffs have not met their burden of establishing the necessary elements for a preliminary injunction.

PROCEDURAL HISTORY

Plaintiffs commenced this action on February 16, 2022, with the filing of their Complaint For Declaratory And Injunctive Relief ("Complaint"). Doc. 1; s*ee also* Fed. R. Civ. P. 3. In their Complaint, Plaintiffs challenge the new legislative subdistrict boundaries created in House Bill 1504 by the North Dakota Legislative Assembly, signed by Governor Doug Burgum on November 11, 2021, and which became law when filed with the Secretary of State the next day. *See generally* Doc. 1; Affidavit Of Irwin James Narum (Jim) Silrum ("Silrum Aff."), ¶ 6, ***Exhibit C***. Specifically, Plaintiffs challenge the creation of House Subdistricts 4A, 4B, 9A, and 9B (collectively "Challenged Subdistricts"), which are located within the boundaries of Senate Districts 4 and 9, respectively. *Id.* Plaintiffs allege the creation of the Challenged Subdistricts constituted a racial gerrymander, allegedly in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[1] *Id.* at pp. 8-9, ¶¶ 44-51. The Mandan, Hidatsa and Arikara Nation, Lisa DeVille, and Cesareo Alvarez, Jr. have intervened as Defendant-Intervenors. Doc. 17. Defendants have not yet answered the Complaint. *See* Docs. 15, 17. On March 4, 2022,

[1] Plaintiff Charles Walen alleges that he is a resident of Senate District 4 and Plaintiff Paul Henderson alleges he is a resident of Senate District 9, however they have presented no evidence proving these allegations in order to establish standing. Doc. 1 at p. 3, ¶¶ 11-12.

Plaintiffs filed the present Motion For Preliminary Injunction. Doc. 9. Defendants submit this memorandum in opposition to Plaintiffs' Motion For Preliminary Injunction (Doc. 9).

BACKGROUND AND FACTS

A. Legislative Redistricting In North Dakota

Legislative redistricting in North Dakota is governed in part by the Constitution of North Dakota. Under Section 2, Article IV of the Constitution of North Dakota, the Legislative Assembly is required to "fix the number of senators and representatives and divide the state into as many senatorial districts of compact and contiguous territory as there are senators." N.D. Const., Art. IV, Sec. 2. A senator and at least two representatives are apportioned to each senatorial district, however, Section 2, Article IV expressly permits the creation of subdistricts for elections of members of the House of Representatives, as was done in this case.[2] *Id.* State law, specifically N.D. Cent. Code § 54-03-01.5, fixes the number of senators and representatives within the parameters set by Section 1, Article IV of the Constitution of North Dakota and also provides requirements for legislative redistricting plans. In addition to the state requirements with respect to redistricting, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires state legislative districts have substantial population equality. *Reynolds v. Sims*, 377 U.S. 533, 578 (1964). United States Supreme Court has also recognized various traditional race-neutral redistricting principles, including: 1) compactness, 2) contiguity, 3) preservation of counties and other political subdivisions, 4) preservation of communities of interest, 5) preservation of cores of prior districts, and 6) protection of incumbents. *Shaw v. Reno*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *Abrams v. Johnson*, 521 U.S. 74, 92 (1997); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

[2] N.D. Const., Art. IV, Sec. 2 and N.D. Cent. Code § 54-03-01.5(3) allow two senatorial districts to be combined under certain circumstances, creating multimember senate districts with two senators and four representatives. However, these provisions are not relevant to the present case.

B. 2021 Legislative Redistricting

Plaintiffs' motion is not supported by any affidavits, transcripts of legislative hearings, or other evidence of the full scope of the legislative history. Instead, Plaintiffs rely entirely on a few selected quotes from individual legislators, hyperlinks to a few selected hearing videos (without transcripts), and hyperlinks to some selected hearing minutes. *See* Doc. 12. However, the actual redistricting process in the Legislative Assembly, while performed on a short timeline, was extensive. On April 21, 2021, Governor Burgum signed House Bill 1397, which established an interim legislative management redistricting committee ("Interim Redistricting Committee") to among other things develop and submit to the legislative management by November 30, 2021 a redistricting plan and legislation to implement the plan. Silrum Aff., ***Exhibit A.*** Between July 29 and September 29, 2021, the Interim Redistricting Committee held six public meetings (three of which were two-day meetings), and gathered voluminous data and testimony, including the written testimony attached as ***Exhibits E, F, G, H, M, N, O, P, R, T, U, V, and W*** to the Affidavit of Emily Thompson ("Thompson Aff."). Another legislative committee also held relevant public meetings relating to redistricting: the Interim Tribal and State Relations Committee. Pursuant to N.D. Cent. Code § 54-35-23(3), this committee conducts "joint meetings with the North Dakota tribal governments' task force to study tribal-state issues…." Between August 17, 2021 and September 1, 2021, the Interim Tribal and State Relations Committee held 3 public meetings, and gathered data and testimony, including the written testimony attached as ***Exhibit C*** to the Thompson Aff.

