UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

CASE NO: 1:22-CV-00031-CRH

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 State of the State of North Dakota,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND REQUEST FOR A THREE-JUDGE PANEL

INTRODUCTION

Plaintiffs Charles Walen and Paul Henderson, through their undersigned counsel, move for a preliminary injunction pursuant to Fed. R. Civ. P. 65(a) and 28 U.S.C. § 2284(b). Plaintiffs seek a preliminary injunction for Count I of the Complaint – racial gerrymandering. The North Dakota Legislative Assembly's creation of Subdistricts in Legislative Districts 4 and 9 are racial gerrymanders which violate the Equal Protection Clause of the 14th Amendment. As such, Plaintiffs respectfully request an Order from this Court temporarily enjoining Defendants from enforcing or giving any effect to the boundaries of the challenged Subdistricts, including barring Defendants from conducting

any future elections based on the challenged Subdistricts, pending an outcome of this case on its merits.

FACTS AND BACKGROUND

Article IV, Section 2 of the Constitution of North Dakota, requires the North Dakota Legislative Assembly to redraw the district boundaries of each legislative district following the public release of the decennial census. Following the release of the 2020 Census results, North Dakota's Governor Doug Burgum issued Executive Order 2021-17 on October 29, 2021.[1] This Executive Order convened a special session of the Legislative Assembly for the purposes of "redistricting of government." A Joint Redistricting Committee (the "Committee") was formed to develop new legislative district maps.

While drawing new legislative district maps, the members of the Committee expressed concern regarding the possibility of a forthcoming lawsuit under the Voting Rights Act of 1965 (the "Voting Rights Act").[2] Specifically, some members of the Committee were concerned that several of North Dakota's Native American Tribe's may bring a lawsuit alleging a violation of Section 2 of the Voting Rights Act.[3] Section 2 of the Act prohibits voting practices or procedures that discriminate on the basis of race, color, or membership in a language minority group. 52 U.S.C. § 10301. To address these concerns, the Committee discussed subdividing Legislative Districts 4 and 9. The

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[1] North Dakota Governor's Office, Executive Order 2021-17 (2021), https://www.governor.nd.gov/sites/www/files/documents/Executive%20Order%202021-17%20Special%20Session.pdf.

[2] *Aug. 26 Joint Redistricting Committee, Committee Hearing Minutes, 67th Leg., 1st Spec. Sess.* at 1-2 (N.D. Aug. 2021), *https://ndlegis.gov/assembly/67-2021/interim/23-5024-03000-meeting-minutes.pdf.*

[3] *Sep. 8 Joint Redistricting Committee, Committee Hearing Minutes, 67th Leg., 1st Spec. Sess* at 3 (N.D. Aug Sep. 2021), https://ndlegis.gov/assembly/67-2021/interim/23-5065-03000-meeting-minutes.pdf.

Committee focused on Districts 4 and 9 solely because those districts contain the boundaries of the Fort Berthold and Turtle Mountain Indian Reservations.

During its inquiry into the possible creation of Subdistricts in Districts 4 and 9, the Committee received legal guidance from both the National Council of State Legislatures[4], and the North Dakota Legislative Council.[5] The Committee was repeatedly informed that in order to create subdistricts on the basis of race, the Committee must meet certain legal requirements, including the three preconditions set forth in Thornberg v. Gingles, 478 U.S. 30 (1986). Those preconditions are: 1) the minority group must be sufficiently large and geographically compact to constitute a majority in some reasonably configured district; 2) the minority group must be politically cohesive; and 3) the districts majority population must vote sufficiently as a "bloc" to usually defeat the minority's preferred candidate. Id. at 50-51.

Despite this guidance, the Committee, and the Legislative Assembly as a whole, failed to conduct a proper factual analysis in creation of the challenged Subdistricts. The Committee did not retain a redistricting expert who could identify the basis for the challenged Subdistricts. The Committee failed to conduct any sort of statistical analysis demonstrating the Subdistricts were required under the Voting Rights Act. The Committee never analyzed past election results in Districts 4 and 9 to determine whether the minority groups were politically cohesive or whether the majority population had voted as a bloc to

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[4] *Aug. 26 Hearing of the Joint Redistricting Committee, 67th Leg., 1st Spec. Sess.* 10:32:40 (N.D. Aug. 2021), https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20210825/-1/21573.
[5] *Sep. 21 Hearing of the Joint Redistricting Committee, 67th Leg., 1st Spec. Sess.* 10:05:41 (N.D. Sep. 2021), https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20210921/-1/21599.

defeat the minority group's preferred candidate. As a result, the Committee wholly failed to meet the Gingles preconditions. On September 29, 2021, the Committee recommended a "do pass" on the newly drawn redistricting plan, which included the challenged Subdistricts.[6] On November 10, 2021, the Legislative Assembly passed House Bill 1504, which provided for a complete Redistricting of North Dakota's Legislative Districts. The Bill was signed into law by Governor Burgum on November 11, 2021.[7] As a result of the Assembly's redistricting plan, Districts 4 and 9 are now Subdivided into Subdistricts 4A and 4B, and 9A and 9B. See Exhibit 1, Final Redistricting Maps for Districts 4 and 9.

Traditionally, the North Dakota House of Representatives consists of 94 members, with two Representatives being elected at-large in each District. Under the Assembly's redistricting plan, State Representatives in the Subdistricts are no longer elected at-large, but instead elected only by citizens in their respective Subdistricts. The Plaintiffs, as citizens of Districts 4 and 9, are deprived of multi-member representation in the House of Representatives. All other North Dakota citizens retain the benefit of multi-member representation.

