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HOW REDISTRICTING AFFECTS NATIVE REPRESENTATION: THE TURTLE MOUNTAIN BAND OF CHIPPEWA

Ryland Mahre
Seattle University School of Law

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HOW REDISTRICTING AFFECTS NATIVE REPRESENTATION: THE TURTLE MOUNTAIN BAND OF CHIPPEWA

*Ryland Mahre*¹

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I. INTRODUCTION

The Indian Citizenship Act of 1924 gave Native peoples the right to vote,² and the last states afforded on-reservation voting in 1957 and 1958,³ yet into the 21st Century many obstacles remain in place to full Native political participation. Numerous states continue to prevent Native voter participation through laws that do not treat residents of a tribal nation living on reservations as citizens of the state, stringent voter identification laws, and long distances between reservations and voter infrastructure.⁴ In addition, Native communities have been routinely

¹ Ryland Mahre is a 2024 graduate of Seattle University School of Law with a passion for redistricting, electoral predictions, and politics. He hopes this article serves to help Native communities in their quest for equal access to the American political sphere.

² *Voting Rights for Native Americans*, LIBRARY OF CONGRESS, <https://www.loc.gov/classroom-materials/elections/right-to-vote/voting-rights-for-native-americans/#:~:text=The%20Snyder%20Act%20of%201924,rights%20granted%20by%20this%20amendment>. (last visited Apr. 19, 2024); Indian Citizenship Act of 1924, Pub. L. 68-175, 43 Stat. 253. Indeed, citizenship for Natives may have resulted in less rights in some instances, as citizenship status was forced without consent and invalidated and delegitimized tribal governments. Victoria Guillemard, *The Forgotten Voters: An Examination of Native American Voting Rights*, 7 TAPESTRIES: INTERWOVEN VOICES OF LOCAL AND GLOBAL IDENTITIES, 1, 8 (2018), Available at: <https://digitalcommons.macalester.edu/tapestries/vol7/iss1/8>.

³ Patty Ferguson-Bonhee, *How the Native American Vote Continues to be Suppressed*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-rights/how-the-native-american-vote-continues-to-be-suppressed/ (last visited Apr. 19, 2024).

⁴ *Id.*

broken up into smaller legislative districts or “cracked” to prevent a Native candidate-of-choice from winning.⁵

Gerrymandering, or the practice of dividing a geographic area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength,⁶ is only the newest tactic in a long history of Native voter disenfranchisement and civic exclusion. When the Constitution was ratified in 1788, Natives were not considered American citizens and only free white men could vote.⁷ Even upon the end of slavery in 1865 and the advent of Reconstruction, including the 14th Amendment, which gave Black Americans citizenship and a host of other rights, was interpreted to exclude Native Americans because Native Americans were not considered American citizens at the time.⁸ It was not until the passage of the Indian Citizenship Act of 1924 that Natives were granted universal American citizenship.⁹ Even still, states such as Arizona, New Mexico, and Utah continued to prohibit Native voting, often under the guise of “persons under guardianship” or a lack of taxation.¹⁰ The prohibition on Native voting finally ended in a series of landmark court decisions that found denying the franchise was unconstitutional.¹¹

While Natives were finally given the right to vote by the middle of the 20th century, the dominion of Jim Crow, which allowed for anti-voting measures such as literacy tests, was still strong in much of the Nation, and enforcement of Native voting rights was spotty at best.¹² However, with the passage of the Voting Rights Act (VRA) in 1965, procedure and enforcement of minority voting rights was finally implemented.¹³ The VRA applied to redistricting to prevent states and localities from denying minority communities the ability to elect a candidate of their choice.¹⁴ The VRA enabled enforcement via Section 5, which forced specific states and jurisdictions with a history of racial discrimination to seek federal preclearance before a change in voting laws. The VRA also granted a cause-of-action via Section 2, which gave voters a

⁵ DeAbrea Walker, *Indigenous Voters Challenge North Dakota Voter ID Rules*, THE CENTER FOR PUBLIC INTEGRITY, (Oct. 6, 2023) <https://publicintegrity.org/politics/elections/who-counts/indigenous-voters-challenge-north-dakota-voter-id-rules-gerrymandering/>.

⁶ “Partisan gerrymandering” definition, Black’s Law Dictionary 696 (7th ed. 1999), *see also* *Rucho v. Common Cause*, No. 18-422 slip op. at 8 (U.S. June 17, 2019).

⁷ Katie Friel & Emil M. Pablo, *How Voter Suppression Laws Target Native Americans*, BRENNAN CENTER FOR JUSTICE, (May 23, 2022), <https://www.brennancenter.org/our-work/research-reports/how-voter-suppression-laws-target-native-americans>.

⁸ Earl M. Maltz, *The Fourteenth Amendment and Native American Citizenship*, 17 UNIV. OF MINN. L. SCH. CONST. COMMENT. 555, 567-68 (2000).

⁹ Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253.

¹⁰ Friel, *supra* note 7.

¹¹ *See* *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948), holding that the phrase “persons under guardianship” in the Arizona state constitution applied only to judicial guardianship and that the phrase has no application to the federal status on Indians in Arizona as a class. *See also* *Trujillo v. Garley*, No. 1353 (D.N.M. Aug. 11, 1948), holding that the exclusion of the franchise from “Indians not taxed” violated the fourteenth and fifteenth amendments as racial discrimination; Voting Rights Act of 1965, Sec. 5, Pub. L. No. 89-110, 79 Stat. 437.

¹² Friel, *supra* note 7.

¹³ Friel, *supra* note 7.

¹⁴ Micah Altman & Michael P. McDonald, *A Half-Century of Virginia Redistricting Battles: Shifting from Rural Malapportionment to Voting Rights to Public Participation*, 47 U. RICH. L. REV. 771, 805 (2013).

mechanism to challenge discriminatory practices in court.¹⁵ Specifically, Section 2 provided for minorities with “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”¹⁶

Section 2 concerns us most, as it has been interpreted to require the creation of majority-minority and ethnic centric districts.¹⁷ In the late 1960s and early 1970s, many minority-majority districts were created for the first time, with most districts being created for Black Americans due to their larger population.¹⁸ By 1975, the VRA had been extended to specifically include Natives.¹⁹

A primary issue facing Native voters in comparison to other minority groups, is their small population and geographic dispersion, making Natives an “ultra numerical minority.”²⁰ Indeed, Natives make up only 1.1% of the population of the United States, much lower than other racial minorities such as Black-Americans (12.4%) and Asian-Americans (6%).²¹ Native dispersion further dissipates their voting strength, with remaining tribal lands primarily scattered through the mountain west, and much of the remaining population being located in populous urban centers in states and cities where they are drastically outnumbered.²² Simply put, Native voters are not “maximally positioned for voter strength” and require further legal protections.²³

Unfortunately, in recent years, the VRA has been dramatically weakened and diluted by cases such as *Shelby v. Holder*.²⁴ In *Shelby*, the Supreme Court found Section 4 of the VRA, the Section responsible for the coverage formula of states covered by preclearance, unconstitutional.²⁵ Section 4 had previously established a coverage formula to identify those parts of the Nation that may need more stringent remedies.²⁶ The first element of the formula entailed whether a state maintained a “test or device” restricting the ability to vote, such as a literacy or good moral character test.²⁷ The second element was satisfied if the Director of the

¹⁵ Friel, *supra* note 7.

¹⁶ 52 U.S.C. § 10301.

¹⁷ *Everything You Always Wanted to Know About Redistricting, *But Were Afraid to Ask* at 8, ACLU, (Apr. 2001) available at <https://www.aclu.org/publications/everything-you-always-wanted-know-about-redistricting-were-afraid-ask>.

¹⁸ Joe Mitchell, *Breaking Out of the Mold: Minority-Majority Districts and the Sustenance of White Privilege*, WASH. U. J. L. & POLY 235, 239 (2013).

¹⁹ The VRA originally prohibited discrimination based on “race or color.” 42 U.S.C. § 1973. In 1975 Congress extended the Act’s protections to linguistic minorities, including Natives, Asian-Americans, Alaskan Natives, and persons of Spanish heritage. 42 U.S.C. § 1973aa-1a(e).

²⁰ Emily Rong Zhang, *Native American Representation What the Future Holds*, 56 IDAHO L. REV. 323, 324 (Oct. 14, 2021).

²¹ Nicholas Jones et al., *2020 Census Reflects the Racial and Ethnic Composition of the Country*, CENSUS.GOV. Numbers are by identification with a racial status alone, and thus does not include people who identify with multiple races. Available at <https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html>.

²² Zhang, *supra* note 20, at 325.

²³ Zhang, *supra* note 20, at 325.

²⁴ *The Effects of Shelby County v. Holder*, BRENNAN CENTER FOR JUSTICE (Aug. 6, 2018), <https://www.brennancenter.org/our-work/research-reports/effects-shelby-county-v-holder>.

²⁵ *Shelby County v. Holder*, 570 U.S. 529, 551, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013).

²⁶ Voting Rights Act of 1965, Sec 4, Pub. L. No. 89-110, 79 Stat. 437.

