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' REPLY IN SUPPORT OF MOTION TO AMEND REMEDIAL ORDER

The Court should grant Plaintiffs' motion to amend the remedial order because Plaintiffs' proposal (1) continues to provide the Legislature a reasonable opportunity to adopt its own proposal, (2) ensures that a lawful plan will be in effect for the November 2024 election, and (3) fully addresses the Secretary's contention that the plan for the next election must be finalized by December 31. The Secretary's and the Legislature's[1] objections to Plaintiffs' motion are without merit. Plaintiffs respectfully request that the Court expedite its decision on this motion so that the *Purcell* concerns the Secretary raises are resolved before the Secretary seeks additional relief from

[1] On December 8, 2023, the Legislative Assembly filed a combined brief that supports its motion to intervene, joins in the Secretary's motion to stay, and responds to Plaintiffs' motion to amend. Doc. 138. Plaintiffs will file a separate opposition brief to the Legislature's motion to intervene, but will focus here on its arguments regarding Plaintiffs' motion to amend the remedial order.

the Eighth Circuit so that the court of appeals has the benefit of understanding the contours of this Court's remedial order as it considers the Secretary's motion.[2]

ARGUMENT

I. The Court has afforded the Legislature a reasonable opportunity to adopt a remedial plan.

The Court has afforded the Legislature a reasonable opportunity to adopt a remedial plan. "When a federal court declares an existing apportionment scheme [unlawful], it is . . . appropriate, *whenever practicable*, to afford a *reasonable opportunity* for the legislature to . . . adopt[] a substitute measure rather than for the federal court to devise and order into effect its own plan." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (emphasis added). The Supreme Court has explained, however, that "[w]hen those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the unwelcome obligation of the federal courts" to devise a remedy. *Id.*

This Court permanently enjoined the Secretary's further implementation of Districts 9, 15, 9A, and 9B on November 17, 2023, and provided the Legislature until December 22, 2023—35 days—to adopt a remedial proposal and submit it to the Court for review. Doc. 125 at 39.[3] That period—35 days—is more than reasonable. Indeed, it *exceeds* the time most courts provide legislative bodies to adopt remedial plans. For example, the Eighth Circuit has affirmed a district court's imposition of a Section 2 remedial plan that provided the government half as much time as

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[2] The Secretary has indicated an intention to seek relief from the Eighth Circuit after Tuesday, December 12, 2023; Plaintiffs respectfully request the Court decide Plaintiffs' motion by that date.

[3] Contrary to the Legislature's characterization, Doc. 138 at 6, this Court did not order the Legislature or the Secretary to adopt a remedial plan. Consistent with case law, the Court provided a time period during which the Legislature could adopt one before proceeding to impose its own remedial plan. If the Legislature were to adopt such a plan, the Secretary would be involved in implementing it—thus the Court's reference to the Secretary. Doc. 125 at 39.

this Court has afforded the Legislature here. *See Williams v. City of Texarkana*, 861 F. Supp. 756, 767 (W.D. Ark. 1992) (issuing liability determination on Sept. 29, 1992 and providing until Oct. 15, 1992 to submit remedial plans), *aff'd*, 32 F.3d 1265, 1268 (8th Cir. 1994) (affirming district court's imposition of remedial map). Following the Supreme Court's *Allen v. Milligan* decision this year, the district court provided the Alabama Legislature 31 days—4 fewer than this Court has provided here—to adopt a remedial plan; the Supreme Court has denied a stay of the subsequent remedial order. Order, *Caster, et al. v. Allen, et al.*, No. 2:21-cv-01536-AMM (N.D. Ala. June 20, 2023), Doc. 156, *stay denied*, *Allen v. Milligan*, __ S. Ct. __, 2023 WL 6218394 (U.S. Sept. 26, 2023) (Mem.). Courts across the country routinely provide less time than this Court has afforded the Legislature. *See, e.g.*, *Robinson v. Ardoin*, 37 F.4th 208, 232 (5th Cir. 2022) (affirming order providing 14 days); *Calvin v. Jefferson Cnty. Bd. of Comm'rs*, 172 F. Supp. 3d 1292, 1326 (N.D. Fla. 2016) (providing 16 days); *Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016) (providing 14 days); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1356 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004) (providing 19 days).

The Legislature contends that it is "impossible," Doc. 138 at 6, and "impracticable," *id.* at 14, for it to adopt a remedial plan in the 35 days provided by the Court. Thus, the Legislature contends, the Court must keep the existing (unlawful) plan in place to govern the November 2024 election. Not so.

Even if it were truly impossible or impracticable for the Legislature to adopt a proposed plan in the 35 days this Court has provided, that is precisely the circumstance in which the Supreme Court has directed district courts to *impose* a remedial plan to ensure that a lawful plan is in place for the "imminent" election. *See Wise*, 437 U.S. at 540 (explaining that legislature should be provided first opportunity where "practicable," but that court must impose plan if "imminence of

a state election makes it impractical" for legislature to adopt its own proposal). That is, although federal courts must for comity and federalism purposes afford the legislature an opportunity where practicable, the paramount objective is ensuring that elections are conducted under a redistricting map that does not violate federal law.