LAW AND ARGUMENT

This Court has authority to issue a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. To prevail on a motion for a preliminary injunction, the moving party must demonstrate: 1) there is a substantial likelihood his claim will succeed

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[6] *Sep. 29 Hearing of the Joint Redistricting Committee, 67th Leg., 1st Spec. Sess.* 1:29:08 (N.D. Sep. 2021), https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20210929/-1/22602.
[7] North Dakota Legislative Assembly, Enrolled House Bill 1504 (2021), https://www.ndlegis.gov/assembly/67-2021/special-session/documents/21-1113-04000.pdf.

on the merits; 2) he is likely to suffer irreparable injury without preliminary injunctive relief; 3) the balance of equities tips in his favor; and 4) a preliminary injunction is in the public interest. See Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008); see also Dataphase Systems, Inc. v. CL Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981). A district court has broad discretion when ruling on a request for a preliminary injunction, and it will be reversed only for abuse of discretion. Novus Franchising, Inc. v. Dawson, 725 F.3d 885, 893 (8th Cir. 2015).

The purpose of a preliminary injunction is to protect plaintiffs from future irreparable injury that will result without an injunction. Woodbury v. Porter, 158 F.2d 194, 195 (8th Cir. 1946). An injunction prevents irreparable injury by preserving the relative position of each party until a determination on the merits can be made. University of Texas v. Camenisch, 451 U.S. 390, 395 (1981). Irreparable injury occurs when a plaintiff's harm cannot be undone through monetary remedies. General Motors Corp. v. Harry Brown's, LLC, 563 F.3d 312, 319 (8th Cir. 2009). An injury regarding the constitutional right to vote is irreparable because there is no redress once an election has occurred. Council on Am.-Islamic Relations-Minnesota v. Atlas Aegis, LLC, 497 F. Supp. 3d 371 (D. Minn. 2020) (citing League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 247 (4th Cir. 2014)).

In this case, a preliminary injunction is warranted and necessary. All four elements required for a preliminary injunction weigh heavily in Plaintiffs' favor. First, Plaintiffs are likely to succeed on the merits. Second, both Plaintiffs are voters in Districts 4 and 9 respectively, and will be irreparably harmed if future elections are conducted using the

Subdistrict boundaries drawn in violation of the United States Constitution. Third, the balance of equities weighs in Plaintiffs' favor; excluding the unconstitutional Subdistricts from the legislative district map poses no potential harm to the Defendants. Conversely, the harm that racial gerrymandering poses to Plaintiffs, absent an injunction, is both clear and significant. Finally, the requested injunction is in the public's interest because it will protect the public from the inherent harms inflicted by racial gerrymandering in the challenged Subdistricts.

I. Plaintiffs' claim of unconstitutional racial gerrymandering is likely to succeed on the merits.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall…deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, §1. The United States Supreme Court has found that the central purpose of the Fourteenth Amendment is to "prevent the State from purposefully discriminating between individuals on the basis of race." Shaw v. Reno, 509 U.S. 630, 642 (1993). Thus, the Equal Protection Clause limits racial gerrymandering in legislative redistricting plans. Cooper v. Harris, 137 S. Ct. 1455, 1463 (2017). That is, it prevents a State, absent sufficient justification, from "separating its citizens into different voting districts on the basis of race." Id. (citing Bethune-Hill v. Virginia State Bd. of Elections, 137 S. Ct. 788, 797 (2017)).

A claim for Racial gerrymandering requires a two-step analysis. First, the burden is on the plaintiff to demonstrate that "race was a predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular

district." Id. (citing Miller v. Johnson, 515 U.S. 900, 916 (1995)). Second, if it is demonstrated race was a predominant factor, the configuration of the challenged district must withstand strict scrutiny. Id. at 1464. In order to withstand strict scrutiny, the burden shifts to the State to prove its separation of citizens based on race is narrowly tailored to serve a compelling government interest. Id. If the State cannot demonstrate its plan is narrowly tailored to serve a compelling government interest, the plan constitutes racial gerrymandering in violation of the Equal Protection Clause. Id.

a. Race was a predominant factor in the Legislative Assembly's decision to subdivide Districts 4 and 9.

In order to prove race was a predominant factor, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles to racial considerations. Bethune-Hill, 137 S. Ct. at 797 (citing Miller, 515 U.S. at 916). A plaintiff may prove racial considerations predominated over traditional redistricting principles through direct evidence of legislative intent or circumstantial evidence, such as a district's shape or demographic makeup. Cooper, 137 S. Ct. 1455, 1464. Thus, a redistricting plan's legislative history may demonstrate clear legislative intent to use race as a predominant factor. See id. (explaining that statements made by elected officials regarding race may demonstrate racial criteria as a predominant factor). Alternatively, a district's appearance, shape, or demographic makeup may, in itself, be enough to prove race was a predominant factor. See Shaw, 509 U.S. at 632 (holding that a district's shape "that is so bizarre on its face that it is unexplainable on grounds other than race" is subject to strict scrutiny).

In this case, the evidence that racial considerations were a predominant factor in the

creation of the challenged Subdistricts is overwhelming. Uncontroverted evidence contained in the Redistricting Committee's hearings, testimony, and meeting minutes demonstrates the creation of the Subdistricts was motivated solely by race. The Committee purportedly believed creating Subdistricts was necessary in order to comply with the Voting Rights Act.[8] The Committee received multiple presentations from both the National Council of State Legislatures and the North Dakota Legislative Council regarding the creation of subdistricts which would encompass the Forth Berthold and Turtle Mountain Indian Reservations.

Discussions amongst members of the Committee during the redistricting process demonstrate racial considerations were the predominant factor for the creation of Subdistricts. For example, during a Committee hearing which took place on September 28, 2021, Representative Craig Headland remarked: "I have issues with subdivisions and dividing them based on race."[9] In response to Representative Headland's remarks, Committee Vice Chairman Ray Holmberg stated: "That's a reasonable position to take. I'm not a big fan of it, but either we do it or someone else does it for us."[10] Similarly, in a Committee discussion regarding the challenged Subdistricts which took place on September 29, 2021, Representative David Monson stated:

> I hesitate to use the word gerrymander, but we have not gerrymandered. We have actually, I think, gerrymandered to give them [Native Americans] every opportunity to get as many Indian Americans into that district and give them

[8] See the following discussion of the Joint Redistricting Committee regarding subdistricts: *Sep. 28 Hearing of the Joint Redistricting Committee, 67th Leg., 1st Spec. Sess. 1:18:54* (N.D. Sep. 2021), https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20210928/-1/22601

[9] Sep. 8 Hearing of the Joint Redistricting Committee, 67th Leg., 1st Spec. Seas. 1:23:50 (N.D. Sep. 2021), https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20210910/-1/22601.