²⁷ *Id.*

Census determined that less than fifty percent of the voting age population were registered to vote on November 1, 1964, or that year's presidential election.²⁸ This had the effect of covering several southern states in their entirety, and established partial coverage in several more.²⁹

The removal of the coverage formula largely made Section 5, that of forcing preclearance before a state could enact a voting change, largely inoperable.³⁰ In effect, this meant that regions with a history of discrimination no longer required federal oversight before changing their voting procedures.³¹ This decision opened the floodgates to increasingly restrictive voting rights laws and the dismantling of minority legislative and congressional districts formerly protected by federal statute.³² Indeed, “[s]tates wasted no time implementing election changes” upon the ruling, specifically through measures such as stricter voter identification, reduced early voting, and closed polling places.³³

North Dakota is one such state. After the 2020 Census, North Dakota enacted a new legislative map that has devastating consequences for Native representation.³⁴ The new map created by House Bill 1504 overwhelmingly concentrates, or “packs” Native voters, primarily of the Turtle Mountain Band of Chippewa Indians, into a single House Subdistrict, District 9A.³⁵ Other Turtle Mountain citizens were “cracked” into House Subdistrict 9B, and Spirit Lake citizens were “cracked” into House District 15.³⁶ In the previous decade, the Native peoples of northeastern North Dakota had two opportunity majority-minority districts.³⁷ In February 2022, the Turtle Mountain and Spirit Lake Tribes brought suit, filing *Turtle Mountain Band of Chippewa Indians et al. v. Alvin Jaeger* on a claim of the violation of the VRA Section 2.³⁸ That following July, the North Dakota district court held that the plaintiffs had standing and that Section 2 of the VRA can be enforced by a private party.³⁹ As noted by Spirit Lake Tribe Chair Douglas Yankton, Sr.:

North Dakota's newly drawn state legislative map dilutes the voting strength of Spirit Lake members. The Secretary of State has tried to dismiss the case on far-

²⁸ *Id.*

²⁹ *Id.*

³⁰ Kristen Clarke, *Reflecting on the 10th Anniversary of Shelby v. Holder*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, (June 23, 2023), <https://www.justice.gov/opa/blog/reflecting-10th-anniversary-shelby-county-v-holder>.

³¹ See Zhang, *supra* note 20, at 329 (discussing how preclearance did much to prevent vote dilution of Native communities).

³² *Id.*

³³ Clarke, *supra* note 30.

³⁴ *North Dakota Redistricting (Turtle Mountain Band of Chippewa v. Alvin Jaeger)*, NATIVE AMERICAN RIGHTS FUND, <https://narf.org/cases/north-dakota-redistricting-map/> (last visited Mar. 29, 2024), [hereinafter “NARF”].

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*; a majority-minority district is defined as any district in which a minority group or collection of minority groups comprise a simple majority of the district's population. *Majority-minority districts*, BALLOTPEdia, https://ballotpedia.org/Majority-minority_districts (last visited Mar. 29, 2024).

³⁸ *Turtle Mountain Band of Chippewa Indians et al. v. Alvin Jaeger* 1, United States District Court, District of North Dakota, 3:22-cv-22 (D.N.D. July 7, 2022).

³⁹ NARF, *supra* note 34.

fetches procedural arguments because he doesn't want to have to argue the facts, but we look forward to the opportunity move forward with this case.⁴⁰

This case is an important step in the quest for Native representation in state legislatures, especially as the Supreme Court has continuously weakened the VRA and may strike down much of its powers of enforcement in upcoming terms.⁴¹ However, in sharp contrast to the federal decline of minority voting rights, state and local challenges have found some success in recent years.⁴²

In San Juan County, Utah, in 2012, the Navajo Nation of Utah filed suit alleging a violation of the Equal Protection Clause and Section 2 of the VRA to overturn local commissioner maps that consisted of a white majority in a majority Native county.⁴³ San Juan County is approximately fifty percent Native and forty-seven percent white, yet Natives held only one of three commissioner seats, and those seats was over ninety percent Navajo.⁴⁴ The Navajo Nation was successful in their suit, and forced the appointment of a special master who redrew the County Commissioner Districts into two out of three being Navajo majority, and three out of five school districts, ending the former racial gerrymander.⁴⁵ The ongoing suit by the Turtle Mountain Tribe of North Dakota seeks to forge a similar path, and represents a new era of voting rights and representation for Native communities.

The Turtle Mountain Band of Chippewa is the focus of this article because ongoing redistricting litigation regarding cohesive and compact Native populaces is rare and isolated. The Native American Voting Rights Fund notes four ongoing suits with all four taking place in the Dakotas.⁴⁶ Two of these cases deal with local elections, and two with legislative districts.⁴⁷ Of these, the Turtle Mountain suit has the greatest impact, with multiple state House and Senate seats as the subject of litigation. While “all politics is local,”⁴⁸ it is legislative races that have the

⁴⁰ *Id.*

⁴¹ John Kruzel, *Voting Rights Act survives at US Supreme Court but more challenges loom*, REUTERS, (June 9, 2023), [https://www.reuters.com/world/us/voting-rights-act-survives-us-supreme-court-more-challenges-loom-2023-06-09/#:~:text=WASHINGTON%2C%20June%209%20\(Reuters\),by%20Republican%20legislators%20in%20numero us](https://www.reuters.com/world/us/voting-rights-act-survives-us-supreme-court-more-challenges-loom-2023-06-09/#:~:text=WASHINGTON%2C%20June%209%20(Reuters),by%20Republican%20legislators%20in%20numero us).

⁴² *But see* Mark Sherman, *The Supreme Court will let Alabama's congressional map be redrawn to better represent Black voters*, AP NEWS, (Sept. 26, 2023), <https://apnews.com/article/supreme-court-alabama-black-voters-redistricting-congress-66b1ae2f84a2a1e8352c983e7eb88387>.

⁴³ Christopher Smart, *San Juan County Readies for Political Shift*, SALT LAKE TRIBUNE, (Dec. 22, 2017), <https://www.sltrib.com/news/2017/12/22/federal-judge-adopts-new-voting-district-boundaries-in-san-juan-county/>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Fair Districting in Indian Country*, NATIVE AMERICAN RIGHTS FUND, <https://vote.narf.org/redistricting/> (last visited Mar. 29, 2024).

⁴⁷ *Id.*

⁴⁸ Common American lexicon; typically attributed to Speaker Tip O'Neill Jr. Charles P. Pierce, *Tip O'Neill's idea that all politics is local is how Government dies*, ESQUIRE, (July 17, 2015), <https://www.esquire.com/news-politics/politics/news/a36522/how-all-government-is-local-and-thats-how-it-dies/>.

greatest impact on the representation of American citizens.⁴⁹ In most states, legislatures draw the congressional and legislative boundaries, giving a political party in control the ability to “gerrymander themselves into power.”⁵⁰ The path towards proportional and fair Native representation runs through the legislative chambers of your state capitol.

North Dakota has a long history and place in American-Native conflicts, including the Dakota War of 1862, which aptly demonstrates the American push west towards the Pacific Ocean and “150 years of trauma inflicted on Native people at the hands of state government.”⁵¹ In addition, North Dakota has only one congressional district, a small populace, and several Native reservations, which serves to spotlight inequities in legislative control.

In this article, I seek to explore how Native tribes and various interest groups may file suit for violations of the VRA Section 2 to overturn racial gerrymanders, and the differing manners in which fair maps, that allow for equitable Native representation, can be drawn. While the focus of this article is on increased Native representation, this is viewed through the lens of a fair and reasonable redistricting process. As the Supreme Court curtails VRA enforcement and largely recuses itself from gerrymandering, tribes as private actors, seeking enforcement at the state and local level, is likely a realistic path towards increased Native representation. In addition, broader redistricting goals can serve to increase Native representation, such as by the passing of independent commissions and stringent regulations in states previously required for preclearance by the federal government in VRA Section 5.

To support this claim, this article will discuss the conditions of how *Turtle Mountain Band of Chippewa Indians et al. v. Alvin Jaeger* came to be and how similar matters of Native gerrymandering have been handled in other jurisdictions. While litigation regarding the Turtle Mountain Tribe of Chippewa is currently ongoing,⁵² this article will discuss options for redistricting should their suit succeed, such as the hiring of a “independent expert” to draw impartial and nonpartisan districts, or an independent commission that draws the map. This article will also reflect on the changes and effects that equitable representation will have on Native communities more broadly.

⁴⁹ See Pema Levy, *Will Democrats Ever Wake Up to the Importance of State-Level races?* MOTHER JONES (Nov. 11, 2022), <https://www.motherjones.com/politics/2022/11/will-democrats-ever-wake-up-to-the-importance-of-state-level-races/>.

⁵⁰ *Id.*

⁵¹ Quoting Minnesota Lieutenant Governor, Peggy Flanagan, herself a member of the White Earth Band of Ojibwe (see *Lieutenant Governor Flanagan*, OFFICE OF GOVERNOR TIM WALZ & LT. GOVERNOR PEGGY FLANAGAN, <https://mn.gov/governor/about-gov/peggyflanagan/> (last visited Apr. 19, 2024)); Press Pool, *Governor Walz makes historic apology for 1862 mass hanging in Mankato*, ICT (Jan. 7, 2020), <https://ictnews.org/the-press-pool/governor-walz-makes-historic-apology-for-1862-mass-hanging-in-mankato>.

⁵² Jack Dura, *Judge’s ruling awaited in tribes’ lawsuit over North Dakota redistricting map*, ASSOCIATED PRESS, (June 15, 2023), <https://apnews.com/article/spirit-lake-turtle-mountain-north-dakota-redistricting-fb0dce4fa157c4710fa80e1bacfb0c3d>.