On October 29, 2021, Governor Burgum issued Executive Order 2021-17, which convened a special session of the Legislative Assembly on November 8, 2022 to, among other things, "provide for redistricting of government pursuant to Article IV, Section 2, of the North Dakota Constitution following the 2020 census". Silrum Aff., ***Exhibit B***. On November 8 and 9, 2022, a Joint Redistricting Committee held hearings on House Bill 1504, and gathered various data and testimony, including the written testimony attached as ***Exhibits X, Y, and Z*** to the Thompson Aff.

On November 9, 2022, the House of Representatives debated and voted in favor of House Bill 1504. On November 10, 2021, the Senate debated and voted in favor of House Bill 1504. House Bill 1504 was signed by Governor Doug Burgum on November 11, 2021 and became law when filed with the Secretary of State the next day. Silrum Aff., ***Exhibit C***. The district descriptions were codified as N.D. Cent. Code § 54-03-01.14.

LAW AND ARGUMENT

A. Preliminary Injunction Standard

Plaintiff's Motion for Preliminary Injunction is brought pursuant to Rule 65 of the Federal Rules of Civil Procedure. Doc. 9, p. 1. With respect to motions for preliminary injunctions under Rule 65, this Court has previously explained:

> The court is required to consider the factors set forth in *Dataphase Sys., Inc. v. C L Sys., Inc*., 640 F.2d 109, 114 (8th Cir. 1981). Whether a preliminary injunction or temporary restraining order should be granted involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that the granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.
>
> It is well-established that the burden of establishing the necessity of a temporary restraining order or a preliminary injunction is on the movant. No single factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance they weigh toward granting the injunction.

Emineth v. Jaeger, 901 F.Supp.2d 1138, 1141 (D.N.D. 2012) (internal citations and quotations omitted). "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

B. Preliminary Injunction Should Be Denied Under The *Purcell* Principle

Regardless of the purported merits of the Plaintiffs' claims in this action, this Court should not issue a preliminary injunction, as it would violate the well-established principle laid out by the United States Supreme Court in *Purcell v. Gonzalez*, 549 U.S. 1 (2006) that courts should not change election rules during the period of time just prior to an election because doing so could

confuse voters and create problems for officials administering the election. On this basis alone, Plaintiff's Motion for Preliminary Injunction (Doc. 9) should be denied. The 2022 election cycle in North Dakota is well underway and there is simply not enough time to make changes to the legislative district maps without causing chaos and confusion for voters, state and local election officials, political parties, and candidates.

1. The *Purcell* Principle

When a plaintiff seeks to enjoin the operation of election procedures "just weeks before an election," federal courts must "weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures." *Id.* at 4. As the United States Supreme Court has explained, "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4-5. The Court "should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). "[A] court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree." *Id.*

The recent United States Supreme Court order in *Merrill v. Milligan*, 142 S. Ct. 879 (2022) is instructive. The *Merrill* case involved several challenges to Alabama's recently redrawn congressional electoral maps, wherein the plaintiffs claimed racial gerrymandering in violation of the United States Constitution and/or violations of the Voting Rights Act of 1965. *Singleton v. Merrill*, Case No. 2:21-cv-1291 (N.D. Ala.), *Milligan v. Merrill*, Case No. 2:21-cv-1530 (N.D. Ala.), and *Caster v. Merrill*, Case No. 2:21-cv-1536 (N.D. Ala.). After a very extensive seven-day preliminary injunction hearing, the District Court found the plaintiffs were substantially likely to