[10] Sep. 8 Hearing of the Joint Redistricting Committee, 67th Leg., 1st Spec. Sess. 1:24:05 (N.D. Sep. 2021), https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20210910/-1/22601.

> the advantage, especially when we keep the reservations whole. Would the courts look at that and say 'you've given them every opportunity to put up their own candidate?'…[11]

The testimony and discussion identified are not isolated comments; rather, they are part of a predominant theme regarding the racial makeup of the challenged Subdistricts. The legislative history of House Bill 1504 demonstrates race was a predominant factor.

In addition to the legislative history, the Court needs to look no further than the circumstances of how the Subdistrict boundaries were drawn to determine race was the predominant factor. It is not coincidental that out of 47 legislative districts, only Districts 4 and 9 were subdivided. Districts 4 and 9 were chosen because they encompass the boundaries of the Forth Berthold and Turtle Mountain Indian Reservations, respectively. Each Subdistrict was divided using the boundaries of an Indian Reservation; Subdistrict 4A contains only the Fort Berthold Reservation, while Subdistrict 9A contains only the Turtle Mountain Reservation. The placement and shape of the challenged Subdistricts proves, without question, race was a predominant factor in creation of the Subdistricts. See Shaw, 509 U.S. at 632.

The Defendants will likely argue racial considerations were not the predominant factor, but just one of several factors the Committee considered in creating Subdistricts. However, such an argument fails as a matter of law. In Shaw v. Hunt, the Supreme Court rejected the argument "that strict scrutiny does not apply where a State 'respects' or 'complies' with traditional districting principles." 517 U.S. 899, 906 (1996) (quotations

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[11] Sep. 29 *Hearing of the Joint Redistricting Committee, 67th Leg., 1st Spec. Sess.* 9:46:37 (N.D. Sep. 2021), https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20210929/-1/22602.

omitted). According to the Court, the fact that a legislature may have considered other redistricting principles, such as compactness or contiguity, "does not in any way refute the fact that race was the legislature's predominant consideration." Id. at 907. Rather, the constitutional violation stems from the "racial purpose of the state action, not its stark manifestation." Miller, 515 U.S. at 913. See also Bethune-Hill, 137 S. Ct. at 797-798 (stating "[t]he Equal Protection Clause does not prohibit misshapen districts. It prohibits unjustified racial classifications."). Thus, arguments that the Subdistricts comply with other redistricting principles (such as compactness, contiguity, and respect for subdivision boundaries) does not diminish the Assembly's unconstitutional consideration of race.

Both the legislative history and the circumstantial evidence in this case establish race was the predominant factor for the creation of the challenged Subdistricts. The Legislative Assembly's use of race as the predominant factor in creating Subdistricts constitutes racial gerrymandering.

b. The Subdistricts are not narrowly tailored to achieve a compelling government interest.

Because Plaintiffs have demonstrated that race was the predominate factor in creation of the Subdistricts, Defendants now bear the burden of proving the use of race was narrowly tailored to serve a compelling government interest. Cooper, 137 S. Ct. at 1464. A legislature's compliance with the Voting Rights Act may be a compelling interest. Shaw v. Hunt, 517 U.S. at 915-916. Undoubtedly, a State has an interest in seeking to comply with a law aimed at remedying past voting discrimination. City of Richmond v. J.A. Croson Co., 488 U.S. 469. 490 (1989). However, race-based redistricting is only "narrowly

tailored" if a legislature has "a strong basis in evidence" to believe the use of racial criteria is required to comply with the Voting Rights Act. Alabama Black Legislative Caucus v. Alabama, 575 U.S. 254, 278 (2015). In order to have a strong basis in evidence, a State must conduct a "pre-enactment analysis with justifiable conclusions" of what the Voting Rights Act demands before classifying individuals based on race. Abbott v. Perez, 138 S. Ct. 2305, 2335 (2018). In this case there was no pre-enactment analysis conducted, and there were no justifiable conclusions supporting the creation of race-based Subdistricts.

In order to have a strong basis in evidence to justify racial classifications, a legislature must satisfy three preconditions enacted by the Supreme Court in Gingles. Those preconditions are: 1) the minority Group must be sufficiently large and geographically compact to constitute a majority in some reasonably configured district; 2) the minority group must be politically cohesive; and 3) the districts majority population must vote sufficiently as a "bloc" to usually defeat the minority's preferred candidate. Cooper, 137 s. Ct. at 1470 (citing Gingles, 478 U.S. at 50-51). If a legislature has evidence demonstrating all the Gingles preconditions are met, it has a strong basis in evidence justifying its racial classifications. Id. However, "unless these points are established, there neither has been a wrong nor can there be a remedy." Growe v. Emison, 507 U.S. 25, 40-41 (1993).

In this case, the Redistricting Committee had no basis in evidence to believe the second and third Gingles preconditions were met. The Committee, and the Assembly as a whole, conducted no functional or statistical analysis which would indicate political cohesiveness or the existence of majority bloc voting in Districts 4 and 9. For its part, the

Committee considered the testimony of Tribal leaders and members regarding the creation of the Subdistricts. However, lay testimony, without more, is not enough to establish the second and third preconditions. See Abbot, 138 S. Ct. at 2334-2335 (holding that lay testimony from citizens requesting a particular district design is not an "actual legislative inquiry that would establish the need for manipulation of the racial makeup of the district").