Moreover, the Legislature has not shown why it could not adopt a remedial plan in the 35 days this Court provided—nor has it cited any case law for the proposition that 35 days is unreasonable. Strangely, the Legislature does not address this issue in the relevant argument section of its brief—instead it focuses on speculating about the motivation and timing of Plaintiff's motion,[4] *see* Doc. 138 at 15-16—but elsewhere in the Legislature's brief it appears to proffer some statements related to its objection to the time period.

First, the Legislature notes that Thanksgiving occurred during the 35-day period, *see* Doc. 138 at 3 n.1. A one-day holiday does not render the 35-day period unreasonable; for example, Independence Day occurred during the 31-day period the Alabama Legislature was provided following the Supreme Court's *Milligan* decision. *See supra* at 3.

Second, the Legislature observes that laws enacted between August 1 and January 1 become effective 90 days after passage unless (1) the Legislature by two-thirds vote designates it emergency legislation or (2) the law is enacted in a Special Session called by the Governor. Doc. 138 at 5. But these facts do not make the 35-day period unreasonable. The Legislative Management Committee could request a special session, Doc. 138 at 6; N.D. Const. art. V § 7; N.D.C.C. § 54-

[4] The Legislature repeatedly contends that Plaintiffs filed their motion as some nefarious response to the Legislative Management Committee's December 5 meeting. Doc. 138 at 3, 15. They did not. Plaintiffs filed this motion to provide a solution to the timing concerns raised by the Secretary and to avoid any *Purcell* objections to this Court's injunction. Given that the Legislature's meeting was ongoing while the motion was being drafted, Plaintiffs alerted the Court to the committee meeting, as would seem appropriate.

03-02.2, but it has not done so here. And even if the remedial legislation failed to garner a two-thirds majority to accelerate its effective date, the remedial map would still be effective in time to govern the primary and general elections (in June and November 2024), and nothing would preclude the affected counties from aligning their precinct boundaries to that map by December 31. In any event, the State's inability to take legislative action during a 35-day period would not render the period unreasonable, nor would it justify permitting an unlawful map to remain in place. *See Wise*, 437 U.S. at 540.[5]

Third, the Legislature complains that this Court took five months to issue its opinion and judgment following trial, and that it too must analyze any map for compliance with state law and the VRA. Doc. 138 at 13. But this Court's effort in resolving the VRA question has *eased* the Legislature's task. Having received this Court's guidance about the obligations, the Legislature offers no explanation why 35 days is insufficient.

Fourth, this is not complicated. Given the stark white bloc voting in all surrounding counties, the only configuration that complies with the VRA is one that joins Rolette and Benson Counties. Plaintiffs have offered two possibilities. The Legislature offers no explanation for what it might do differently, or how any tweaks would materially affect the map even if it did propose a plan. And unlike the decennial redistricting process in which the Legislature is redrawing the entire map in response to population changes, here changes are needed to only three or four districts. A consultant retained by the Legislature could do this in a matter of hours. Thirty-five days is more than sufficient time.

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[5] Notably, in *Ardoin*, the defendant objected that because of various procedural requirements, the court's 14-day period would effectively be 5 days. 37 F.4th at 232. The Fifth Circuit held that this was sufficient time, particularly because the Louisiana legislature "would not start from scratch," having received VRA-compliant proposals during the legislative process. The same is true here—except with 35, not 14, days.

Fifth, the Legislature has not acted with haste. It waited 18 days to even hold the December 5 Legislative Management Committee meeting. That is more time than the "reasonable" 14-day time period most courts provide legislatures. The request for proposals it has posted for an expert consultant does not require responses until December 15.[6] The Legislature did not raise any objection to the 35-day period with this Court until 21 days—fully three weeks—into the period. Doc. 138 at 14. The Legislature's delay suggests it has never intended to meet the Court's reasonable deadline.[7]

II. Adoption of Plaintiffs' proposed remedial plan is appropriate in the absence of a legislative proposal.

In the absence of a remedial plan proposed by the Legislature, this Court is empowered to adopt a plan proposed by Plaintiffs. In *Bone Shirt v. Hazeltine*, the district court provided the South Dakota legislature an opportunity to adopt a proposed remedial plan, but the legislature did not do so. 461 F.3d 1011, 1022 (8th Cir. 2006). In such a circumstance, the Eighth Circuit explained, "the district court [may] fashion its own remedy or, as here, adopt a remedial plan proposed by the plaintiffs." *Id.* at 1022. The Legislature is therefore wrong to contend there is anything improper with Plaintiffs requesting that the Court issue an order specifying that Plaintiffs' demonstrative plan will be the court-imposed remedy should the Legislature fail to act by December 22. Doc. 138 at 15-16.

Tellingly, neither the Secretary nor the Legislature identify any substantive objection to Plaintiffs' demonstrative plans in their responses to Plaintiffs' motion. The Legislature merely

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[6] *See* N.D. Legis. Mgm't Comm., RFP for Redistricting Analysis Consultants (Dec. 8, 2023), https://www.ndlegis.gov/sites/default/files/committees/68-2023/25.9174.01000.pdf.