A. *The History of Native Gerrymandering and the Turtle Mountain Band of Chippewa Indians*

The Turtle Mountain Band of Chippewa Indians are a multi-cultural community with origins among the Ojibwe and Métis peoples.⁵³ Their current lands are based around the Turtle Mountain Reservation in Rolette, North Dakota, and the Tribe has 25,000 enrolled members and 7,101 residents.⁵⁴ Turtle Mountain is beset by poverty, with one out of three residents jobless and an average income of \$4,681 per year for resident tribal members.⁵⁵

The first origins of the Turtle Mountain Band of Chippewa Indians stem from their Ojibwa roots, which are an Algonquin language group originating in the eastern United States, ranging from the Rocky Mountains to Newfoundland.⁵⁶ The Ojibwa call themselves Anishinaabe meaning “original people.”⁵⁷ The Chippewa, then a subgroup of the various Ojibwa tribes, lived on the eastern coast of “Turtle Island” around 900 AD, likely settling by the Great Lakes by 1200 AD.⁵⁸ During the beginning of the 17th century, the Chippewa (so named as an English mispronunciation of Obijwa), continued to migrate west by the Great Lakes, specifically the shores of Lake Superior.⁵⁹

The Chippewa’s first recorded interaction with Europeans was in 1640, as the Chippewa met French Jesuits and fur traders.⁶⁰ This contact had an enormous influence on Chippewa language, economy, culture and religion, and brought them into contact with other Native tribes such as the Cree.⁶¹ The Chippewa, increasingly reliant on the fur trade, began to intermix with French fur traders, adopted European tools, and transitioned into a prairie and fur-trade lifestyle.⁶² Intermixture with French colonists gave many of the Chippewa the name Métis,⁶³ an intermixed ethnic group dominating as middle men in the prosperous fur trade.⁶⁴ After the conclusion of the French and Indian War, the British took control over the region in 1763 via the Hudson Bay Company, and paved the way for further European settlement and expansion.⁶⁵

⁵³ TURTLE MOUNTAIN CHIPPEWA HERITAGE CENTER, available at <http://www.chippewaheritage.com/> (last visited Mar. 29, 2024).

⁵⁴ *North Dakota: Turtle Mountain Reservation*, PARTNERSHIP WITH NATIVE AMERICANS, http://www.nativepartnership.org/site/PageServer?pagename=PWNA_Native_Reservations_TurtleMountain (last visited Mar. 28, 2024).

⁵⁵ *Id.*

⁵⁶ Patricia F. Poitra & Karen L. Poitra, *The History and Culture of the Turtle Mountain Band of Chippewa*, N.D. DEPT’ OF PUB. INSTRUCTION, 1, 4 (1997).

⁵⁷ *Ojibwa*, BRITANNICA, (last updated Mar. 21, 2024), <https://www.britannica.com/topic/Ojibwa>.

⁵⁸ Poitra, *supra* note 56, at 7 (“Turtle Island” refers to North America).

⁵⁹ Connie Jacobs, *A History of the Turtle Mountain Band of Chippewa Indians*, UNIV. OF IDAHO, 23, 24, available at https://www.webpages.uidaho.edu/eng1504_404jj/turtle_mt_info.pdf.

⁶⁰ Poitra, *supra* note 56, at 7. The first unrecorded contact was likely in 1610 per the account of Chief Copway, who reportedly made contact with European traders associated with French explorer Samuel de Champlain.

⁶¹ Poitra, *supra* note 56, at 8.

⁶² *Id.*

⁶³ *Id.* (“Métis” people refers to the descendants of male French fur traders and their Cree or Ojibway wives), *See also* Jacobs, *supra* note 59, at 27-28; *See also The Otipemisiuk: The Metis*, TURTLE MOUNTAIN CHIPPEWA HERITAGE CENTER, (last visited Mar. 29, 2024) <http://www.chippewaheritage.com/the-metis-people.html>. Métis people are integral to the modern makeup of Turtle Mountain.

⁶⁴ Poitra, *supra* note 56, at 8.

⁶⁵ *Id.* (The French and Indian War (1754-63) is American lexicon for the Seven Years War).

With overcrowding Native tribes, new colonial dominion, and the adoption of European horses, the Chippewa continued to migrate west into the modern-day Great Plains region.⁶⁶ By the early 19th century, the Chippewa completed their migration into modern day North Dakota.⁶⁷ They soon began to engage in conflict with Native tribes such as the Dakota.⁶⁸ After nearly half a century of conflict, heavy losses ensued, and the Chippewa and Dakota sought to make peace and form treaties with the American government.⁶⁹

Congress defined the relationship between the American government and the Native tribes in the 1787 Northwest Ordinance, as the United States took ownership of former British North America: “[t]he utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed.”⁷⁰

The United States government did not live up to these lofty words. The Turtle Mountain became distinguished from other tribal groups in the mid 19th century.⁷¹ In 1858, the Dakota and Chippewa signed the Sweet Corn Treaty, which defined Chippewa lands in modern day North Dakota, including some eleven million acres of land that the United States government desired for public domain.⁷² The Chippewa territory covered one-third of North Dakota, and was concentrated in the Red River Valley in the eastern part of the state.⁷³

The Red River Valley was fertile and prime for agriculture, and the United States soon demanded another treaty, and in 1863, under protest, the Chippewa ceded eleven million acres at the price of eight cents per acre.⁷⁴ Despite this concession, white settlers continued to encroach on the remaining Chippewa lands, especially as the Black Hills gold rush began in 1874.⁷⁵ The settlers petitioned the Department of the Interior to officially open up the lands for further white settlement.⁷⁶ In 1882, the United States government acted accordingly and established the Turtle Mountain reservation in Rolette county.⁷⁷ In 1884, the United States government reduced the townships under its domain from twenty-two to two.⁷⁸ On the other side of the border, the Canadian government put down a Métis revolt, allowing for further land reduction.⁷⁹

⁶⁶ *Id.* at 10.

⁶⁷ *Id.* at 11.

⁶⁸ *Id.*

⁶⁹ *Id.* at 12.

⁷⁰ Northwest Ordinance (1787), NATIONAL ARCHIVES, <https://www.archives.gov/milestone-documents/northwest-ordinance#:~:text=The%20Northwest%20Ordinance%20chartered%20a,rights%20guaranteed%20in%20the%20territory> (last visited Mar. 29, 2024); United States Code: Ordinance of 1787: The Northwest Territorial Government (1934) (quoting Article 3).

⁷¹ Jacobs, *supra* note 59, at 29 (first treaty signed by the Turtle Mountain group in 1863).

⁷² Poitra, *supra* note 56, at 12-13.

⁷³ *Id.* at 13.

⁷⁴ *Id.* at 13.

⁷⁵ Jacobs, *supra* note 59, at 29; *The Black Hills Gold Rush*, BLACK HILLS VISITOR MAGAZINE, (Oct. 15, 2019) available at <https://blackhillsvisitor.com/learn/history/the-black-hills-gold-rush/>.

⁷⁶ Poitra, *supra* note 56, at 14.

⁷⁷ *Id.* at 17.

⁷⁸ *Id.* at 17.

⁷⁹ *Id.* at 13-14.

The United States government saw traditional conceptions of Native land ownership, which was essentially held as tenants in common, as part of the “Indian problem.”⁸⁰ In an effort to “civilize” and “Americanize” tribal nations, the Dawes Act of 1887 was passed, which broke up reservation land into parcels that were allotted to individual tribal members in exchange for American citizenship.⁸¹

Life on the reservation was hard for the Chippewa, being removed from their traditional way of life, their food sources destroyed, constant droughts and winter storms, and subject to constant harassment from white settlers and bureaucrats.⁸² Finally, in the aftermath of World War I, in which many Native soldiers served, the Indian Citizenship Act (Snyder Act) of 1924 granted United States citizenship to all Natives born within the territorial limits of the Country.⁸³ This set the path towards eventual self-determination for Native peoples.

1. The Path Towards Self-Determination

While the Great Depression and World War II are defined as some of the greatest obstacles in the United States governments history, ironically, they allowed for increased autonomy and support for many Native peoples.⁸⁴ The founding of the Works Progress Administration in 1933 offered many economic options for the Turtle Mountain Band of Chippewa, providing jobs in construction, sewing, canning, and gardening.⁸⁵ Many among the Turtle Mountain thought the Depression was a blessing in disguise for this reason.⁸⁶

In 1932, Congress approved the first Constitution for the Turtle Mountain Band of Chippewa.⁸⁷ This was quickly followed by the Indian-Reorganization Act of 1934 which was envisioned to allow tribes to draft their own constitutions and bylaws, though the Chippewa voted not to accept this new form of government.⁸⁸

Another significant federal action was the creation of the United States Court of Claims in 1948, which allowed the Chippewa to file claims against the government for unfair market values in the lands the tribe was forced to cede.⁸⁹ Also in 1948, Native tribes achieved one of their first major legislative victories.⁹⁰ In *Harrison v. Laveen*, the Arizona Supreme Court held that Native Americans had a right to vote which could not be denied by on a basis of “persons

⁸⁰ *Id.* at 17.

⁸¹ *Id.* at 18; *Dawes Act and Commission: Topics in Chronicling America*, LIBRARY OF CONGRESS, <https://guides.loc.gov/chronicling-america-dawes-act-commission> (last visited Mar. 29, 2024).

⁸² *Id.* at 19.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 19-20.

⁸⁹ *Id.* at 20.

⁹⁰ Friel, *supra* note 7.

under guardianship.”⁹¹ New Mexico and Utah followed suit, and by 1957 all Natives had the legal right to vote throughout the United States.⁹²

Despite progress and federal flirtation with ending the reservation system in 1954, the Chippewa continued to live in poverty, suffering from low education levels and high unemployment.⁹³ The 1960s and 1970s however, would finally bring about the legislation of purported equality and its enforcement.