As noted in Abbott, the Supreme Court routinely rejects district designs based on race where a State has not made "a strong showing of a pre-enactment analysis with justifiable conclusions." Id. at 2335. The requirement of proving political cohesiveness and the existence of majority bloc voting is established through extensive expert testimony and clear statistical analyses. See Shirt v. Hazeltine, 336 F. Supp 2d. 976, 1010 (S.D. Dist. Ct. 2004) (stating "no mathematical formula or simple doctrinal test is available…the inquiry therefore focuses on statistical evidence to discern the way voters voted."); see also Buckanaga v. Sisseton Indep. Sch. Dist., No. 54-5, S. Dakota, 804 F.2d 469, 473 (8th Cir. 1986) (stating "[t]he surest indication of race conscious politics is a pattern of racially polarized voting extending over time"); see also Sanchez v. State of Colo., 97 F.3d 1303 (10th Cir. 1996) (stating "[t]he heart of each inquiry requires a searching look into the statistical evidence to discern the way voters voted").

For example, in Cooper, the Supreme Court analyzed the evidence presented by the state as justification for drawing district boundaries based on race. Cooper, 581 S. Ct. at 1469. In that case, North Carolina submitted two expert reports, each containing statistical analyses regarding voting patterns throughout the state. Id. at 1471. However, when presented with these expert reports, the Court rejected such evidence as insufficient. Id.

According to the Court, "North Carolina can point to no meaningful legislative inquiry" to justify the district's boundaries. Id. Similarly, in Abbott, the Supreme Court rejected Texas' justification for intentionally drawing district boundaries to encompass a larger number of Latinos into House District 90. Abbott, 138 S. Ct. at 2334. In that case, Texas offered two justifications for its drawing of the district: 1) such a drawing was requested by a minority group; and 2) the State analyzed election primary results from two different elections years, and concluded it was required to do so. Id. Again, the Court rejected such evidence as insufficient. Id. According to the Court, "putting these two evidentiary items together helps, but is simply too thin a reed to support the drastic decision to draw lines in this way." Id.

In this case, the Committee, and Assembly as a whole, provided no evidence which satisfies the Gingles preconditions. No redistricting experts were retained or testified regarding the challenged Subdistricts. No statistical analyses were performed which would demonstrate political cohesiveness or majority bloc voting. The Committee did not consider any prior election results for Districts 4 and 9. Based on the Committee hearings, testimony, and minutes, it is wholly unclear what evidence, if any, led the Committee to believe the Subdistricts were legally necessary. Notably, the Turtle Mountain Band of Chippewa, located in District 9, were opposed to the creation of the Subdistrict their Reservation now resides in.[12] In fact, the Senator serving in District 9, Richard Marcellais, is an enrolled Tribal member, former Tribal Chairman, and has won the last eight Senate

[12] The Turtle Mountain Band of Chippewa have initiated a lawsuit over the enactment of Subdistrict 9A and the overall configuration of District 9. See Turtle Mountain Band of Chippewa Indians, et al v. Jaeger, Case No. 3:22-cv-00022-PDW-ARS.

elections in that District 9.[13] In short, the Legislative Assembly made no reasonable inquiry into whether the Gingles preconditions were met, despite being advised such an inquiry was legally necessary.[14] As such, the use of race to draw the boundaries of the challenged Subdistricts is unjustified and unconstitutional.

The Legislative Assembly had no evidentiary justification for creating the Subdistricts based on race. Because of this, the challenged Subdistricts are unconstitutional racial gerrymanders. Therefore, Plaintiffs' claim is likely to succeed on the merits.

II. Plaintiffs will suffer irreparable injury absent an injunction.

In the absence of the requested injunction, Plaintiffs will suffer irreparable injury. The Supreme Court has long recognized that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democrat society. . . ." Reynolds v. Sims, 377 U.S. 533, 555 (1965). Under this well-settled legal principle, courts have repeatedly found that state actions which impact the constitutional right to vote, such as racial gerrymandering, constitute irreparable injury. Council on Am.-Islamic Relations-Minnesota, LLC, 497 F. Supp. 3d at 371. see also League of Women Voters of N. Carolina,769 F.3d at 247 (stating "[c]ourts routinely deem restrictions on fundamental voting rights irreparable injury."); Obama for Am. v. Husted, 697 F.3d 423, 436 (6th Cir. 2012) (stating "When constitutional rights are threatened or impaired, irreparable injury is presumed.").

In this case, Plaintiffs will suffer clear and irreparable injury if the challenged

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[13] North Dakota Legislative Assembly, Senator Richard Marcellais (2021), https://www.ndlegis.gov/assembly/67-2021/members/senate/senator-richard-marcellais.

[14] Sep. 21 *Hearing of the Joint Redistricting Committee, 67th leg., 1st spec. Sess.* 10:11:21 (N.D. Sep. 2021), https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20210921/-1/21599.

Subdistricts are given effect. Absent an injunction, Plaintiffs' will be deprived of multi-member representation in the North Dakota House of Representatives. That is, the Plaintiffs 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. For example, while voters in the Subdistricts of District 4 will have one State Representative serving their interests, voters in District 5 will have two. This constitutes a clear infringement on the Plaintiffs' constitutional right to vote. This infringement of their equal protection rights is the direct result of the Legislative Assembly's unconstitutional racial gerrymandering. accordingly, Plaintiffs will suffer irreparable injury absent an injunction.

III. A preliminary injunction is in the public's interest.

Granting a preliminary injunction in this action is in the public's interest. Courts have routinely held that "upholding constitutional rights serves the public interest." Newsome v. Albermarle Cnty Sch. Bd., 354 F.3d 249, 261 (4th Cir. 2003). Undoubtedly, the public has a "strong interest in exercising the fundamental political right to vote." Purcell v. Gonzalez, 549 U.S. 1, 4 (2006). Plaintiffs' requested injunction would protect the public's right to vote by allowing them to equally participate in elections with constitutionally drawn district boundaries. In addition, the injunction would ensure the public in Districts 4 and 9 are able to vote for and be represented by two State Representatives, similar to all other voters in North Dakota. In essence, an injunction would ensure voters in Districts 4 and 9 have an opportunity to receive equal representation and treatment under the law.

