

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

TURTLE MOUNTAIN BAND OF CHIPPEWA
INDIANS, et al.,

Plaintiffs,

v.

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

Defendant.

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

PLAINTIFFS' MOTION TO AMEND REMEDIAL ORDER

Plaintiffs respectfully move the Court for an order amending its remedial schedule and order in this case. In light of the Legislature's stated intent not to meet the Court's December 22, 2023, deadline to enact a proposed remedial plan, the Court now has the opportunity to amend its order to ensure that the November 2024 election takes place under a court-approved map that complies with Section 2 of the Voting Rights Act before any *Purcell* timing concerns arise.

The Court provided the Legislature until December 22, 2023, to adopt a legislative redistricting plan that remedies the violation of Section 2 of the Voting Rights Act. Doc. 125 at 39. That order provides that Plaintiffs could file any objections to that plan by January 5, 2024, and that Defendants could file any response by January 19, 2024. *Id.* Over two weeks after this Court issued judgment, the Secretary moved for a stay and requested a ruling by this Court just one week later, by December 12, 2023. Doc. 132 at 3. That stay motion does not challenge the district court's conclusion that the current map violates Section 2, rather it contends that 42 U.S.C. § 1983 provides no cause of action for private plaintiffs to bring suit under Section 2—something no court anywhere has ever held. Plaintiffs oppose the requested stay and, notwithstanding the

Secretary's delay in filing it, will expedite their filing of a response brief consistent with the requested decision date of December 12, 2023. Plaintiffs file this separate motion now seeking an alteration of the Court's remedial schedule and process in light of various representations in the Secretary's stay motion. Counsel for the Secretary indicated that they would respond in writing with their position on the date ordered by the Court.

The Secretary raises several objections to the timing of this Court's remedial order, primarily that the process extends beyond December 31, 2023, the date state law envisions that precinct boundaries will be settled and the day before candidate petition circulation commences on January 1, 2014. Doc. 132 at 14-22. The Secretary has also notified the Court that the Legislative Assembly will not be adopting a remedial plan by the Court's December 22, 2023, deadline. Doc. 132 at 17. Although the Secretary objects that the Court provided the Legislature "just 35 days," that is more time than other courts have allowed in similar cases. *See, e.g., Order, Caster, et al. v. Allen, et al.*, No. 2:21-cv-01536-AMM (N.D. Ala. June 20, 2023), Doc. 156 (providing 31 days for Legislature to adopt remedial plan following remand from Supreme Court in *Allen v. Milligan*, 599 U.S. 1 (2023)); Memorandum Opinion, *Harris v. McCrory*, No. 1:13-cv-94 (M.D.N.C. Feb. 5, 2016), Doc. 142 (providing 14 days for Legislature to adopt remedial plan in a decision affirmed by Supreme Court in *Cooper v. Harris*, 581 U.S. 285 (2017)).¹

In light of the Secretary's representations, Plaintiffs respectfully request that the Court modify its remedial order to clarify that **Plaintiffs' Demonstrative Plan 1** will be ordered into

¹ The Legislative Management Committee met on December 5, 2023, and voted to hire counsel and move to intervene in this case on behalf of the Legislature and to publish an RFP to retain a redistricting expert. N.D. Leg. Mgmt. Comm' Meeting (Dec. 5, 2023), <https://video.ndlegis.gov/en/PowerBrowser/PowerBrowserV2/20231204/-1/31899>. Plaintiffs will oppose the Legislature's untimely intervention motion once it is filed. In any event, consistent with what it advised the Secretary, the Committee announced no intention of enacting a remedial map by December 22, 2023.

effect as the remedial plan if the Legislature does not adopt, and the Governor does not sign into law,² an alternative remedial plan by **December 22, 2023**. Should the Legislature enact a remedial plan by that date, Plaintiffs request to be provided until **December 26, 2023**, to file any objections and accompanying expert analysis and/or proposed alternative remedial plan(s), with any response from the Secretary to be filed by **December 28, 2023**. Plaintiffs' proposed amendment is sensible for several reasons.

First, the Secretary has indicated that the Legislature will not be enacting a remedial plan by the Court's deadline. Doc. 132 at 17. Plaintiffs' proposal retains the opportunity for the Legislature to change its mind while simultaneously ensuring a legally compliant map is in effect should the Legislature fail to act, as it has told the Secretary it will. Ordering Plaintiffs' Demonstrative Plan 1 as the remedial plan in the absence of legislative action permits county and state officials to prepare for the imposition of that plan now, and well in advance of the December 31 deadline suggested by the Secretary. Plaintiffs' proposal also permits an expedited briefing schedule should the Legislature reverse course and enact a remedial plan, and should plaintiffs have any objection to that plan. To the extent a legislatively enacted plan involves additional or different precinct modifications, counties could prepare those in advance of December 31 in the event the Court approves the legislatively enacted remedial proposal.

