

Testimony on Senate Concurrent Resolution

Februaury 21, 2025

Sponsor Chuck Walen, Senator D4

cwalen@ndlegis.gov

701-421-2262

Chairman Roers and members of the committee

For the record my name is Chuck Walen Senator for District 4

I am here to sponsor and introduce SCR 4014

Senate Concurrent Resolution 4016 is a study based on the redistricting of 4A , 4B, 9A and B.

When the committee on redistricting split our 2 districts into 2 parts, it did not study what the Supreme Court said was the reasons they were allowed to split the Districts. The Gingles test was not applied and resulted in the lawsuit against the state of ND. In the Gingles case it required 4 parts to be in agreement to pass a split of a district. One part of the test was whether a group could elect the representation of their choice. When looking at past history within the voting district. In the case of 4 and 9 both districts had history of a group being able to choose their candidate and elected to office in recent years. Had it not been able to, it would provide some justification for splitting a district.

The lawsuit asserted that we lost equal representation by only having 1 representative instead of 2 as in all other districts in the state. The district court said in District 9 should not have been split while in District 4 said it should be split. Opposite points of view in the same lawsuit.

Part of this study would look at dividing all districts in the state so equal representation is maintained or the possibility of putting 4A & 4B back together

This issue will continue to cause problems and lawsuits will continue. A study will look into all aspects of the law and if any changes should be made in future redistricting plans to help prevent future lawsuits.

I request I do pass on a study of this issue with SCR 4014

Chairman Roers and members of the committee this concludes my testimony.

I stand for any questions you may have

FUNDAMENTALLY WRONG

Protecting North Dakotans' Right to Equal Representation

SUMMARY

In November 2021, the North Dakota Legislature passed a redistricting plan that has become the focal point of significant legal challenges. The redistricting map, particularly related to Districts 4 and 9, has been criticized for violating the Equal Protection Clause of the 14th Amendment, and raising concerns about the implications for voter rights both within North Dakota and across the United States. Districts 4 and 9 were divided into subdistricts where residents could only vote for one Representative, unlike other districts where residents could vote for two Representatives. This reduction in voting power is a significant issue, as it raises concerns about whether the residents of these districts are being afforded the same opportunities to participate in the political process as residents in other parts of the state.

As stakeholders in one of the court cases and defenders of voting rights in our districts, we are now asking for help in reinstalling our voting rights and equal representation.

WHAT IS AT STAKE

If left to stand, this court decision would:

- ✓ Reduce voting power in Districts 4 and 9 because they can only have ONE representative while all other districts have two.
- ✓ Set a dangerous precedent where laws set by Congress could force states to violate the Equal Protection of the 14th Amendment.
- ✓ Lead to more focused districts that reflect the demographics of specific populations, potentially reducing the influence of broader, more diverse voter groups.

BACKGROUND

After the 2021 special legislative session, two lawsuits emerged in response to North Dakota's new redistricting plan. Both lawsuits argue that the redistricting map was drawn in a manner that either diminishes or unjustly enhances the voting power of specific racial groups and unfairly reduces the voting rights of residents in Districts 4 and 9.

Case 1: Turtle Mountain Band of Chippewa Indians, et al. v. Michael Howe (Case No. 3:22-cv-22)

Filed in December 2021, this case was brought by the Turtle Mountain Band of Chippewa Indians, the Spirit Lake Tribe, and other plaintiffs against North Dakota. They argued that the redistricting map violated Section 2 of the Voting Rights Act (VRA) by diluting Native American voting power. The plaintiffs claimed that the map either "packed" Native Americans into a single district or "cracked" them across multiple districts to minimize their influence.

In November 2023, a federal judge ruled in favor of the plaintiffs, finding that the map was discriminatory and ordering North Dakota to redraw it. When the state failed to produce a new map by the court-ordered deadline, the court adopted the plaintiffs' proposed map. The state

has since appealed the decision, to the 8th Circuit Court of Appeals. The appeal is pending. (We are not involved in this lawsuit, but it has implications for North Dakota voters).