Contrarily, allowing the challenged Subdistricts to take effect does not further any public interest. Rather, the public harm that derives from racial gerrymandering is apparent. See Bethune-Hill, 137 S. Ct. at 797. In Bethune-Hill, the Supreme Court stated "[t]he harms that flow from racial sorting include being personally subjected to a racial classification as well as being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group." Id. (citing Alabama, 575 U.S. at 263). In this case, the Legislative Assembly's racial gerrymandering has not yet been subject to strict scrutiny, and will certainly inflict irreparable injury on the public. Enjoining the Defendants from giving effect to the challenged Subdistricts will serve the public interest by preventing the public harms that are inherent with racial gerrymandering.

IV. The balance of equities weighs in favor of Plaintiffs.

When a court balances the equities to determine whether to grant a preliminary injunction, it compares the injury to the moving party if the injunction is not issued, with the injury the non-moving party would suffer from a wrongfully-issued injunction. National City Bank, N.A. v. Prime Lending, Inc., 737 F. Supp. 2d 1257, 1270 (E.D. Wash. 2010). As previously discussed, the Plaintiffs, and the public, will face serious and irreparable injury if an injunction is not granted. By contrast, any potential or alleged injury the Defendants may face absent an injunction is substantially less, if not wholly unclear. The preliminary injunction will maintain the status quo and treat all North Dakota voters equal until a decision on the merits can be reached.

In this case, the harms faced by the Plaintiffs and public are clear: an infringement

on their constitutional right to vote, as well a constitutional right to equal representation under the law. Conversely, the Defendants face no additional burden by simply removing the Subdistricts from Districts 4 and 9. The external boundaries of both Districts are not impacted by the Subdistricts. Rather, the Subdistricts constitute nothing more than a line within the Districts which follows the boundaries of each Reservation, respectively. Removing the Subdistrict dividing-line does not change the current population or makeup of either District. Removing the Subdistrict dividing-line does not impact any of the traditional redistricting principles, such as compactness, contiguity, or respect for political subdivision borders. Further, removing the Subdistrict dividing-line does not interfere with the manner in which an election will be conducted. Put simply, enjoining the effect of the Subdistricts does little more than remove a dividing line placed along the border of two Native American Reservations for no other reason than the race of people who live in the District.

V. Plaintiffs request this case be heard by a three-judge panel pursuant to 28 U.S.C. § 2284.

Section 2284 of Chapter 28 of the United States Code provides: "A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." In Shapiro v. McManus, the Supreme Court found that under Section 2284, a Plaintiff may request an action regarding the apportionment of state legislative districts be heard by a three-judge panel. 577 U.S. 39 (2015). According to the Court, such a request must be granted, so long as the

action is of the kind named in the statute. Id. at 43-44.

In this case, Plaintiffs are challenging the Legislative Assembly's creation of Subdistricts as unconstitutional gerrymanders under the Fourteenth Amendment. This claim is a direct constitutional challenge to the Assembly's apportionment of voters in Districts 4 and 9. As such, Plaintiffs respectfully request a three-judge panel be convened pursuant to 28 U.S.C. § 2284 for the purposes of hearing this motion on its merits.

CONCLUSION

The challenged Subdistricts perpetuate a clear racial gerrymander that is not narrowly tailored to serve a compelling government interest. Therefore, the Subdistricts pose a grave constitutional risk to the voters of Districts 4 and 9. The Plaintiffs respectfully request the Court enjoin the Defendants from giving effect to the challenged Subdistricts pending the outcome of this case on the merits. Additionally, Plaintiffs respectfully request a three-judge panel be convened to hear this motion pursuant 28 U.S.C. § 2284.

Respectfully submitted this 4th day of March, 2022.

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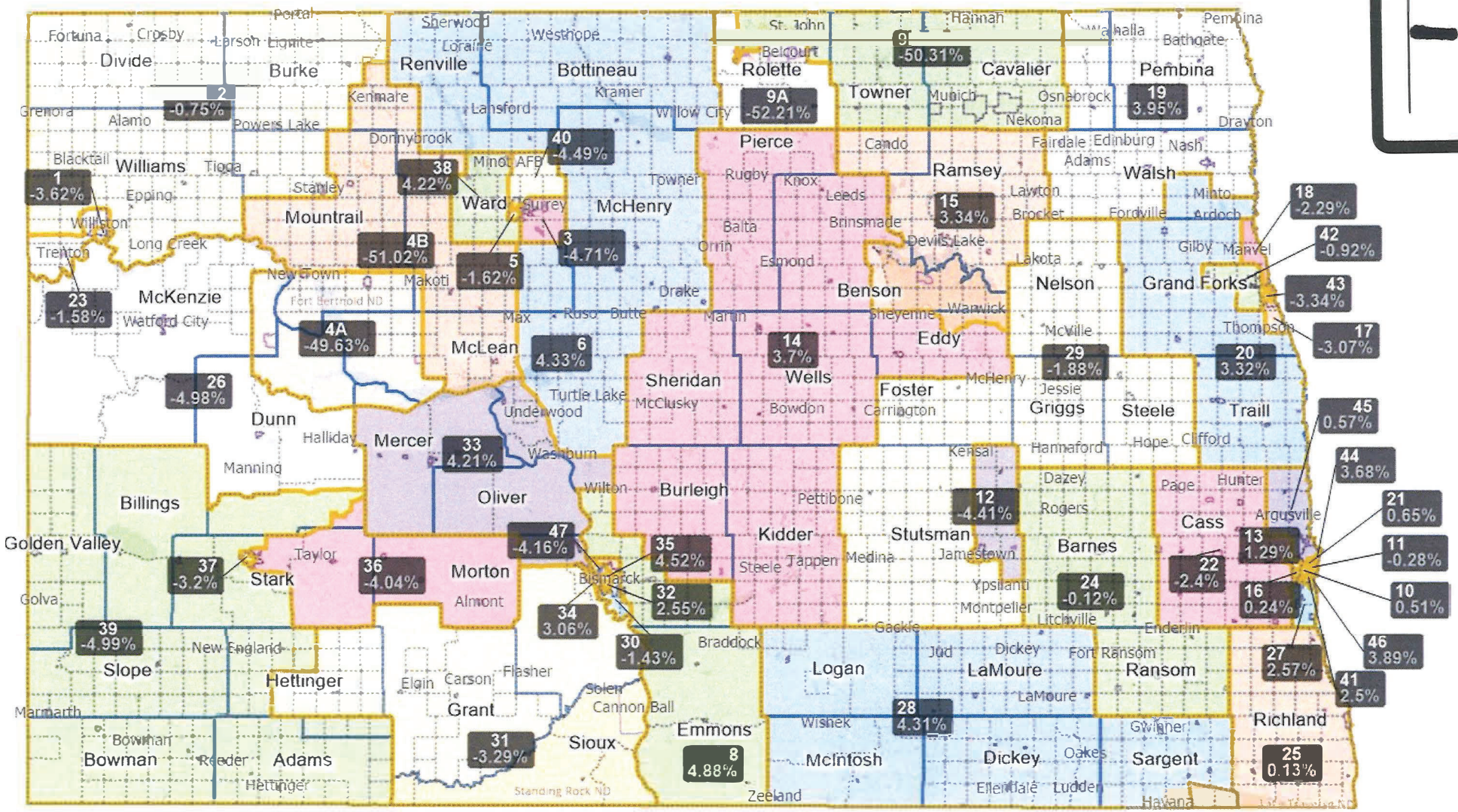
09-29-21