2. Modern Legislation

In 1965, the Voting Rights Act was passed, and finally provided a framework in which to enforce voting rights.⁹⁴ The Voting Rights Act applied to all citizens, including Natives, because the Snyder Act made them full bore citizens.⁹⁵ In addition, the VRA had been explicitly expanded to include Natives in 1975.⁹⁶ In particular, the VRA outlawed poll taxes, literacy tests, and other bureaucratic obstacles to minority voting and enfranchisement.⁹⁷

The Act provided for federal examiners in certain jurisdictions who were “covered” by statute, these primarily being located in the Deep South, but expanded to several western states in 1975.⁹⁸ Further, Section 5 of the VRA required certain jurisdictions, again primarily southern, to obtain “preclearance” from the federal government before enacting any new voting practices or procedures.⁹⁹ Section 2 of the VRA, highly similar to the language of the 15th Amendment, applied a national ban on the denial or abridgement of the right to vote due to race or color.¹⁰⁰ The VRA proved effective, with the Department of Justice bringing nearly 1,000 objections to proposed voting changes in covered jurisdictions between 1970 and 2000.¹⁰¹

3. Implications on Redistricting

It is Section 2 of the VRA which most concerns this article, and the Turtle Mountain Band of Chippewa in regard to their voting community. In the redistricting process, federal law provides that majority-minority districts can be created to prevent the dilution of minority voting strength in compliance with the Voting Rights Act of 1965.¹⁰² *Thornburg v. Giles* is the primary

⁹¹ *Id.*

⁹² *Id.*

⁹³ Poitra, *supra* note 56, at 21.

⁹⁴ Friel, *supra* note 7.

⁹⁵ Library of Congress, *supra* note 2.

⁹⁶ *Id.*; 42 U.S.C. § 1973aa-1a.

⁹⁷ Voting Rights Act of 1965, Voting Rights Act, *supra* note 26.

⁹⁸ *Id.*; “Certain political subdivisions (usually counties) in four other states (Arizona, Hawaii, Idaho, and North Carolina) were covered.” *Section 4 of the Voting Rights Act*, U.S. Department of Justice, Civil Rights Division, <https://www.justice.gov/crt/section-4-voting-rights-act> (last visited Mar. 29, 2024).

⁹⁹ Democracy Docket, *The Heart of the Voting Rights Act*, DEMOCRACY DOCKET, (Mar. 19, 2021), <https://www.democracymocket.com/analysis/the-heart-of-the-voting-rights-act/>.

¹⁰⁰ Voting Rights Act, *supra* note 26.

¹⁰¹ Democracy Docket, *supra* note 99.

¹⁰² Voting Rights Act, *supra* note 26.

caselaw in determining whether a voter district has diluted the power of a minority group's collective vote, this by way of a three-part test:

1. The minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district;
2. The minority group must be able to show that it is politically cohesive; and
3. The minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.¹⁰³

After the 2020 census, there were 136 congressional majority-minority districts, roughly thirty-one percent of the nation's total.¹⁰⁴ The vast majority of these districts were drawn for Blacks and Latinos, with no congressional district in the nation having a Native majority.¹⁰⁵ There are likely hundreds of minority-majority legislative districts further down ballot at the legislative level.

The dearth of research into Native redistricting is a direct result of the population imbalance between Natives and other minority groups.¹⁰⁶ There are no congressional precedents because Natives make up only a sliver of the population in the vast majority of districts.¹⁰⁷ Alaska has the highest proportion of Natives of any state, nearly twenty percent of the population, still only a fifth of Alaska's lone congressional district.¹⁰⁸ However, this higher number has a strong correlation with representation, and likely led to the election of the first Alaskan Native to Congress in 2022.¹⁰⁹ In contrast to Alaska, North Dakota's Native population is just 6.53%, though it is still the sixth highest in the nation.¹¹⁰ The future of Native representation is best understood by looking at its impacts at the legislative level.

Supporters of VRA districts largely argue that they avoid racial dilution into the majority and allows minority voters to elect their candidate of choice.¹¹¹ A further argument is raised that

¹⁰³ Voting Rights Act, *supra* note 26; *Thornburg v. Gingles*, 478 U.S. 30, 50-51, 106 S. Ct. 2752, 92 L. ED. 2d (1986). In *Gingles*, the court found that the North Carolina legislature impaired Black citizens ability to vote by diluting the Black vote across six legislative districts. *Id.* at 80 (hereinafter "Gingles").

¹⁰⁴ Ballotpedia, *supra* note 37.

¹⁰⁵ *Id.* (Citing the U.S. Census Bureau, 2022 American Community Survey).

¹⁰⁶ The "American Indian and Alaskan Native" alone percentage, as of 2023, is 1.3% of the American population, with Hispanics or Latinos, of any race, at 19.1% of the population, and Blacks at 13.6%. *Quick Facts*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045223> (Last visited Mar. 28, 2024).

¹⁰⁷ Ballotpedia, *supra* note 37.

¹⁰⁸ *Native American Population by State 2024*, WORLD POPULATION REVIEW, <https://worldpopulationreview.com/state-rankings/native-american-population> (Last visited Mar. 28, 2024).

¹⁰⁹ Chris Klint, *Mary Peltola makes History as first Alaska Native sworn into Congress*, ALASKA PUBLIC MEDIA – ANCHORAGE, (Sept. 13, 2022), <https://alaskapublic.org/2022/09/13/mary-peltola-makes-history-as-first-alaska-native-person-sworn-into-congress/>. Mary Peltola was elected to a full term in November of 2022, Chris Klint & Liz Ruskin, *Peltola Wins Alaska's U.S. House race by 10 point margin*, ALASKA PUBLIC MEDIA, (Nov. 23, 2022), <https://alaskapublic.org/2022/11/23/peltola-wins-alaskas-u-s-house-race-by-10-point-margin/>.

¹¹⁰ World Population Review, *supra* note 108.

¹¹¹ Ballotpedia, *supra* note 37.

such districts have increased the number of minority office-holders throughout the country since their enactment, specifically citing the vast increase in Black office holders in the decades after the VRA's enactment.¹¹²

Opponents of VRA districts argue that they result in the overwhelming concentration, or “packing” of minority voters, thus minimizing their influence from a broader number of districts.¹¹³ A further argument entails that packing minority voters into specific districts provides an unfair advantage to Republicans by “packing” all minority candidates into just one district, therefore bleeding minority support in others, allowing for a small number of minority candidates to be elected at the price of electing fewer Democrats.¹¹⁴ The resulting effect is a few incredibly safe democratic seats represented by minority office holders, and many more Republicans in neighboring districts in seats that have considerably less minority influence.¹¹⁵

While this article has mentioned terms such as gerrymandering, packing, and cracking in the discussion of Native voting rights and history, this article requires a short discussion of just what those terms mean: “Packing” in gerrymandering is overwhelming concentrating a type of voter in one specific district, this way that type of voter cannot win in multiple districts.¹¹⁶ “Cracking” is taking a kind of voter, and splitting their numbers across multiple districts so that they are overwhelmed by other kinds of voters more favorable to the map drawer.¹¹⁷ It is common to use both of these strategies in gerrymandering schemes, often in tandem.¹¹⁸ “Gerrymandering” occurs when electoral districts are drawn for the purpose of giving one political group an advantage over another group.¹¹⁹

The current North Dakota legislative scheme is a perfect example of this tandem strategy.¹²⁰ In *Turtle Mountain Band of Chippewa Indians et al. v. Alvin Jaeger*, plaintiffs contend that Natives were packed into District 9A, giving them an overwhelming majority in that district, *and that district only*.¹²¹ The remaining Native voters not living in 9A were cracked, ala divided and split, between districts 9B and 15.¹²² The realized goal is no hope of a Native Democrat winning in any remaining district.¹²³

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* (Quoting Steven Hill, *How the Voting Rights Act Hurts Democrats and Minorities*, THE ATLANTIC, (June 17, 2013), <https://www.theatlantic.com/politics/archive/2013/06/how-the-voting-rights-act-hurts-democrats-and-minorities/276893/>).

¹¹⁶ Malia Jones, *Packing, Cracking, and the Art of Gerrymandering Around Milwaukee*, UW APPLIED POPULATION LAB, (June 8, 2018), <https://apl.wisc.edu/shared/tad/packing-cracking>.

¹¹⁷ *Id.*

¹¹⁸ It should be noted that “stacking” is also used to dilute low income and minority votes. This process involves an even split between less educated minorities and higher educated Whites, with the latter having much higher turnout. *Id.* Jean Schroedel & Artour Aslanian, *Native American Vote Suppression: The Case of South Dakota*, 22 RACE, GENDER & CLASS: 308, 308-323 (2015).

¹¹⁹ *Gerrymander*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/gerrymander> (last visited Mar. 29, 2024).

¹²⁰ NARF, *supra* note 34.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

4. Implications of Redistricting on Native Communities

The Supreme Court's decision in *Shelby County v. Holder* has destroyed much of the VRA's ability to protect voting rights for minority communities, including Native populations.¹²⁴ In *Shelby*, the conservative majority on the Court found that Section 4(b) of the VRA, which establishes the formula under Section 5 for jurisdictions with a history of discrimination unconstitutional.¹²⁵ Justice Roberts opined that the coverage formula was based on "decades-old data and eradicated practices"¹²⁶ and the VRA was "not designed to punish for the past..."¹²⁷ while finding that formula was no longer applicable to a changed America.¹²⁸ While the *Shelby* Courts discussion of the VRA and indeed its procedural history have focused on the unique perspective of America's Black community, there is a "striking omission" concerning the effects of the VRA on Natives.¹²⁹ With the erasure of much of the bite of the VRA, states have a great deal of free reign to "undermine the ability of Native Americans to be full participants in governance."¹³⁰ In effect, *Shelby* has allowed for far more aggressive gerrymanders at the state and legislative level.