succeed on the merits and the other requirements for preliminary injunction were met. Case No.: 2:21-cv-1530, Doc. 107, pp. 4-5; *see also* Case No.: 2:21-cv-01536, Doc. 101. The Alabama Secretary of State was enjoined by the District Court from conducting elections based on the existing redistricting plan, and the Alabama legislature was given 14 days to enact a new redistricting plan. Case No.: 2:21-cv-1530, Doc. 107, pp. 5-6; *see also* Case No.: 2:21-cv-01536, Doc. 101, pp. 6-7. The Alabama defendants filed an application for a stay of injunctive relief with the United States Supreme Court. *Merrill v. Milligan*, 142 S. Ct. 879 (2022). Even though the District Court had found the plaintiffs were likely to succeed on the merits and the other preliminary injunction factors were met, the United States Supreme Court granted the Alabama defendants' request to stay the preliminary injunctions pending further order of the Court. *Id.*

While the *Merrill* Court issued its order without a substantive opinion, Justice Kavanaugh, joined by Justice Alito, wrote separately to concur with the stay of the injunctions. *See id.* at 879–82. Citing the *Purcell* principle, the concurrence explains, "[t]he stay order follows this Court's election-law precedents, which establish (i) that federal district courts ordinarily should not enjoin state election laws in the period close to an election, and (ii) that federal appellate courts should stay injunctions when, as here, lower federal courts contravene that principle." *Merrill*, 142 S. Ct. at 879. The concurrence notes the primary elections were set to begin in Alabama in only seven weeks, and explains, "[t]his Court has repeatedly stated that federal courts ordinarily should not enjoin a state's election laws in the period close to an election, and this Court in turn has often stayed lower federal court injunctions that contravened that principle." *Id.* at 880. The concurrence further explains: "It is one thing for a State on its own to toy with its election laws close to a State's elections. But it is quite another thing for a federal court to swoop in and re-do a State's election laws in the period close to an election." *Id.* at 880-81. The *Purcell* principle has been discussed by the United States Supreme Court in other cases this year relating to the 2022 elections (*see e.g.*

Moore v. Harper, 142 S. Ct. 1089 (2022) (Kavanaugh, J., concurring), stating "[i]n light of the *Purcell* principle and the particular circumstances and timing of the impending primary elections in North Carolina, it is too late for the federal courts to order that the district lines be changed for the 2022 primary and general elections, just as it was too late for the federal courts to do so in the Alabama redistricting case last month"), and has been relied on by District Courts as well (*see e.g. Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 1:21-CV-5337-SCJ, 2022 WL 633312, at *75–76 (N.D. Ga. Feb. 28, 2022) (stating, "it would be unwise, irresponsible, and against common sense for this Court not to take note of *Milligan*, which essentially allowed Alabama's May 24, 2022, primary election to go forward despite a three-judge court's preliminary injunction ruling that the plaintiffs had a likelihood of success on the merits of their Section 2 claims.").

2. If The Court Granted Preliminary Injunction, The Matter Would Need To Be Sent Back To The Legislative Assembly To Redraw The District Maps

Plaintiffs assert in their memorandum in support of the motion for preliminary injunction "enjoining the effect of the Subdistricts does little more than remove a dividing line placed along the border of two Native American Reservations…" and that "Defendants face no additional burden by simply removing the Subdistricts from Districts 4 and 9." Doc. 12, p. 17. Defendants do not agree the injunction sought by Plaintiffs would have the effect of simply removing the subdistrict lines within Districts 4 and 9. Even assuming arguendo the Plaintiffs ultimately prevail on the merits in this case, and are able to prove their allegation the State racially gerrymandered in violation of the Fourteenth Amendment, this Court cannot simply delete subdistrict lines created by the North Dakota Legislative Assembly. Supreme Court precedent dictates the North Dakota Legislative Assembly would have the first opportunity to create a redistricting plan in a manner that does not violate the Constitution. *See, e.g. North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018); *White v. Weiser*, 412 U.S. 783, 794–95 (1973). "The Supreme Court has repeatedly held

that "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt.'" *Diaz v. Silver*, 932 F. Supp. 462, 465 (E.D.N.Y. 1996) (quoting *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978)). "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that "reapportionment is primarily the duty and responsibility of the State."'" *Miller v. Johnson*, 515 U.S. 900 (1995)(internal citations omitted). "[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison*, 507 U.S. 25 (1993) (citing U.S. Const. art. I, § 2).