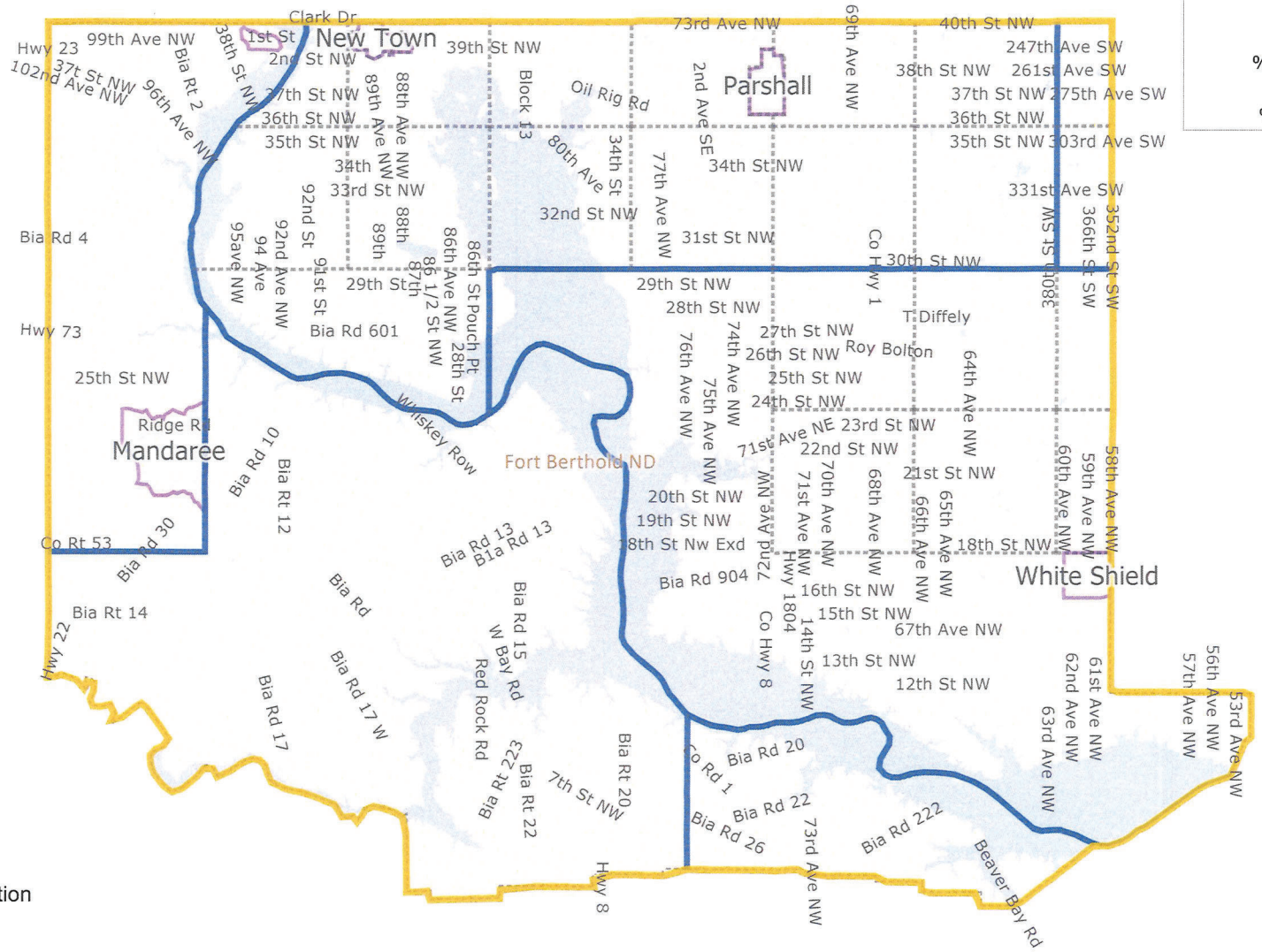
Proposed Statewide Plan



EXHIBIT

District: 4A

Field	Value
District	4A
Population	8350
Deviation	-8,226
% Deviation	-49.63%
18+_Pop	5709
AmIndian	5537
% AmIndian	66.31%
18+_Ind	3547
% 18+_Ind	62.13%