B. State Litigation

On February 7th of 2022, the Turtle Mountain and Spirit Lake Tribes brought suit against the state of North Dakota on a Section 2 VRA claim, claiming the voter dilution of Native Americans and a civil action for the deprivation of rights.¹³¹ In particular, the Tribes claim that North Dakota cracked and packed Native voters to reduce Native districts from two to one.¹³² Formerly, two house subdistricts existed in North Dakota that could elect the Native candidate-of-choice, now a supermajority of Turtle Mountain Band of Chippewa residents reside in House District 9A, while other Turtle Mountain and Spirit Lake residents are cracked between 9b and 15.¹³³

On July 7, 2022, the court ruled that the plaintiffs had proper subject matter jurisdiction and standing to bring suit, and denied the state's motion to dismiss.¹³⁴ North Dakota argued for dismissal on three grounds: (1) the Tribes lack standing to bring a suit under the VRA, (2) that Tribal plaintiffs cannot allege a VRA claim because they are not "citizens" of the United States,

¹²⁴ See Ferguson-Bonhee, *supra* note 3.

¹²⁵ Holder, 570 U.S. at 551.

¹²⁶ *Id.*

¹²⁷ *Id.* at 553.

¹²⁸ *Id.* at 557.

¹²⁹ Schroedel, *supra* note 118, at 309.

¹³⁰ *Id.* at 321.

¹³¹ Complaint for Declaratory and Injunctive Relief, 1, Turtle Mountain Band of Chippewa Indians et al. v. Alvin Jaeger, No. 3:22-cv-00022 (D.N.D. Feb. 2, 2022) [hereinafter "Complaint"].

¹³² *Id.* at 2-3.

¹³³ *Id.* at 15.

¹³⁴ Order Denying Motion to Dismiss, 3, *Turtle Mountain Band of Chippewa Indians et al. v. Alvin Jaeger*, 3:22-cv-22 (D.N.D. Jul. 7, 2022).

and (3) that Section 2 of the VRA does not provide a private right of action.¹³⁵ The court was not persuaded. Firstly, because the Complaint had individual plaintiffs, and they resided in an allegedly aggrieved voting district, the individuals had standing which was conferred to all plaintiffs.¹³⁶ Secondly, the court held that § 1983 indeed provides a private remedy for Section 2 violations, notably stating that there is a robust history of private enforcement since the VRA's inception.¹³⁷

The Complaint itself includes the Turtle Mountain Band of Chippewa, the Spirit Lake Tribe, and three Native voters as individual plaintiffs and names Alvin Jaeger as the defendant in his official capacity as the Secretary of State.¹³⁸ The plaintiffs note that Section 2 of the VRA prohibits “any standard, practice, or procedure that results in a denial or abridgement of the rights of any citizen of the United States to vote on account of race or color.”¹³⁹ Further, a violation can be established if “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.”¹⁴⁰

The plaintiffs reference the Supreme Court case *Thornburg v. Gingles*, which established the leading law for a successful Section 2 claim (The *Gingles* preconditions), these being that the minority group is sufficiently large and geographically compact to constitute a single member district, racially polarized area, the minority group must be “politically cohesive”, and the majority must vote as a sufficient bloc to enable it to defeat the minority candidate-of-choice.¹⁴¹ Once these preconditions are established, the court conducts a totality of the circumstances test looking at the history of discrimination, racial polarization, procedures that enhance political discrimination, exclusion from slating process, inequality in socio-economic conditions, racial appeals, and whether members of the minority group have won public office, as a non-exhaustive list of factors, of which no set amount must be proven.¹⁴²

In *Gingles*, Black citizens of North Carolina alleged that the state diluted their vote via a redistricting plan that created a substantial majority of white voters in areas with sufficient concentrations of Black voters to form single-member districts in which they were the majority.¹⁴³ The court held unanimously that the North Carolina redistricting plan impaired the

¹³⁵ *Id.* at 3.

¹³⁶ Order Denying Motion to Dismiss, *supra* note 134, at 4. One plaintiff having standing to bring a specific claim generally confers standing to all plaintiffs on that claim. *See Village of Arlington Heights v. Metropolitan House. Dev. Corp.*, 429 U.S. 252, 264 (1977); *see also Jones v. Gale*, 470 F.3d 1261, 1265 (8th Cir. 2006).

¹³⁷ Order Denying Motion to Dismiss, *supra* note 134, at 6, 11.

¹³⁸ Complaint, *supra* note 131, at 4-7.

¹³⁹ Complaint, *supra* note 131, at 7; 52 U.S.C. § 10301(a).

¹⁴⁰ Complaint, *supra* note 131, at 7-8; 52 U.S.C. § 10301(b).

¹⁴¹ Complaint, *supra* note 131, at 8; *Gingles*, *supra* note 103, at 50-51.

¹⁴² Complaint, *supra* note 131, at 8-9 (from the Senate Report on the 1982 amendments to the Voting Rights Act); *Guidance under Section 2 of the Voting Rights Act*, 52 U.S.C. 10301, for redistricting and methods of electing government bodies, U.S. DEPARTMENT OF JUSTICE, (Sep. 1, 2021) at 7, available at <https://www.justice.gov/opa/press-release/file/1429486/dl>, [hereinafter “Section 2 Guidance”].

¹⁴³ *Gingles*, *supra* note 103, at 35.

ability of Black voters to participate in the political process and select their candidate-of-choice and invalidated the plan.¹⁴⁴

In *Turtle Mountain Band of Chippewa*, the facts of the complaint detail the history of the tribal nations of North Dakota, the various reservations, and their demographic makeup.¹⁴⁵ The facts then note North Dakota's redistricting process post census, in particular, the lack of communication with Native tribes over their concerns of the new map, and the continued desire by the plaintiffs to be placed in the same district so to improve native representation in the legislature.¹⁴⁶ Native voter strength was diluted and split despite these raised objections and the lack of tribal input, leading to attempted complaints and amendments, including a joint letter to Governor Burgum asking that the Tribal reservations be placed into a single legislative district.¹⁴⁷ The letter and subsequent amendment attempts were ignored and the original redistricting plan was signed by Governor Burgum on November 11, 2021.¹⁴⁸

Like most states in the Union, North Dakota has a partisan redistricting process controlled by a partisan legislature.¹⁴⁹ While the state has only one congressional district, the state lines are drawn by the legislature, whom has a great deal of authority to choose their own voters.¹⁵⁰ Republicans have controlled the North Dakota legislature in both houses since 1995 and the Governorship since 1993.¹⁵¹ North Dakota last voted for a Democrat in the Presidential Election in 1964.¹⁵² In 2020, President Donald Trump carried the State by approximately thirty-three percent.¹⁵³

With all other avenues failing, the plaintiffs proposed a new configuration of the districts and sought to fulfill the *Gingles* prongs.¹⁵⁴ The plaintiffs proposed district would combine the Turtle Mountain and Spirit Lake Reservations and have a Native voting age population of 69.1%.¹⁵⁵ The Tribes contend this district would satisfy *Gingles*.¹⁵⁶

Firstly, plaintiffs contend the larger Native population would elect their candidate-of-choice for both State House seats and the Senate seat, while keeping the district more compact than the original map.¹⁵⁷ The reservations are only fifty-five miles apart, while the original

¹⁴⁴ *Id.* at 80.

¹⁴⁵ Complaint, *supra* note 131, at 11 (Natives are 7.2% of the North Dakota population according to the census, and 5.9% of its voting age population).

¹⁴⁶ *Id.* at 13.

¹⁴⁷ *Id.* at 14.

¹⁴⁸ *Id.*

¹⁴⁹ National Summary, ALL ABOUT REDISTRICTING, available at <https://redistricting.ils.edu/national-overview/?colorby=Institution&level=Congress&cycle=2020> (last visited Mar. 29, 2024).

¹⁵⁰ *Id.*, State Summary, North Dakota.

¹⁵¹ Party control of North Dakota state government, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_North_Dakota_state_government (last visited Apr. 19, 2024).

¹⁵² North Dakota Presidential Voting History, 270TOWIN, https://www.270towin.com/states/North_Dakota (last visited Mar. 28, 2023).

¹⁵³ *Id.*

¹⁵⁴ Complaint, *supra* note 131, at 15.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

district stretches 150 miles and a three-hour drive from end to end.¹⁵⁸ Compactness and “communities of interest” are highly important factors in most states’ redistricting process.¹⁵⁹ This reflects legislative intent to enact districts with common social and economic interests.

Secondly, the Spirit Lake and Turtle Mountain communities vote cohesively for the same candidate-of-choice.¹⁶⁰ Native voters in the State share similar priorities and party affiliation, for instance, Joe Biden carried 93.7% Native Rolette County with 65.3% of the vote, and won Benson County precinct 23-02 with 78.6% of the vote.¹⁶¹ Even nationwide, Natives generally prefer and vote for Democratic candidates at high numbers, with approximately sixty percent voting for Joe Biden in 2020.¹⁶²

Thirdly, the white bloc of Republican voters is usually able to overwhelm and defeat the Native Democratic candidates in Districts 9B and 15.¹⁶³

Next, the plaintiffs look at the factor test under *Gingles*. They argue under the totality of the circumstances, Native American voters in North Dakota have less opportunity and ability to participate in the political process and elect their candidate of choice.¹⁶⁴ To begin with, tribal leaders were met with hostility and excluded from the redistricting process including not holding a single hearing on tribal lands and conflating the desire for multiple districts with “ask[ing] to be marginalized.”¹⁶⁵ He was not the only legislator to make such comments.¹⁶⁶ This made attendance for tribal residents incredibly difficult, as many are without reliable private transportation.¹⁶⁷

Furthermore, as the district court itself has recognized, North Dakota has a long history of discriminating against Native voters.¹⁶⁸ For example, until 1922, North Dakota explicitly barred

¹⁵⁸ *Id.* at 15-16.