Case 2: Charles Walen v. Doug Burgum, Governor of North Dakota, et al. (Case No. 1:22-cv-00031)

This lawsuit was filed against North Dakota in February 2022 by Charles Walen and Paul Henderson, residents of the districts, who argued that the sub-districts in Districts 4 and 9 constituted an unconstitutional racial gerrymander under the Equal Protection Clause of the Fourteenth Amendment. A three-judge panel granted North Dakota's motion for summary judgment, finding that the Legislature had good reasons and strong evidence to believe the subdistricts were required by the VRA and were narrowly tailored to the State's compelling interest in complying with the VRA, and sufficient to withstand Equal Protection Clause analysis.

The plaintiffs have appealed the decision directly to the U.S. Supreme Court (SCOTUS). Our appeal was supported by the attorneys general of 14 other states with an amicus brief.. In an unprecedented move, the State of North Dakota has since submitted a memorandum suggesting that the Supreme Court should reverse the decision the district court had made

in its favor and reexamine its approach to VRA compliance. In another unusual twist, the Supreme Court has invited the U.S. Solicitor General to submit a brief on the matter. We are waiting for the USGS response to SCOTUS. The case is likely to take 1 of 2 directions: a. SCOTUS agrees with ND and reverses the lower court and sends the case back to ND for further proceedings, or b. SCOTUS calls the case for full briefing and argument before the full court—into spring 2025.

CONTROVERSIES AND IMPLICATIONS

The division of Districts 4 and 9 into sub-districts has led to significant controversy, particularly regarding the role of race in redistricting:

1. **Reduction in Voting Power:** The creation of subdistricts reduced the voting power of residents in Districts 4 and 9, allowing a resident to vote for only one representative instead of two as in the rest of the state.
2. **Racial Gerrymandering Allegations:** The district court found that race was a major factor in creating the sub-districts but believed that the state was compelled to do so under the VRA. The Plaintiffs in Case 2 argue that the state and the district court failed to consider thorough analysis of past election results, district statistics before subdistricting, racially polarized voting, the effect of partisanship, and other factors typically considered in racial gerrymandering cases. These are points later reiterated by the State in their request to the Supreme Court to vacate the district court's decision.

Furthermore, the VRA establishes a two-pronged test to determine whether members of a minority group have less opportunity than other voters to elect representatives of their choice and participate in the political process. Both elements must be proven to establish liability under Section 2 of the VRA. The first element focuses on whether minority voters can elect their preferred candidates, while the second addresses their ability to participate meaningfully in the political process (for instance, access to polls). The group must prove both elements, which they did not.

3. **Prioritizing Statute Over the Constitution:** In ruling in other cases involving the VRA and 14th Amendment, SCOTUS has consistently backed the Constitution noting

that "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause." 403 U.S. 365, 380, 382 (1971) with Justice Clarence Thomas later stating, "The Constitution is supreme over statutes, not vice versa. Therefore, if complying with a federal statute would require a State to engage in unconstitutional racial discrimination, the proper conclusion is not that the statute excuses the States discrimination, but that the statute is invalid."

NATIONWIDE IMPLICATIONS

If the SCOTUS allows the decisions in these cases to stand, the implications could extend beyond North Dakota, influencing voter rights and redistricting practices nationwide:

1. **Precedent for Racially Based Districting:** The case could set a legal precedent that allows or even encourages the creation of legislative districts based on racial or ethnic considerations.
2. **Changes in Political Strategy:** If racial considerations become more prominent in districting, political strategies may shift toward more racially focused campaigns, increasing polarization. To quote Justice Clarence Thomas, redistricting based predominately on racial goals is "radically inconsistent with the [Reconstruction] Amendments' command that government treat citizens as individuals and their goal of a political system in which race no longer matters."
3. **Legal Challenges Across the Country:** The outcomes could inspire similar legal challenges in other states, potentially leading to new national standards for redistricting.

CONCLUSION

The redistricting cases in North Dakota highlight the complex interplay between race, representation, and voter rights. The decisions made by the courts, particularly by the U.S. Supreme Court, will have far-reaching consequences, not only for the residents of North Dakota but also for voters across the nation. The legal battles underscore the importance of ensuring that redistricting practices are conducted in a manner that upholds the principles of equal protection and fair representation, as enshrined in the U.S. Constitution.