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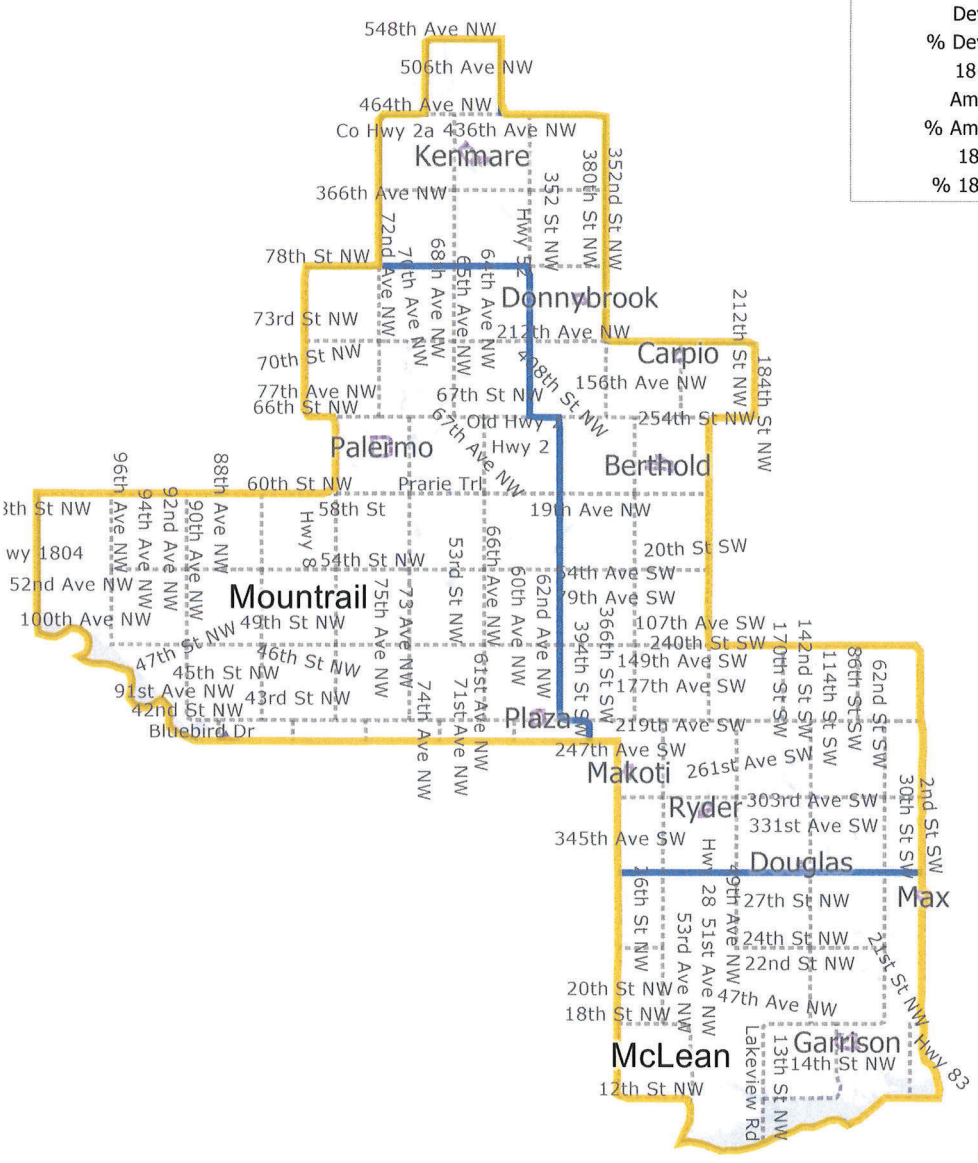
Map layers
Indian Reservation
City/Town
County
County Subdivision
0 4 8
Miles