¹⁵⁹ “Compactness refers to the principle that the constituents residing within an electoral district should live as near to one another as possible.” *Compactness*, BALLOTPEDIA, <https://ballotpedia.org/Compactness> (last visited Mar. 28, 2024). “A community of interest refers to a group of people with a common set of concerns that may be affected by legislation.” *Community of interest*, https://ballotpedia.org/Community_of_interest (last visited Mar. 28, 2024).

¹⁶⁰ Benson County precinct 23-02 has a Native voting age population of 91.8%. Complaint, *supra* note 131, at 17; *See North Dakota presidential results*, <https://www.politico.com/2020-election/results/north-dakota/> (Last visited Mar. 28, 2024).

¹⁶¹ Complaint, *supra* note 131, at 17 (Native American voting population percentage).

¹⁶² Sixty percent of Native American voters reported voting for Joe Biden. Gabriel Sanchez et al., *Native Americans overcame major obstacles to vote in 2020 elections*, UNM NEWSROOM, (Nov. 14, 2020), <http://news.unm.edu/news/native-americans-overcame-major-obstacles-to-vote-in-2020-election>. *But see* Michael Kruse, *How Trump Won One of America’s Most Diverse Counties – By a Lot*, POLITICO, (Dec. 10, 2020) <https://www.politico.com/news/magazine/2020/12/10/roberson-county-rural-rainbow-coalition-north-carolina-trump-republicans-443978> (specifically looking at the Lumbee Tribe); Scott Simon, *Hispanic and minority voters are increasingly turning to the Republican party*, NPR, (July 23, 2022), <https://www.npr.org/2022/07/23/1113166779/hispanic-and-minority-voters-are-increasingly-shifting-to-the-republican-party>.

¹⁶³ Complaint, *supra* note 131, at 17.

¹⁶⁴ *Id.* at 18.

¹⁶⁵ *Id.* at 18-19 (Quoting the Redistricting Chairman).

¹⁶⁶ *Id.* at 19.

¹⁶⁷ *Id.* at 18.

¹⁶⁸ *Id.* at 19-20; *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).

most Natives from voting, requiring that Natives “[abandon] their tribal relations.”¹⁶⁹ The North Dakota Constitution of 1898 also established a literacy test, of the kind commonly used in the Jim Crow South.¹⁷⁰

In more recent times, Benson County was sued by the Justice Department in 2010 over their “at large” county commissioner election system and the removal of a reservation polling station.¹⁷¹ The County admitted in a consent decree that their electoral system discriminated against Natives and reestablished the polling location.¹⁷² This was followed by attempts from 2013 to 2017 to change the State’s voter identification laws in a manner that discriminated against Native voters, for instance by removing alternative identification and residential address factors used heavily by Natives.¹⁷³ In 2016, the District Court for the District of North Dakota found that the amended Voter identification law discriminated against Natives.¹⁷⁴ In particular, the court noted that the practices and history of discrimination resulted in no Native candidate ever being elected in the at-large method of election and markedly lower socioeconomic status compared to the white population.¹⁷⁵ This status hindered the present-day ability of Natives to participate effectively in the political process.¹⁷⁶

This is coupled with the United States’ long history of forced assimilation of Native populations and the attempted destruction of indigenous religions, languages, and culture.¹⁷⁷ The American government also engaged in outright massacres, such as Wounded Knee in 1890, where approximately 250-300 unarmed Lakota were killed by the United States cavalry.¹⁷⁸

That history still has ramifications today, specifically applied to North Dakota. North Dakota Natives are nearly four times more likely than the State’s white population to live in poverty, are disproportionately homeless, and are eight times more likely to be incarcerated than the white population, which all contribute to Native political disempowerment and lower quality of life.¹⁷⁹

Lastly, voting in North Dakota is highly racially polarized between whites and Natives with the former largely supporting Republicans by upwards of seventy percent while Natives routinely support Democrats by upwards of eighty percent¹⁸⁰ No Native candidate has ever been elected to statewide office.¹⁸¹ The totality-of-the-circumstances test clearly favors the plaintiffs, and should lead to electoral change.

¹⁶⁹ Complaint, *supra* note 131, at 20.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 21.

¹⁷² *Id.*

¹⁷³ *Id.* at 21-22.

¹⁷⁴ *Id.* at 22.

¹⁷⁵ Consent Judgment and Decree, *United States v. Benson Cnty.*, 4, Civ. A. No. A2-00-30 (D.N.D. Mar. 10, 2000).

¹⁷⁶ *Id.*

¹⁷⁷ Complaint, *supra* note 131, at 23.

¹⁷⁸ *Id.* at 24.

¹⁷⁹ *Id.* at 24-28.

¹⁸⁰ *Id.* at 29.

¹⁸¹ *Id.*

The plaintiffs’ claim for relief entails the restoration of two majority Native house districts and one senate district, estop the legislature from drawing the original packed and cracked map, enact the plaintiffs’ proposed redistricting map, and lawyer fees.¹⁸²

The bench trial took place from June 12 through 15 of 2023.¹⁸³ The judge took the ruling under advisement and set a deadline for June 30 for the parties to make additional findings.¹⁸⁴ On November 17, 2023, the federal judge found for the plaintiffs and ruled that North Dakota’s legislative maps constituted a Section 2 VRA violation.¹⁸⁵ The court ordered the North Dakota Legislative Assembly to redraw a VRA complaint map before the upcoming 2024 election.¹⁸⁶ On December 15, 2023, the 8th Circuit Court of Appeals denied a request to delay the judge’s decision.¹⁸⁷

On January 8, 2024, Judge Welte ordered the North Dakota Legislature to adopt the plaintiffs’ proposed plan two be adopted and implemented correct the Section 2 VRA violation.¹⁸⁸ Native American Rights Fund (NARF) Staff Attorney, Michael Carter, stated; “The tribal plaintiffs’ hard-fought victory means Native American voters in North Dakota will be able to vote in fairly and lawfully drawn legislative districts in this year’s elections.”¹⁸⁹ Appeals remain pending, but the new legislative map will be used for the 2024 elections.¹⁹⁰

C. Analogous Matters

1. The Navajo Nation in San Juan County, Utah

In determining the chances of successful relief for future litigants, it is important to look to similar facts and cases that allowed for redrawn maps that better favored Native communities. A strong example lies in the Beehive State in San Juan County, Utah. San Juan is the largest county in Utah, roughly the size of New Jersey, and is home to a large Navajo reservation.¹⁹¹

¹⁸² *Id.* at 30-31.

¹⁸³ Findings of Fact and Conclusions of Law, 2, *Turtle Mountain Band of Chippewa Indians et al. v. Alvin Jaeger*, No. 3:22-cv-00022 (D.N.D. Nov. 17, 2023), [hereinafter “Findings of Fact and Law”].

¹⁸⁴ *Judge’s ruling awaited in tribe’s lawsuit over North Dakota redistricting map*, CBS NEWS MINNESOTA, (Jun. 16, 2023), <https://www.cbsnews.com/minnesota/news/judges-ruling-awaited-in-tribes-lawsuit-over-north-dakota-redistricting-map/>.

¹⁸⁵ Findings of Fact and Conclusions of Law, *supra* note 183, at 2.

¹⁸⁶ *Id.* at 39.

¹⁸⁷ NARF, *supra* note 34.

¹⁸⁸ Order, 3, *Turtle Mountain Band of Chippewa Indians et al. v. Howe*, No. 3:22-cv-22 (D.N.D. Jan. 8, 2024), <https://narf.org/nill/documents/20240108tmc-order-map.pdf>.

¹⁸⁹ *Court Orders North Dakota to Restore Native Voting Power Without Delay*, NATIVE AMERICAN RIGHTS FUND, (Jan. 9, 2024), <https://narf.org/nd-redistricting-challenge/>.

¹⁹⁰ *Arguments in North Dakota redistricting appeal still months away*, INFORUM/NORTH DAKOTA MONITOR, (Feb. 19, 2024), <https://www.inforum.com/news/north-dakota/arguments-in-north-dakota-redistricting-appeal-still-months-away>.

¹⁹¹ PBS NewsHour, *Utah’s Navajo residents hope redistricting brings needed resources*, PBS NEWSHOUR, (June 21, 2018) <https://www.pbs.org/newshour/show/utahs-navajo-residents-hope-redistricting-brings-needed-resources>.

In San Juan County, the county commissioner map (3 districts), packed Native voters into a single district, allowing for white candidates to win the other two and thus the majority.¹⁹² San Juan county was 50.4% Native (primarily Navajo) according to the 2010 census, but despite this, the county commissioner board had never been majority Navajo before.¹⁹³ The Navajo Nation of eastern Utah sued to redraw the commissioner map in a quest for two majority Native districts more proportional to their population.¹⁹⁴ The Navajo Nation's suit was premised on a Section 2 violation of the Voting Rights Act.¹⁹⁵

The Navajo Nation won the suit, although the court declined to adopt the Navajo remedial plan, and instead ordered a redraw by a special master appointed by the court, here being University of California Irvine political science professor, Doctor Bernard Grofman.¹⁹⁶ Despite the failure to adopt the Navajo's preferred map, Dr. Grofman's impartially drawn map entailed two majority Navajo districts.¹⁹⁷ The following election in 2018, Democratic Natives gained control over the San Juan County Commissioners Board by a two to one margin.¹⁹⁸ In 2022 however, those Native commissioners lost reelection, despite the new 2020 map being "least change", however these losses may be due to allegations of corruption by the newly elected commissioners.¹⁹⁹

While these recent developments may prove discouraging to the Turtle Mountain and Spirit Lake tribes, the San Juan County redraw does serve as an excellent example of how a special master can be appointed by the court should the court not wish to adopt a party's remedial plan.²⁰⁰ Moreover, *Navajo Nation v. San Juan County* was affirmed by the 10th Circuit Court of Appeals, which while not binding on North Dakota, helps to legitimize Native suits with local implications at high court levels.²⁰¹

Furthermore, the Navajo Nation provides a specific example on how the court can settle boundary disputes and provide a roadmap for an equitably drawn map.²⁰² Dr. Grofman's

¹⁹² Anastasia Hufham, *San Juan County heads towards potential electoral redistricting: Decades of legal trouble complicate process*, MOAB SUN NEWS (June 4, 2021), <https://moabsunnews.com/2021/06/04/san-juan-county-heads-toward-potential-electoral-redistricting-decades-of-legal-trouble-complicate-process/>.