² The Secretary expresses confusion about whether the Court's order envisioned a "conditional[]" adoption of a plan by the Legislature. Doc. 132 at 17. The Secretary misreads the Court's order. In cases where a redistricting plan is enjoined as violating Section 2, the Court—if timing permits—must provide an opportunity for the Legislature to enact (through the state's normal process—here bicameralism and presentment) a remedial plan. The Court retains jurisdiction to determine whether that plan remedies the violation, and if it does not, to similarly enjoin that plan and impose its own remedy. *See, e.g., Caster v. Allen*, Order at 5, No. 2:21-cv-01536-AMM (N.D. Ala. June 20, 2023), ECF No. 156 (providing opportunity for plaintiffs to file objections if Alabama legislature enacts remedial plan).

Second, Plaintiffs’ Demonstrative Plan 1 has already been adjudicated by the Court to “comport with traditional redistricting principles, including compactness, contiguity, respect for political boundaries, and keeping together communities of interest.” Doc. 125 at 20. It remedies the Section 2 violation by offering Native American voters an equal opportunity to elect their candidates of choice. *See* P001.032 (Collingwood Report).

Third, implementing Plaintiffs’ Demonstrative Plan 1 will not be challenging for state and local officials. It requires changes to just four districts, primarily Districts 9 and 15 with minor adjustments to Districts 14 and 29. Only two precincts in the entire state would be altered by the imposition of Plaintiffs’ Demonstrative Plan 1, the remainder of the changes follow existing county and precinct boundaries. *See* Doc. 132 at 21-22 (detailing the process for redrawing precinct boundaries). In Ramsey County, Precinct 361503 would be split between Districts 15 and 29. That split would follow Census block boundaries and—for nearly the entire length—three roadways (85th St. NE, County Hwy. 8, and 60th St. NE). *See* Trial Tr. Vol. 4 at 20:8-24 (testimony of Brian Nybakken, Elections Systems Administrator Manager for the Secretary of State, testifying that following roadways for precinct boundaries eases the administrative task of assigning voters to new precincts). In Stutsman County, Precinct 472910³ would be split between Districts 14 and 29. That split would match exactly the 2020 precinct boundaries in Stutsman County, significantly easing the burden on county officials. However, this precinct split is unnecessary. Plaintiffs’ Demonstrative Plan 1 followed the 2020 precinct boundaries in Stutsman County, but it can be modified to follow exactly the new precinct boundaries, with all of Precinct 472910 being placed in District 14. Doing so would have no effect on the plan-wide population deviation, as

³ *See* Stutsman County, N.D. Voting Precinct Map, chrome-extension://efaidnbmnnnibpcajpcgclefindmkaj/https://www.stutsmancounty.gov/files/election-precinct-county-wide-map.pdf.

exceedingly few people would be affected, and would eliminate the need for any precinct boundary modifications by Stutsman County officials.⁴

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court modify its remedial order as set forth above and expeditiously announce that, in the absence of legislative action by December 22, 2023, Plaintiffs' Demonstrative Plan 1 (or a modified version that eliminates the need for a Stutsman County precinct alteration, or Plaintiffs Demonstrative Plan 2, *see n.4*) will be the court-ordered map for the 2024 elections. Doing so will resolve all *Purcell* and timing concerns raised by the Secretary in his stay motion.

December 5, 2023

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⁴ Plaintiffs recommend the imposition of Plaintiffs' Demonstrative Plan 1 because its District 9 is somewhat more compact than Plan 2's version. However, Plaintiffs' Demonstrative Plan 2 affects fewer surrounding districts, requiring changes to only Districts 9, 14, and 15—with very minimal changes to District 9. Plaintiffs would also support the imposition of Plaintiffs' Demonstrative Plan 2 if the Court wished to further minimize the changes to the enacted map.

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CERTIFICATE OF SERVICE

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

/s/ Mark P. Gaber
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[PROPOSED] ORDER

On November 17, 2023, the Court permanently enjoined portions of the existing North Dakota legislative map as violating Section 2 of the Voting Rights Act. Doc. 125 at 39. The Court provided the Legislature until December 22, 2023, to enact a remedial plan, with a deadline for January 5, 2024, for any objections filed by plaintiffs and a January 19, 2024, deadline for any response by the Secretary.

The Secretary filed a motion for a stay on December 4, 2023, and contended that the remedial process should be concluded by December 31, 2023, to permit the completion of precinct boundaries and to permit candidates to begin collecting signatures for ballot access on January 1, 2024. Doc. 132. The Secretary also notified the Court that the Legislature has informed the Secretary that it will not be enacting a remedial plan by December 22, 2023. Plaintiffs have filed a motion to modify the Court's remedial process and schedule in light of the Secretary's representations, such that Plaintiffs' Demonstrative Plan 1 be ordered as the remedy in the event that the Legislature fails to enact a remedial plan by December 22, 2023.

For the reasons stated in Plaintiffs' motion, the Court **GRANTS** plaintiffs' motion. Absent enactment by the Legislature of a plan that remedies the Section 2 violation by December 22, 2023, the Court **ORDERS** the Secretary to implement Plaintiffs' Demonstrative Plan 1. If the Legislature enacts a new plan by December 22, 2023, Plaintiffs shall have until December 26, 2023, to file any objections to such plan, along with supporting expert analysis and potential remedial proposals. The Defendants shall have until December 28, 2023, to file any response. The first election for the state legislative positions in the remedial districts shall occur in the November 2024 election.

IT IS SO ORDERED.

Dated this ___ day of December, 2023.

Peter D. Welte, Chief Judge
United States District Court