Under Section 2, Article IV of the Constitution of North Dakota, the Legislative Assembly is charged with redistricting. Not only would it take time for the Legislative Assembly to reconsider its districting if preliminary injunction were granted (and the Legislative Assembly is not in session, with its next regular session set to convene in January 2023), but the outcome of that reconsideration cannot be presumed. Due to the constitutional and statutory requirement that legislative districts have substantial population equality (*Reynolds v. Sims*, 377 U.S. 533, 578 (1964); N.D. Const., Art. IV, Sec. 2; N.D. Cent. Code § 54-03-01.5(5)), the creation of subdistricts which accounted for Indian Reservation boundaries necessarily impacted the legislative options for the size and shape of the full Districts 4 and 9, as those full districts were required to have twice the population of the subdistricts, as close as was practicable. If the Legislative Assembly were to reconsider its legislative redistricting decisions, altering or eliminating the Challenged Subdistricts, it cannot be assumed the boundaries of District 4 and District 9 would remain the same. If the boundaries of either of those districts were altered, it would have cascading effects that would require changes to all the other districts in the State due to the requirement of substantial population equality. Silrum Aff. at ¶ 7.

As discussed in more detail below, changing the legislative districts (whether only subdistrict boundaries or full district boundaries) this late into the 2022 election cycle would cause chaos and confusion for voters, state and local election officials, political parties, and candidates.

3. Impact Of Districting Changes To The 2022 Election Cycle

The 2022 election cycle will include elections for members of the North Dakota House of Representatives in all the Challenged Subdistricts.[3] To assist the Court with its analysis of this case, North Dakota Deputy Secretary of State Irwin James Narum (Jim) Silrum ("Deputy Secretary of State Silrum") has provided in his affidavit a list of important election deadlines for the June 14, 2022, Primary Election and November 8, 2022, General Election, with citations to applicable statutes or other authorities. Silrum Aff. at ¶ 14. There are many important deadlines that occur in advance of election day, and which require weeks or months of work by election officials to prepare for. Changing the districts and/or subdistricts at this late date would have drastic consequences and could operate to remove otherwise eligible candidates from the ballot.

For example, as explained by Deputy Secretary of State Silrum in his affidavit, for candidates running by Petition rather than by party endorsement, the filed Petition must contain, among other things, the signatures and printed names of qualified electors, the number of which for legislative offices is determined by N.D. Cent. Code § 16.1-11-06(1)(b)(3)(d), which requires "the signatures of at least one percent of the total resident population of the legislative district as determined by the most recent federal decennial census." Silrum Aff. at ¶ 12. The Secretary of State has interpreted this to require candidates running for the House in subdistricts to submit signatures of at least one percent of the total resident population of the subdistrict in which they are running. *Id.*

[3] North Dakota law provides for staggering of terms of members of the Legislative Assembly based on even-numbered and odd-numbered districts. N.D. Cent. Code § 54-03-01.15. However, with respect to subdistricts, a representative must be elected from each even numbered and odd-numbered subdistrict in the year 2022, with only the length of the terms of office varying. N.D. Cent. Code § 54-03-01.15(1)(c) and (3)(c).

The Secretary of State has already given this guidance to individuals who have inquired regarding the total number of signatures required to run for a House seat in a subdistrict. *See* ***Exhibit E***, attached to the Silrum Aff.. As such, candidates running for the House in Subdistrict 4A, 4B, 9A, and 9B are collecting approximately half the signatures required of a candidate running for the Senate in the entire district. Silrum Aff. at ¶ 12. For example, as shown on the chart attached as ***Exhibit E*** to the Silrum Aff., a candidate running for the Senate in District 4 is required to submit not less than 164 valid signatures, but the signature requirements for House candidates in Subdistrict 4A is 83 and 4B is 81. Similarly, a candidate running for the Senate in District 9 is required to submit not less than 161 valid signatures, but the signature requirements for House candidates in Subdistrict 9A is 79 and 9B is 82. *Id.* The signatures must be submitted no later than 4 p.m. on April 11, 2022, which is only a few days after the filing of this memorandum, and after the briefing will be complete on the present motion. Silrum Aff. at ¶ 12 (citing N.D. Cent. Code § 16.1-11-06); Doc. 15. If Subdistrict 4A, 4B, 9A, and/or 9B were eliminated in advance of the 2022 elections as requested by Plaintiffs, candidates that would have qualified to be on the ballot based on the number of signatures required in a subdistrict might no longer qualify, as they would not have sufficient signatures to be a candidate for an entire district. Silrum Aff. at ¶ 12. Representatives of the Office of the Secretary of State and the political parties in North Dakota have informed potential candidates of the signature requirements in subdistricts, and by the time this motion is fully briefed, it will be too late under North Dakota law for any candidate to submit additional signatures if the Challenged Subdistricts are eliminated. *Id.*; *see also* N.D. Cent. Code § 16.1-11-06 (establishing a deadline of 4 p.m. on April 11, 2022 for submission of signatures). Eliminating the Challenged Subdistricts, as requested by Plaintiffs, could operate to remove otherwise eligible candidates from the ballot in the 2022 elections. These candidates would have followed all applicable laws and met all required deadlines, only to have the rules changed by the

