

United States Court of Appeals
for the Eighth Circuit

**Turtle Mountain Band of Chippewa Indians,
Spirit Lake Tribe, Wesley Davis, Zachery S.
King, and Collette Brown,**

Plaintiff-Appellees,

v.

**Michael Howe, in his official capacity as
Secretary of State of North Dakota,**

Defendant-Appellee,

and

North Dakota Legislative Assembly,

Appellant.

APPEAL FROM DECISION OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NORTH DAKOTA
(No. 3:22-cv-00022)

**SECRETARY HOWE’S RESPONSE TO LEGISLATIVE ASSEMBLY’S
MOTION FOR EXTENSION OF DEADLINE TO SUBMIT REMEDIAL
REDISRICTING PLAN**

Pursuant to the Court’s order of December 18, 2023, to respond to the North
Dakota Legislative Assembly’s Emergency Motion for Extension of Deadline to

Submit Remedial Redistricting Plan, the Secretary of State of North Dakota (the “Secretary”), responds as follows:

Under North Dakota law, the Secretary’s authority over elections is limited to administering the State’s election laws. *See* N.D. Const. art. V, § 2; N.D.C.C. § 16.1-01-01. The Secretary does not have the authority to dictate the State’s election laws, nor to redraw the State’s redistricting maps. Those authorities are constitutionally assigned to the Legislative Assembly, not the Secretary. N.D. Const. art. II, § 1; N.D. Const. art. IV, § 2. And the Secretary recognizes that State legislatures have powers to change election rules on the eve of an election that the Federal judiciary does not. *Cf. Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring) (“It is one thing for a State on its own to toy with its election laws close to a State’s elections. But it is quite another thing for a federal court to swoop in and re-do a State’s election laws in the period close to an election.”).

However, as discussed further below, the Secretary is concerned that the Legislative Assembly’s proposal to extend the deadline for adopting a remedial plan into February and March risks introducing significant confusion, hardship, and unfairness into the State’s 2024 elections, and on that basis is opposed to the motion. Nonetheless, if the Court grants the Legislative Assembly’s motion to extend the deadlines, the Secretary’s Office will faithfully endeavor to administer the election laws it is directed to administer on whatever timeline is provided.

In response to the motion, the Secretary would like to clarify an apparent misunderstanding on the part of the Legislative Assembly. The Legislative Assembly’s motion repeatedly states the Secretary’s Elections Director presented information during a redistricting committee meeting that April 8th “is the hard deadline ... to be able to successfully administer an election.” Mot. at 7, 13, 14. The Legislative Assembly’s characterization of that statement is in tension with the Secretary’s position—before both this Court and the district court—that changing the election map after December 31 cannot be done without imposing significant cost, confusion, and unfairness for candidates, voters, and election administrators.

To clarify, April 8th is the deadline by which the information needed to finalize the ballots for the June 11, 2024 primary must be received. That April 8 deadline cannot be extended without destabilizing the State’s ability to administer the June primary and comply with federal deadlines in the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). But many other requirements must be met before finalization of the ballots can begin—including determining what candidates will be on the ballots, assigning voters and issues to districts and precincts, and establishing polling locations for each district. Having a final map established in advance of April 8th is a predicate requirement for those other things to occur, and completing those predicate requirements is critical to administering the election in an organized, transparent, and fair manner. Consequently, not having a

final map established until March 1 (or later) will risk introducing additional hardship, confusion, and unfairness into the 2024 election.

For candidates, there is a limited window to gather signatures from their district to be placed on the ballot. For most districts in the State (or at least those unaffected by any remedial plan that may be given effect), candidates will have from January 1 to April 8 to gather signatures. If the Legislative Assembly's motion to extend deadlines is granted, candidates for the district(s) affected by any remedial plan will not have finality on what district they reside in, who they may be running against, and from whom they can gather signatures, until sometime after March 1. Those candidates will be at a significant and unfair disadvantage when compared to candidates campaigning to be on the ballot for other districts. And the potential for confusion is amplified by the fact that it is unknown which districts, and how many districts, any remedial plan proposed by the Legislative Assembly might encompass.