District: 4B

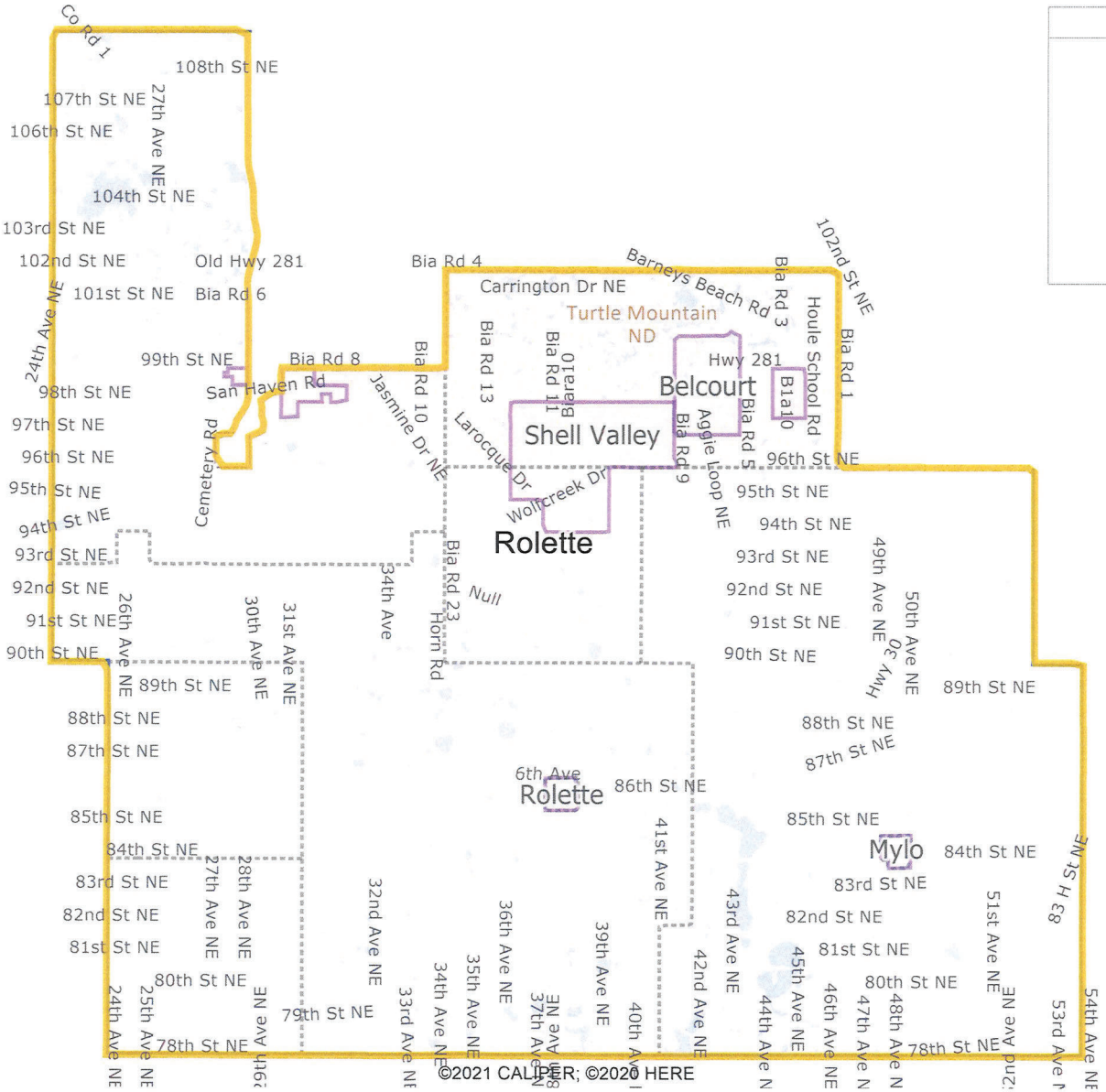
Field	Value
District	4B
Population	8119
Deviation	-8,457
% Deviation	-51.02%
18+_Pop	6207
AmIndian	204
% AmIndian	2.51%
18+_Ind	145
% 18+_Ind	2.34%



Map layers
- Indian Reservation
- City/Town
- County
- County Subdivision

0 7.5 15
Miles

District: 9A

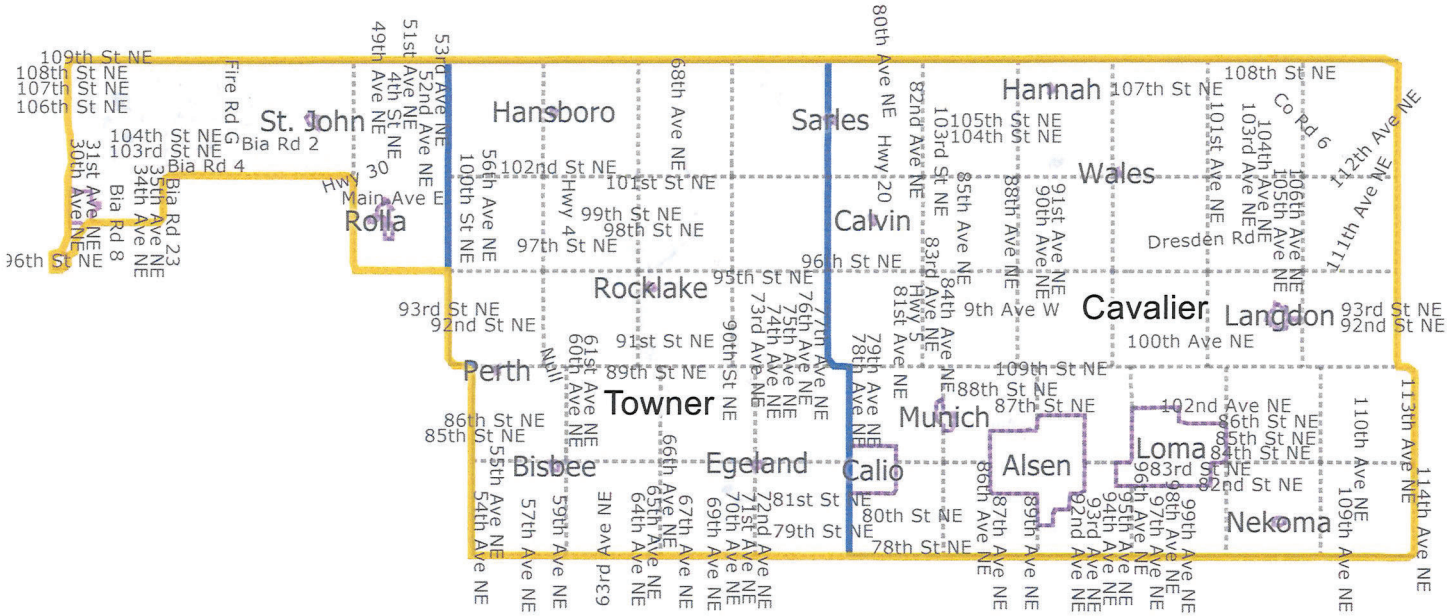


Field	Value
District	9A
Population	7922
Deviation	-8,654
% Deviation	-52.21%
18+_Pop	5269
AmIndian	6460
% AmIndian	81.55%
18+_Ind	4055
% 18+_Ind	76.96%

Map layers
Indian Reservation
City/Town
County
County Subdivision
0 3 6
Miles

District: 9B

Field	Value
District	9B
Population	8236
Deviation	-8,340
% Deviation	-50.31%
18+_Pop	5986
AmIndian	2856
% AmIndian	34.68%
18+_Ind	1760
% 18+_Ind	29.4%



Map layers
Indian Reservation
City/Town
County
County Subdivision
0 5 10
Miles