Court after it is too late for the candidates to meet new signature requirements resulting from the elimination of Subdistricts.

A change to districting at this time would impact endorsed candidates and the political parties. Based on the current redistricting maps, 98 of the 141 Senate and House member offices are required to be on the ballots in 2022. Silrum Aff. at ¶ 11. These offices are from 34 of the 47 legislative districts. *Id.* Therefore, the legislative district political parties of the state have met to endorse candidates for these positions. *Id.* The House candidates endorsed by the political parties for office representing a subdistrict must reside within the subdistrict. *Id.* This naturally reduces the number of qualified candidates in subdistricts compared to districts that are not subdivided. *Id.* If subdistricts were eliminated by this Court as requested by Plaintiffs, the legislative district parties could endorse different candidates, however, the deadline for the candidate paperwork to be filed is fast approaching on April 11, 2022. *Id.* (citing N.D. Cent. Code § 16.1-11-06(1)). Legislative district political parties also elected delegates to attend the state political party conventions that have already occurred in late March and early April. Silrum Aff. at ¶ 11. This work began in January and was not completed until early April of this year. *Id.* A change in the legislative district boundaries would require the legislative district political parties to complete this work again and more could be impacted depending on the extent of the changes. *Id.*

Further, according to N.D. Cent. Code § 16.1-03-17, if redistricting of the Legislative Assembly becomes effective after the organization of political parties and before the primary or the general election, some political parties in newly established districts are required to reorganize as closely as possible in conformance with Chapter 16.1-03 to assure compliance with primary election filing deadlines. Silrum Aff. at ¶ 10. This would include districts in which the population residing within any new geographic area added to the district is at least 25 percent of the district's total population.. *Id.* (citing N.D. Cent. Code § 16.1-03-17(2)). After the 2021 redistricting

boundaries were established, 26 legislative district political parties from the 47 districts were required to reorganize. *See* ***Exhibit D***, attached to the Silrum Aff. (indicating district population numbers, percentage of change, and whether reorganization was required). It should be noted that the new geographic area added to Legislative District 9, in its current form, is very close to the percentage of population change requiring reorganization and any change to the district boundaries could force reorganization of the district political parties. Silrum Aff. at ¶ 10. Since January 1, 2022, the legislative district parties required to reorganize according to N.D. Cent. Code § 16.1-03-17 have been following the steps required in N.D. Cent. Code § 16.1-03-01 (regarding party caucuses). A change in the legislative district boundaries would require the legislative district political parties to complete this work again and more could be impacted depending on the extent of the changes.

In addition to the harm to candidates and political parties, and by extension the voters whose choices of candidates would be impacted, state and county officials would also be significantly harmed by a change to the districts and/or subdistricts at this late date as they have been preparing for the 2022 elections based on the current maps for months. For example, since December 31, 2021, the date by which each county commission established the county precincts in advance of the 2022 election cycle, all 53 county auditors have been reviewing and updating the 47,117 street segments in the State's Central Voter File to ensure each residential address of the state is associated with the correct jurisdictional boundaries, e.g., legislative, judicial, water, city, library, ambulance, etc. based on the changes made by the legislature and each county commission. Silrum Aff. at ¶ 9. Individual street segments vary widely. *Id.* As an example, a street segment might include all house numbers on a street 100 to 1200. *Id.* On a different street in the same precinct, a street segment might include only the odd house numbers, but not the even house numbers on the other side of the street because they are in an adjacent precinct. *Id.* Every individual

street segment must be reviewed by county auditors after precincts are established, whether or not the street segment is changed, to ensure the voters living at the addresses on the street segment will be given the proper ballot for the jurisdictions in which they reside. *Id.* It took from December 31, 2021, until March 23, 2022, (four months) for all 53 counties in North Dakota to review and update the 47,117 street segments in the Central Voter File. *Id.* If even one district were to be changed in the state, there would be cascading impacts that would require this work to be entirely redone. *Id.*