For voters and election administrators, similar problems will arise. Voters in any affected remedial district(s) will have less time than voters elsewhere in the State to familiarize themselves with the potential candidates and issues in their respective districts. And for election administrators, the hardship that the shortened timeline would present at both the State and local levels is significant. As the Secretary detailed in his previous motions for a stay, having the final map established is a requirement for setting precinct boundaries, and having final precinct boundaries

established is a requirement to begin the extremely detailed and time-consuming process of updating the State’s Central Voter File and Street Master, which tie specific voters to specific ballots, and which ensure voters do not receive ballots with candidates from different districts or, for example, vote on bond measures they will not be paying for. Compressing work that is normally done over several months into a couple of weeks will risk introducing serious disruption and error into the administration of the election. *Cf. Merrill v. Milligan*, 142 S.Ct. 879, 880 (2022) (Kavanaugh, J., concurring) (“Running elections state-wide is extraordinarily complicated and difficult. Those elections require enormous advance preparations by state and local officials ... and even heroic efforts [in the next few weeks] likely would not be enough to avoid chaos and confusion.”).

The Legislative Assembly suggests in its motion that it would be able to mitigate these disruptions under its proposed timeline by enacting legislation to modify the State’s early statutory deadlines. *See* Mot. at 7 n.5. It is not apparent to the Secretary that modifying the State’s early statutory deadlines would prevent the potential hardships, confusion, and unfairness discussed above.¹

¹ It is also not apparent the Legislative Assembly’s modification of State deadlines could protect the State from any potential non-compliance with Federal laws that might result from delayed adoption of a remedial plan. *Cf.* 52 U.S.C. § 20302(a)(8) (requiring States to provide requested ballots for certain elections to overseas and military voters 45 days prior to the election); *U.S. v. Arizona*, No. 2:18-cv-00505, Dkt. 8 (D. Ariz. Feb. 15, 2018) (consent decree entered by Arizona after a truncated

However, the Secretary reiterates that the role of the Secretary of State under the North Dakota Constitution is to administer the election laws, not to create them. If the Court grants the Legislative Assembly's motion to extend deadlines and implement a remedial election plan on a delayed and compressed timeline, the Secretary's Office will faithfully work to administer the remedial plan on whatever timeline is provided.

Dated this 20th day of December, 2023.

State of North Dakota
Drew H. Wrigley
Attorney General

By: /s/ David R. Phillips
David R. Phillips (ND Bar No. 06116)
Special Assistant Attorney General
dphillips@bgwattorneys.com
300 West Century Avenue
P.O. Box 4247
Bismarck, ND 58502-4247
Telephone: (701) 751-8188

Philip Axt (ND Bar No. 09585)
Solicitor General
Email: pjaxt@nd.gov
600 E. Boulevard Ave., Dept. 125
Bismarck, ND 58505
Telephone: (701) 328-2210

Counsel for Appellant Michael Howe, in his official
capacity as Secretary of State of North Dakota

election schedule set by state law left the state unable to comply with the UOCAVA deadline for sending final ballots 45 days prior to a primary election).

CERTIFICATE OF COMPLIANCE

1. This response meets the type-volume limitation of Fed. R. App. P. 27(d)(2)(A). This response contains 1,245 words, excluding the parts of the response exempted by Fed. R. App. P. 27(d)(2).
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) and has been prepared in a proportionally spaced typeface using Microsoft Word in Time New Roman 14 point.
3. This document has been scanned for viruses and the brief is virus-free.

/s/ David R. Phillips

David R. Phillips

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2023, I electronically submitted the foregoing to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system and that ECF will send a Notice of Electronic Filing (NEF) to all participants who are registered CM/ECF users.

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David R. Phillips