¹⁹³ *Id.*

¹⁹⁴ *Navajo Nation v. San Juan County*, 2, 2017 WL 3016782, (D. Utah, Central Division, 2017), *aff'd*, 929 F.3d 1270 (10th Cir. 2019), [hereinafter "Navajo Nation"].

¹⁹⁵ *Id.* at *3.

¹⁹⁶ *Id.* at *19; Hufham, *supra* note 192.

¹⁹⁷ Morgan Barron, *Barron: Redistricting of San Juan County Voting Districts Paves the Way for Political Fairness* (Apr. 14, 2018), <https://dailyutahchronicle.com/2018/04/14/barron-redistricting-of-san-juan-county-voting-districts-paves-the-way-for-political-fairness/>.

¹⁹⁸ *Native Candidates Claim Majority on County Commission in Utah*, INDIANZ, (Nov. 8, 2018), <https://indianz.com/News/2018/11/08/native-candidates-claim-majority-on-coun.asp>.

¹⁹⁹ Brian Maffly & Mark Eddington, *San Juan County Votes Out Utah's First Native American Commission Majority*, SALT LAKE TRIBUNE (Nov. 9, 2022) <https://www.sltrib.com/news/politics/2022/11/09/san-juan-votes-out-utahs-first/>; Lexi Peery, *San Juan County Commission passes new redistricting map*, KUER 90.1 (Dec. 22, 2021), <https://www.kuer.org/politics-government/2021-12-22/san-juan-county-commission-passes-new-redistricting-maps>.

²⁰⁰ *Navajo Nation*, *supra* note 194, at *19.

²⁰¹ *Id.*

²⁰² Final Report of Dr. Bernard Grofman, Special Master, 2, *Navajo Nation v. San Juan County*, 2017 WL 3016782 (D. Utah, Central Division, Nov. 29, 2017), [hereinafter "Final Report"].

proposed maps are based on several factors that are quite similar to those detailed in the initial Turtle Mountain Complaint. Specifically, Dr. Grofman grills the gerrymandered map for not keeping communities whole and splitting cities and towns “unnecessarily.”²⁰³ This bears similarity to splitting nearby reservations in North Dakota, and unnecessarily lengthening and distorting the district so as to dissect and drown out the Native populace.²⁰⁴ Further, he notes the issues of “packing” minorities into specific districts, the barriers to full political participation, turnout issues, and English fluency concerns.²⁰⁵ These issues affecting the Navajo Nation of San Juan County bear a striking resemblance to the facts of the Turtle Mountain Band of Chippewa and their gerrymandered districts in North Dakota, yet in this case, maps were redrawn despite the non-acceptance of the tribal map and a politically balanced court of appeals.²⁰⁶

In essence, Dr. Grofman’s plan satisfied “good government considerations” of balanced, fair, and cohesive districts that can pass muster in non-liberal jurisdictions.²⁰⁷ Native plaintiffs may not succeed in having their preferred map drawn, and a third-party adjudicator is a strong option for litigants whose primary goal is taking power out of the legislature’s hands. This case also illustrates the perpetual nature of redistricting issues, namely that the process repeats every decade.²⁰⁸ While Native voters can sue each successive decade, the process of gerrymandering will likely continue until the process is reformed and politicians stripped of their power to pick their own voters.²⁰⁹

2. The Colville and Yakima Reservations of Washington

A differing example, in a state with no partisan gerrymandering, stands in the Colville and Yakima Reservations in Washington State, which have generally been split among many legislative and congressional districts, thus dividing the Native population.²¹⁰ The Confederated Tribes of the Colville Reservation consist of twelve tribes across the Pacific Northwest that were

²⁰³ *Id.* at *12.

²⁰⁴ Complaint, *supra* note 131, at 15.

²⁰⁵ Final Report, *supra* note 202, at 21-28.

²⁰⁶ *Id.*; United States Court of Appeals for the 10th Circuit, BALLOTPEDIA, https://ballotpedia.org/United_States_Court_of_Appeals_for_the_Tenth_Circuit (last visited Mar. 29, 2024).

²⁰⁷ Final Report, *supra* note 202, at 3.

²⁰⁸ *Redistricting and Transparency: Recommendations for Redistricting Authorities and Community Organizations*, BRENNAN CENTER FOR JUSTICE, <https://www.brennancenter.org/sites/default/files/analysis/redistricting%20and%20transparency.pdf> (last visited Apr. 25, 2024).

²⁰⁹ *Utah – State Summary*, ALL ABOUT REDISTRICTING, <https://redistricting.ils.edu/state/utah/?cycle=2020&level=Congress&startdate=2021-11-12>. In 2018, Utah voters passed redistricting reform via, Proposition 4. However, the legislature made its powers advisory only, and in 2020, the state again passed a gerrymandered congressional map that notably split Salt Lake County into four safe Republican districts to extinguish Democratic representation. *Id.*

²¹⁰ Melissa Hellmann, *Redistricting: Tribes fight for an equal voice*, INVESTIGATEWEST, (Mar. 16, 2022), <https://www.invw.org/2022/03/16/redistricting-tribes-fight-for-an-equal-voice/>.

united by the Executive Order in 1872.²¹¹ Their modern reservation is located in Northeastern Washington, centered on Okanogan County.²¹²

While this redistricting matter does not deal with the exact same issue of a partisan legislative body drawing the lines, it does deal with issue of multiple confederated tribes being involved (similar to the Turtle Mountain and Spirit Lake tribes), and explores the political benefits of being split among multiple districts.²¹³ For instance, Colville Business Council Chairman, Andy Joseph Jr. stated “[b]eing a constituent of multiple congressional and state representatives means that the Colville Tribes is [in] a stronger position to advance these issues.”²¹⁴

Furthermore, the example of Washington reservations also explore how interactions with other minority groups can allow for a new way forward via combined minority candidate-of-choice districts. For example, University of California Los Angeles professor Matt Barreto, who runs the University’s Voting Rights Project, proposed a legislative district covering both the Yakima valley and Yakima tribal reservation.²¹⁵ This proposed district would have been roughly eight percent Native and fifty percent Latino by voting age population, however, both minority groups share similar candidate preferences compared to white voters in the region.²¹⁶ Perhaps new lawsuits based on Native redistricting, and whom propose new maps for the court or move for a neutral special master, could consider an alliance with nearby Black or Latino communities so as to form a majority-minority district with similar voting preferences in this manner.

Lastly, Washington demonstrates a non-racial approach to Native redistricting; this being the stripping of redistricting power from the legislature and the establishment of clear regulations on map-drawing.²¹⁷ In Washington, the state constitution and state laws require as equal as populations as possible and that the boundaries should be drawn to respect communities-of-interest, generally meaning political interests.²¹⁸ Further, Washington redistricting is done by a five-person committee appointed by both the majority and minority parties in the legislature, and these persons cannot be an officeholder or lobbyist.²¹⁹ In Washington, the politicians cannot pick their own voters, at least not directly. This has resulted in a formal consultation process between the Attorney General’s Office and Native tribes as of 2019.²²⁰ This process provided for months of virtual or in-person consultations with eight tribes to receive their input, a sharp contrast from

²¹¹ *Significant Washington Land Returned to Colville Tribe, its Original Stewards*, THE NATURE CONSERVANCY, (May 3, 2022), <https://www.nature.org/en-us/about-us/where-we-work/united-states/washington/stories-in-washington/land-back-figlenski-ranch-colville-tribe/>.

²¹² Hellmann, *supra* note 210.

²¹³ *Id.*

²¹⁴ *Id.* (The Colville Business Council is the reservation’s governing body).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*; *Number of States Using Redistricting Commissions Growing*, ASSOCIATED PRESS, (Mar. 21, 2019), <https://apnews.com/article/4d2e2aea7e224549af61699e51c955dd>.

²¹⁸ Hellmann, *supra* note 210; WASH. REV. CODE § 44.05.090 (2019).

²¹⁹ The Associated Press, *supra* note 217; WASH. REV. CODE § 44.05.030 (1984).

²²⁰ Hellmann, *supra* note 210.

the treatment of the Turtle Mountain tribe in North Dakota.²²¹ Perhaps the great lesson to learn is that gerrymandering and racialized redistricting themselves are products of politicians being responsible for the process in most of the country.²²²

On the other hand, there are still issues regarding Native representation in “commission” states, as all Washington reservations but the Yakima Valley remain split between multiple legislative districts as of 2021, despite objections.²²³ Indeed, the Yakima Valley currently has no Democratic representation in the legislature, and a federal court ordered the state to redraw the 15th legislative district, which has only a 51.5% Latino majority, many of whom are low turnout.²²⁴ The court found that such a map diluted Latino voting strength.²²⁵ Republican litigants appealed and the Supreme Court later denied cert.²²⁶

This litigation demonstrates the differing circumstances between a safely Republican state, such as North Dakota, and a safely Democratic one, such as Washington. It demonstrates that Native representation is not solved by a switch in partisan control or even a difference in who draws the lines. It also raises the possibility of combining minority groups to form a cohesive community that can win elections. While independent redistricting would prove a boon towards Native voters in a state such as North Dakota, there’s an argument to be made that it proves to be a detriment in a state such as Washington. If Democrats, whom are in full control of the Washington legislature and governorship,²²⁷ were to disband the redistricting commission and draw the maps themselves, there is little doubt they could draw a Latino/Native district that would safely elect a minority Democrat to represent central Washington.