Further, the board of county commissioners for each of North Dakota's 53 counties is required to divide the county into precincts and establish the county precinct boundaries no later than December 31 of the year immediately preceding an election cycle. Silrum Aff. at ¶ 8 (citing N.D. Cent. Code §§ 16.1-04-01(1)(a); 16.1-04-01(3)). North Dakota law prohibits a single precinct from encompassing more than one legislative district. Silrum Aff. at ¶ 8 (citing N.D. Cent. Code § 16.1-04-01(1)(a)). County commissions must establish the precincts in a properly noticed public meeting and those notices and meetings occurred during the month of December. Silrum Aff. at ¶ 8. If even one district were to be changed in the state, there would be cascading impacts that would require precinct boundaries of the impacted counties to be redrawn to comply with all aspects of applicable law. *Id.* The county commissions drew precinct boundaries based on the legislative redistricting maps and the determination of appropriate precinct boundaries could change if subdistricts were to be removed or district boundaries were otherwise altered. *Id.*

Plaintiff's depiction of their sought relief as a simple matter of eliminating subdistrict lines, with few real consequences, is not realistic and ignores the complex interplay of election laws, election deadlines, and the responsibilities of candidates, political parties, and election officials. The *Purcell* principle is intended to prevent these types of issues that inevitably arise from last minute changes before an election.

C. The Court Should Consider Another Recently Commenced Redistricting Case: *Turtle Mountain Band of Chippewa Indians, et. al. v. Alvin Jaeger, in his official capacity as Secretary of State of North Dakota*

The Court should not consider Plaintiff's Motion for Preliminary Injunction (Doc. 9) in a vacuum. The present case is not the only open redistricting case involving the Challenged Subdistricts. In *Turtle Mountain Band of Chippewa Indians, et. al. v. Alvin Jaeger, in his official capacity as Secretary of State of North Dakota*, Case No. 3:22-cv-00022, the Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, and three individual plaintiffs recently filed a Complaint For Declaratory And Injunctive Relief against Defendant Jaeger, alleging that House Bill 1504 violates the Voting Rights Act by allegedly packing Native American voters into Subdistrict 9A while also allegedly cracking Native American voters in Subdistrict 9B and District 15. Case No. 3:22-cv-00022, Doc.1. The allegations of the plaintiffs in the *Turtle Mountain* case are nearly the opposite of the Plaintiffs in the present case. The Plaintiffs in the present case allege the state unconstitutionally gerrymandered without meeting the requirements of the Voting Rights Act to withstand strict scrutiny. The plaintiffs in the *Turtle Mountain* case allege the state was actually required under the Voting Rights Act to account for Native American voters based on race, but the Voting Rights Act requires the redrawing of the legislative districts to create a single district encompassing both the Turtle Mountain and Spirit Lake Reservations, rather than the Subdistricts 9A and 9B, and District 15 created by the Legislative Assembly.

Defendant Jaeger has not yet filed an answer in the *Turtle Mountain* case. However, Defendants suspect at the appropriate time the *Turtle Mountain* case and the present case might be consolidated at least for some purposes. After all, both cases challenge Subdistricts 9A and 9B, among other districts and subdistricts, and both cases seek to impose unique maps proposed by the plaintiffs to replace the maps created by the Legislative Assembly. The plaintiffs in the *Turtle Mountain* case have not filed a motion for preliminary injunction (likely due to the recent order in *Merrill v. Milligan*, 142 S. Ct. 879 (2022) and the *Purcell* principle, discussed above). While

Defendant Jaeger denies the allegations in the *Turtle Mountain* case are meritorious, the ultimate outcome of that case on the merits is unknown. If the Court issues the requested preliminary injunction in the present case, it presents an unjustified risk of multiple successive changes to the legislative district maps in North Dakota as these two cases progress at different paces, with all the disruption to elections and significant costs that come with such district changes. The Court should not issue a preliminary injunction in the present case and force redistricting changes that may be later changed again as a result of the *Turtle Mountain* case. Both the *Turtle Mountain* case and the present case should move forward in accordance with typical scheduling plans (presumably with trials scheduled prior to the 2024 election cycle), with discovery and expert witness deadlines, and potentially be consolidated.