[7] The Legislature cites footnotes 1 and 2 from Plaintiffs' motion to contend that Plaintiffs "acknowledge" that this Court has provided the Legislature a time period that is "unreasonable, unrealistic, and illusory." Doc. 138 at 2. The logical connection between the content of the footnotes and the Legislature's characterization of them is not at all clear.

appears to object that *Plaintiffs* are the source of the map. That is not a legally cognizable objection in light of its stated plan not to offer its own proposal in the reasonable time this Court has allotted. *See Bone Shirt*, 461 F.3d at 1022.

III. Plaintiffs' motion *resolves* an issue for which the Secretary desires "meaningful appellate review."

Other than a passing comment—with no cited authority—contending that 35 days is an unreasonable time period for legislative action, the Secretary's sole objection to Plaintiffs' motion to amend the remedial order appears to be that the Secretary desires time for "meaningful appellate review" of this Court's decision before this Court's injunction becomes effective for the November 2024 election. Doc. 140 at 3-6. But that is an argument the Secretary advances in support of his motion for a *stay*—it is not an objection to Plaintiffs' motion to amend the remedial order. Indeed, the Secretary says as much. *See id.* (discussing argument in context of request for a stay). Given that one of the Secretary's two bases for seeking a stay pending appeal is a *Purcell* argument about this Court's remedial process extending beyond December 31, it is difficult to imagine how the Secretary is harmed by an order amending that remedial process so that it is completed by December 31. To the extent the Secretary wishes to maintain his *Purcell argument* as a basis for seeking a stay from the Eighth Circuit—that is an insufficient reason for this Court not to resolve the *Purcell* timing concerns raised by the Secretary. This Court is entitled to rely upon the December 31 deadline proffered by the Secretary in fashioning its remedy in this case. *See Rose v. Raffensperger*, 143 S. Ct. 58 (2022) (Mem.) (granting application to vacate Eleventh Circuit's stay issued based upon *Purcell* concerns where the defendant "could not fairly have advanced" a *Purcell* argument because the district court finalized relief by the date suggested by the defendant). The Court should take the Secretary at his word and expeditiously grant Plaintiff's motion so that

it is clear in any subsequent stay proceeding in the Eighth Circuit that this Court has, consistent with *Rose*, adhered to the *Purcell* deadline advanced by the Secretary.

The Secretary's objection that he cannot complete an appeal before December 31 is meritless in any event. The Secretary *could have* acted with haste but did not do so. This Court entered judgment on November 17. The Secretary waited over two weeks to file a notice of appeal or seek a stay. He could have acted immediately, seeking emergency relief. The Eighth Circuit has granted expedition in prior election appeals. *See, e.g.*, Order, *Miller v. Thurston*, No. 20-2095 (8th Cir. June 15, 2020) (granting expedition of appeal and requiring appellant's brief be filed by June 17, 2020, and appellee's brief be filed by June 22, 2020). Last month a redistricting appeal was docketed with the Fifth Circuit on October 17 and the court granted expedition, with briefing completed by November 6, oral argument heard on November 7, and a decision issued on November 10. *See* Order, *Petteway v. Galveston County, Tex.*, No. 23-40582 (5th Cir. Oct. 19, 2023), Doc. 40; Opinion (Nov. 10, 2023), Doc. 118-1. If the Secretary wished to have final appellate resolution prior to December 31, he could have sought it. He did not.

Moreover, the Secretary is not entitled to avoid the operation of the Court's injunction merely because an appeal will not be resolved before December 31. As the Supreme Court's vacatur of the Eleventh Circuit's stay in *Rose* makes clear, the *Purcell* question focuses on whether the *district court* has ensured that its injunction will not interfere with any election deadlines. This Court is entitled to rely upon the Secretary's stated December 31 date. *Rose*, 134 S. Ct. at 58. The Secretary's "meaningful appellate review" argument is thus not one that implicates *Purcell*, but rather must be decided under the traditional stay factors—to which Plaintiffs respond separately. It is not a reason to decline to conform the Court's remedial timeline to the Secretary's December 31 deadline—which is the objective Plaintiffs seek to achieve with their motion. Indeed, it is all

the more reason *to grant* Plaintiffs' motion. Doing so respects the Secretary's wishes regarding the timeline, avoids *Purcell* concerns, ensures stability for the November 2024 election, and eliminates an appellate issue. Particularly considering that neither the Secretary nor the Legislature have proffered any *substantive* objection to Plaintiffs' proposed remedial plan, and neither assert any objection to the Court's Section 2 merits determination as a basis to seek a stay, the Court should grant Plaintiff's motion.

CONCLUSION

Plaintiffs respectfully request that the Court grant their motion to amend the remedial order. Moreover, Plaintiffs request that the Court expedite its decision to do so, and enter an order in by the December 12 date after which the Secretary has indicated he will seek relief from the Eighth Circuit.

December 10, 2023

Respectfully submitted,

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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.

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