D. Tribal Issues

In an era in which Barrack Obama has been elected President and the United States currently has a Black Vice President, many conservatives have argued that we live in a “post racial” world where race has little to no significance, and the VRA lacks the same necessity that predicated its passage.²²⁸ Many conservative jurists have expressly pushed for the neutering of

²²¹ *Id.*

²²² ASSOCIATED PRESS, *supra* note 217.

²²³ *Id.*; Order Regarding the Wash. St. Redistricting Comm’n’s Letter to the S. Ct. On November 16, 2021, and The Comm’n Chair’s November 21, 2021, Declaration, NO. 25700-B-676.

²²⁴ Daniel Beekman, *WA must redraw Yakima valley legislative map judge says is discriminatory*, The Seattle Times, (Aug. 11, 2023), <https://www.seattletimes.com/seattle-news/politics/wa-must-redraw-yakima-valley-legislative-map-judge-says-is-discriminatory/>; *Soto Palmer v. Hobbs*, No. 3:22-CV-05035-RSL, 2023 WL 5125390, at *2 (W.D. Wash. Aug. 10, 2023).

²²⁵ *Soto Palmer v. Hobbs*, at *13.

²²⁶ Cert. denied before judgement sub nom. *Trevino v. Palmer*, 144 S. Ct. 873 (2024)

²²⁷ *Party control of Washington state government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Washington_state_government (last visited Apr. 20, 2024).

²²⁸ Gilda Daniels, *Racial Redistricting in a Post-Racial World*, 32 CARDOZO L. REV. 947, 949 (2011).

what remains of the VRA and the dissolution of Section 2 and its prohibition on electoral practices or procedures that result in vote dilution.²²⁹

However, these assertions fail to recognize the role the VRA continues to play in the elimination of racial barriers.²³⁰ The VRA has been called “one of the most effective pieces of legislation in the country’s history,” and had a clear effect on vastly increasing the number of minority office-holders in the country between its enactment and the 21st century.²³¹ Moreover, the threat of “backsliding” by ever more severe gerrymanders that dissect Native voters, and a toothless Section 2 of the VRA being unable to curtail them, means that these equitable gains could be easily lost.²³² In addition, the ever increasing powers of computer technology makes gerrymandering easier than ever in the modern day.²³³ Majority-minority districts, whether they be at the state or federal level, serve as the primary indicator of Native representation, and works as a conduit to solve issues specific to Native communities.²³⁴

As Native representation suffers and decreases at the state and local level, it becomes more difficult for those communities to allocate their resources, preserve water and the environment, and control land use on their reservations.²³⁵ To summarize: “Indigenous voters often have different priorities at the polls than their non-Indigenous counterparts, and less voting power means they are less likely to be represented by lawmakers on the issues they care about.”²³⁶ Not only do Native voters have different priorities than the non-Indigenous, but Natives have greater socio-economic issues than other voters, for instance, Natives have the second highest rate of homelessness in the nation, and far higher rates of unpaved roads and a lack of access to sanitation facilities.²³⁷

Furthermore, as Native representation is reduced at lower levels of government, it prevents a political bench from being formed that can rise to higher levels of government with more power and authority. Reduced Native voting power can lead to undercounting and underfunding of the community during the census, maintaining the same cycle of a lack of representation.²³⁸ Increased tribal advocacy and participation can however, lead to circumstances such as keeping all reservations in a state in the same district, which in turn leads to an increased number of Native candidates for political office (as occurred with the 2020 Minnesota legislative redrawn map, drawn by the Minnesota Supreme Court, keeping all seven Ojibwe reservations in

²²⁹ Amelia Thomson-DeVeaux, *The Supreme Court is on the verge of Killing the Voting Rights Act*, FIVETHIRTYEIGHT, (Oct. 3, 2022), <https://fivethirtyeight.com/features/supreme-court-kill-voting-rights-act/>; But see Sherman, *supra* note 42; Section 2 Guidance, *supra* note 142.

²³⁰ Daniels, *supra* note 228, at 961.

²³¹ *Id.* at 951, 962.

²³² *Id.* at 961; NARF, *supra* note 34.

²³³ Sam Levine, ‘From dark art to dark science’: the evolution of digital gerrymandering, THE GUARDIAN, (Aug. 22, 2021), <https://www.theguardian.com/us-news/2021/aug/22/gerrymandering-us-electoral-districts-congress>.

²³⁴ Schroedel, *supra* note 118, at 318; Hellmann, *supra* note 210.

²³⁵ Joseph Lee, *Redistricting could make it harder for tribes to protect the environment*, GRIST, (MAR. 18, 2022), <https://grist.org/indigenous/redistricting-could-make-it-harder-for-tribes-to-protect-the-environment/>.

²³⁶ *Id.*

²³⁷ Hellmann, *supra* note 210.

²³⁸ Lee, *supra* note 235.

the same congressional district).²³⁹ By keeping the Minnesota Native tribes together, the State found results, with more Native candidates announced their candidacy in the district and in races down-ballot.²⁴⁰ There, successful advocacy resulted in a stronger political bench that has potential to keep moving up the ranks of state government.

In addition, the issue remains that voting can be difficult for Native citizens, voting itself, a residue of centuries of suppression and exclusion.²⁴¹ Native turnout remains some of the lowest in the country, with a lack of access to transportation and mail often exacerbating this problem.²⁴² These combined issues of lower socioeconomic rates (as in higher poverty among Natives), transportation issues, residential address issues, in addition to events such as the litigation discussed in this article simply make Native voting pragmatically difficult.²⁴³

While these root issues that stem from a long history of oppression and mistreatment at the hands of the United States government, tribes have indicated “cautious optimism” that increased representation allows these problems to be addressed by a politician that knows and relies upon Native voters to achieve their aims.²⁴⁴ However, in the words of Leonard Gorman of the Navajo Human Rights Commission, giving Indigenous communities the ability to advocate for their concerns will benefit everybody, not just Indigenous communities.²⁴⁵ This especially when “redistricting affects every aspect of our lives.”²⁴⁶ While one more Native representative is likely not enough to flip control a chamber, even one more voice in power can make a difference. To summarize; redistricting is representation.

II. CONCLUSION

According to the Native American Rights Fund, Native voters have filed or defended in hundreds of suits facing not only gerrymandering, but voter registration and access issues.²⁴⁷ Significant results have been achieved in areas such as tribal sovereignty, tribal rights, resource, protection, Indian education, and voting rights.²⁴⁸ Such gains, in addition to recent trial victories, bodes well for the Turtle Mountain Band of Chippewa’s chances of success in redrawing the North Dakota legislative map. Yet, the issue remains of who would be qualified to redraw the districts in a manner favorable to the tribes, if they can be neutral and in compliance with the

²³⁹ Lee, *supra* note 235.

²⁴⁰ *Id.*

²⁴¹ Bonhee, *supra* note 3.

²⁴² *Id.*

²⁴³ *Id.* (Native poverty rate is 26.8%).

²⁴⁴ Lee, *supra* note 235.

²⁴⁵ *Id.*

²⁴⁶ *Id.* (Quote by Leonard Gorman, Executive Director of the Navajo Nation Human Rights Commission).

²⁴⁷ *Report: Obstacles at Every Turn*, PROTECTING NATIVE AMERICAN VOTING RIGHTS AT THE NATIVE AMERICAN RIGHTS FUND, <https://vote.narf.org/obstacles-at-every-turn/> (last visited Apr. 20, 2024); *See* Dr. James Tucker et al., *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, NATIVE AMERICAN RIGHTS FUND (NARF), https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf.

²⁴⁸ *Home // About us*, NATIVE AMERICAN RIGHTS FUND (NARF), <https://narf.org/about-us/#:~:text=NARF%20has%20successfully%20asserted%20and,voting%20rights%2C%20and%20Indian%20education> (last visited Apr. 20, 2024).

VRA, and how the Native community and their allies can prevent such injustices from occurring in the future, especially as the disintegration of voting rights legislation seems likely to continue. While addressing the underlying root causes of political inequality is unlikely to be resolved by this case alone, perhaps it can break the cycle of exclusion that has prevented Natives from having a voice in government, even if it is in one small local area in a largely one-party state.

Furthermore, the tribes in this matter have a great deal of case law from which to draw from, to demonstrate a workable and constitutional remedy that will benefit Native peoples. Solutions include plaintiff dictated maps that better fit the *Gingles* prongs (the current strategy of Turtle Mountain), the appointment of a special master in the manner of San Juan County Utah, or the creation of an independent redistricting committee, in the manner of Washington State. Another is removing redistricting regulations in Democratic states, allowing for a partisan actor to draw multi-ethnic majority-minority districts at the expense of Republicans. Other options include the court taking direct control of the mapping process, in the manner of the Ojibwa tribes in Minnesota, or simply requiring stricter regulation, communication, and maintaining communities of interest, like the Colville Reservation. The author argues for an all of the above strategy.

The Turtle Mountain Band of Chippewa and the Spirit Lake Tribes have come a long way in this lawsuit, and this article does not contain the answer to their victory or relief. Nevertheless, I hope this piece could shed light to the plaintiffs on options they can place before the court that have been used in practice in other jurisdictions. North Dakota is unlikely to change course in their quest to render the VRA obsolete, and with it, a great deal of Native representation. An arsenal of cases, practices, and relief is key towards winning the battles to come. Paying attention to state and legislative races is another.