D. Plaintiffs Are Not Substantially Likely To Succeed On The Merits

For the foregoing reasons, the Court need not address the purported merits of Plaintiff's Motion for Preliminary Injunction. However, even if the Court addresses the merits of Plaintiffs' motion, Plaintiffs have failed to meet their burden. Plaintiffs' claim of racial gerrymandering requires a two-step analysis. First, Plaintiffs bear the burden to prove race was the predominant factor in shaping the districts. *Shaw v. Reno*, 509 U.S. 630, 647 (1993); *Miller*, 515 U.S. at 916. "Where a challenger succeeds in establishing racial predominance, the burden shifts to the State to demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S.Ct. 788, 800-801 (2017) (internal citations omitted).

1. Plaintiffs Have Not Established Race Was The Predominant Factor

Plaintiffs have not requested an evidentiary hearing on their motion for preliminary injunction, and the motion is not supported by any expert reports, affidavits, transcripts of legislative hearings, or other evidence of the full scope of the legislative history. Instead, Plaintiffs rely entirely on a few selected quotes from individual legislators, hyperlinks to a few selected

hearing videos (without transcripts), and hyperlinks to some selected hearing minutes. *See* Doc. 12. Compare the record in this case to that in the *Merrill* case discussed above, which included a seven-day preliminary injunction hearing with live testimony from numerous fact and expert witnesses. Case No. 2:21-cv-1530, Doc. 107, p. 4. Plaintiffs rely significantly on *Cooper v. Harris*, 137 S. Ct. 1455, 1497 (2017), however, in that case, the Court noted the following about the record, "This case turned not on the possibility of creating more optimally constructed districts, but on direct evidence of the General Assembly's intent in creating the actual District 12, *including many hours of trial testimony subject to credibility determinations*." *Id.* (emphasis added). Additionally, Defendants suspect Plaintiffs may cite in their reply the recent United States Supreme Court case *Wisconsin Legislature v. Wisconsin Elections Comm'n, No. 21A471*, 2022 WL 851720 (U.S. Mar. 23, 2022). However, in that case, the Wisconsin Supreme Court selected maps created by the governor of Wisconsin, and the governor did not dispute that race needed to be taken into account to create multiple majority-Black districts. *Id.* at *2; *see also Johnson v. Wisconsin Elections Comm'n*, 2022 WL 621082, ¶ 41 (WI 2022). In the present case, Plaintiffs have failed to meet their burden to prove race was a predominate factor. That allegation is not conceded.

While Plaintiffs have not sufficiently developed the record in this case, there were in fact extensive hearings in the Legislative Assembly and committees, most of which Plaintiffs have not referenced in their selective hyperlinks. The Interim Redistricting Committee met six times (three those meetings spanned two-days each), the Interim Tribal and State Relations Committee met three times in relevant public meetings, and the Joint Redistricting Committee met twice. Additionally, both the House and Senate held floor sessions to debate and vote on House Bill 1504. In total, the legislative history relating to redistricting includes over 40 hours of testimony and debate, for which Plaintiffs have provided no transcripts.

On this incomplete record, Plaintiffs have not met their burden to prove race was the predominate factor in the creation of the Challenged Subdistricts. A few comments by individual legislators are insufficient. "[I]t must be kept in mind that references to race by those responsible for drawing or adopting a redistricting plan are not necessarily evidence that the plan was adopted for improper racial reasons." *Cooper v. Harris*, 137 S. Ct. 1455, 1497 (2017) (Alito, S. concurring). "[A]ll legislatures must [] take into account the possibility of a challenge under § 2 of the Voting Rights Act claiming that a plan illegally dilutes the voting strength of a minority community." *Id.* (citing *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 425 (2006). "[B]ecause of the Voting Rights Act, consideration and discussion of the racial effects of a plan may be expected." *Cooper*, 137 S. Ct. at 1497 (Alito, S. concurring).

Plaintiffs are required to:

> prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can defeat a claim that a district has been gerrymandered on racial lines.

Miller, 515 U.S. 900 (1995); *see also Hunt v. Cromartie*, 526 U.S. 541, 547 (1999). Plaintiffs claim the shapes of the Challenged Subdistricts, which in part follow the boundaries of the Turtle Mountain Indian Reservation and Fort Berthold Reservation, constitute evidence that race was the predominate factor. However, generally accounting for the shape of the Reservations in creating subdistricts is consistent with the race-neutral consideration of respect for political subdivisions, as the reservations are governed by tribes that tribal exercise sovereignty within those boundaries. Further, it is consistent with the race-neutral consideration of preserving communities of interest. The legislative record contains numerous requests from tribal members and representatives, and others, to recognize the reservations as communities of interest on grounds reservation communities have similar language, culture, economics, and identity. *See* Thompson Aff.,

Exhibits C, ***E***, ***F***, ***G***, ***H***, ***M***, ***N***, ***O***, ***P***, ***R***, ***T***, ***U***, ***V***, ***W***, ***X***, ***Y***, ***Z***. Plaintiffs have not met their burden of proof that race was the predominate factor, and thus they have not shown they are likely to succeed on the merits in this case.

2. Even If The Court Finds Race Was The Predominant Factor, Preliminary Injunction Should Not Be Granted

"Where a challenger succeeds in establishing racial predominance, the burden shifts to the State to "demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest."" *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S.Ct. 788, 800-801 (2017) (internal citations omitted). The United States Supreme court has assumed that complying with the Voting Rights Act is a compelling interest. *Wisconsin Legislature v. Wisconsin Elections Comm'n, No. 21A471*, 2022 WL 851720, at *2 (U.S. Mar. 23, 2022) (citing *Cooper*, 137 S.Ct. at 1463-64). The Court has identified three preconditions (the Gingles preconditions), which are necessary to proceed under Section 2 of the Voting Rights Act. *Cooper*, 137 S.Ct. at 1470. "If a State has good reason to think that all the 'Gingles preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district." *Id.* (citations omitted). For the reasons discussed above, the Court should deny preliminary injunction as the record is not yet complete and the Court should not move this case forward substantively ahead of the *Turtle Mountain* case. The Plaintiffs in the *Turtle Mountain* case allege the Gingles preconditions are met. Plaintiffs in the present case disagree. Plaintiffs in the present case should not be granted preliminary injunction before discovery, before expert disclosures, and certainly not before the 2022 election cycle.

E. <u>Plaintiffs Are Not Likely To Suffer Irreparable Injury Without Preliminary Injunctive Relief, The Balance Of Equities Tips In Favor Of Defendants, and A Preliminary Injunction Is Not In The Public Interest</u>

Plaintiffs argue they will suffer irreparable injury without preliminary injunctive relief. In that regard, Plaintiffs claim they "will only be able to vote for and be represented by one State Representative, while citizens in all other Districts in the State will be able to vote for and be

represented by two State Representatives." Plaintiffs' Memorandum (Doc. 12), p. 15. Plaintiffs' concerns about subdistricts depriving them of representation is entirely unfounded. The Challenged Subdistricts in this case each contain approximately half the population of a full district. Representation in the subdistrict is thus proportional and the principle of "one-person, one-vote" is preserved. A mixture of single and multi-member districts has long been upheld by the courts, and such a mixture remains in South Dakota after redistricting litigation. In *Reynolds v. Sims*, the United States Supreme Court explained:

> We do not believe that the concept of bicameralism is rendered anachronistic and meaningless when the predominant basis of representation in the two state legislative bodies is required to be the same—population. … Different constituencies can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multimember districts.

377 U.S. 533, 576–77 (1964); *see also White v. Regester*, 412 U.S. 755, 765 (1973) (stating, "Plainly, under our cases, multimember districts are not per se unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State"). Plaintiffs will not suffer any harm as a result of their residence in subdistricts. Further, as discussed above, Plaintiffs are not likely to succeed on the merits and are not entitled to the relief sought in any event.

Plaintiffs argue their constitutional right to equal protection has been violated, and "[c]onversely, the Defendants face no additional burden by simply removing the Subdistricts from Districts 4 and 9." Plaintiffs' Memorandum (Doc. 12), pp. 16-17. As discussed above, Plaintiffs are not likely to succeed on their constitutional claim. Further, Plaintiffs grossly overstate how "simple" it is to remove Subdistricts from North Dakota's districting plan after an election cycle has already started, as discussed above with respect to the *Purcell* principle. Additionally, it is not in the public interest to disrupt the 2022 elections by changing districts and/or subdistricts at this late date, so close to the 2022 elections.

Dated this 7th day of April, 2022.

By: */s/ David R. Phillips*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' MEMORANDUM IN RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** was on the 7th day of April, 2022, filed electronically with the Clerk of Court through ECF:

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