

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

Case No: 3:22-cv-00022

Turtle Mountain Band of Chippewa )  
Indians, Spirit Lake Tribe, Wesley Davis, )  
Zachary S. King, and Collette Brown. )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
Michael Howe, in his official capacity as )  
Secretary of State of North Dakota. )  
 )  
Defendant )  
 )  
 )

**BRIEF IN SUPPORT OF NORTH  
DAKOTA LEGISLATIVE ASSEMBLY’S  
EMERGENCY MOTION FOR  
EXTENSION OF DECEMBER 22, 2023,  
DEADLINE TO ADOPT A REMEDIAL  
PLAN**

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**I. INTRODUCTION**

The North Dakota Legislative Assembly (“Assembly”) has made substantial headway toward the development of a remedial redistricting plan and requests this Court afford it a “reasonable opportunity” to complete its constitutional duty. On December 20, 2023, the Eighth Circuit found this Court erred in its determination that it lacked jurisdiction to amend the deadlines established in its November 17, 2023, Judgment (Doc. 126 at p. 2) under Board of Educ. of St. Louis v. State of Missouri, 936 F.2d 993, 995-96 (8<sup>th</sup> Cir. 1991). See Appellate Case: 23-3697, Entry ID 5346668 (“12/20/23 Order”). The 12/20/23 Order denied the Assembly’s emergency motion for extension of deadline to submit remedial redistricting plan without prejudice to the filing of motions in this Court. The Assembly now submits this emergency motion to extend this Court’s December 22, 2023 deadline for the Assembly to adopt a remedial plan until February 9, 2024.

## II. FACTS RELEVANT TO MOTION FOR EXTENSION

### A. The Assembly has Taken Extensive Action to Develop a Plan.

This Court entered Judgment on November 17, 2023, which provides the “Secretary and...Assembly shall have until December 22, 2023, to adopt a plan to remedy the violation of Section 2.” Doc. 126 at p. 2 (emphasis added).

The Assembly is a part-time citizen legislative body, which is limited to meeting in regular session for no more than 80 natural days during the biennium. See N.D. Const. Art. IV § 7. Between November 17 and November 28, 2023 - which included the Thanksgiving holiday - a series of meetings occurred between members of North Dakota’s executive and legislative branches of government with respect to this Court’s Findings and Judgment. Affidavit of Emily Thompson (“Thompson Aff’d”) at ¶ 2. In an attempt to comply with this Court’s directive, Representative Lefor, Chairman of Legislative Management, called a meeting of Legislative Management, for which the Legislative Council posted the required Notice on November 30, 2023.<sup>1</sup> Doc. 139-1.

On December 4, 2023, the Secretary filed a Notice of Appeal from this Court’s Judgment. Doc. 130. The Secretary’s appeal is filed as Docket No. 23-3655<sup>2</sup>. On December 4, the Secretary also filed a Motion for Stay of Judgment Pending Appeal with this Court. Doc. 131 - Doc.132.

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<sup>1</sup> Legislative Management is an interim committee consisting of the majority and minority leaders of the House and Senate, the Speaker of House, and six Senators and six Representatives chosen before the close of each regular session N.D.C.C. § 54-35-01(1). Legislative Management has various powers to act during the interim period in furtherance of the Assembly’s interests. N.D.C.C. § 54-35-02.

<sup>2</sup> The Assembly seeks to intervene in that appeal and its motion is pending. The basis of intervention is explained in that motion as the Secretary and Assembly no longer have the same interests in this litigation.

Legislative Management met on December 5, 2023. Doc. 139-2. At that meeting, Chairman Lefor appointed an interim Redistricting Committee and Legislative Management approved an RFP to retain an expert statistical consultant to aid in development of a remedial plan. Id. at pp. 2, 18. Legislative Management also passed a motion to intervene in this litigation to protect its constitutional duty to perform redistricting functions. Id. at p. 1.

In an apparent response to Legislative Management's actions, Plaintiffs filed a "Motion to Amend Remedial Order" and "Motion to Expedite" approximately six and a half hours after Legislative Management adjourned. Doc. 134; Doc. 135; Doc. 139-2 at p. 2. The Plaintiffs acknowledged the Assembly must be afforded an opportunity to enact a remedial plan through its normal legislative process, but requested this Court order its "Demonstrative Plan 1" into effect as the remedial plan by December 22, 2023. Doc. 134 at pp. 2-3. This Court ordered a response be filed to the Plaintiffs' motion by December 8, 2023. Doc. 136.

On December 7, Legislative Council posted Notice the Redistricting Committee would meet on December 13, 2023. Thompson Aff'd at ¶ 5, Exhibit A. On December 8, 2023, Legislative Management issued an RFP to retain a redistricting consultant for the Redistricting Committee. Id. at ¶ 6, Exhibit B.

Also on December 8, the Assembly filed a "Motion to Intervene, Joinder in the Secretary's Motion for Stay of Judgment Pending Appeal and Response to the Plaintiffs' Motion to Amend Remedial Order" with this Court. (Doc. 137; Doc. 150). Subsequent to full briefing on the Motion to Amend and Motion for Stay (Doc. 150; Doc. 140, Doc. 142; Doc. 144; Doc. 147; Doc. 148.), this Court issued its December 12, 2023 Order. Doc. 153.

**B. The December 12, 2023 Order.**

This Court denied the Secretary’s Motion for a Stay of Judgment Pending Appeal. Doc. 153 at pp. 1-5. It reasoned “there is no imminent election, little risk of voter confusion, and the final judgment was not issued on the ‘eve’ of any election.” Id. at pp. 2-3. This Court further observed:

...the deadlines cited by the Secretary concern the opening date for candidate signature gathering – for elections that are still months away. Indeed, the Secretary’s concern is not as to voter confusion but rather the administrative burden of correcting the Section 2 violation. Because there is no imminent election...it does not support granting a stay pending appeal.

Id. at p. 3.

This Court further explained “[c]oncerns as to the logistics of preparing for an election cycle cannot trump violations of federal law and individual voting rights. This factor also weighs against a stay pending appeal.” Id. at p. 5. This Court also held the Secretary’s Notice of Appeal (Doc. 130) “divests the district court of jurisdiction over this case, and the district court cannot reexamine or supplement the order being appealed.” Doc. 153 at p. 5.

**C. The Redistricting Committee’s December 13, 2023 Meeting.**

On December 13, 2023, the Redistricting Committee met to continue the process of developing a remedial plan to satisfy this Court’s Order. *Thompson Aff’d* at ¶ 7, Exhibit C. The Committee heard testimony by Scott Davis “on behalf of the members of the Turtle Mountain Band of Chippewa Indians” who noted the Tribe “never wished for their reservation to be combined into one voting district with Spirit Lake Reservation.” Id., Exhibit C at p. 2. Davis expressed a preference for the “consideration of other options over the alternative plans provided by the plaintiffs and the district court.” (Id.) Davis was the Executive Director of the North Dakota Indian Affairs Commission and served at a cabinet level as a liaison between North Dakota’s state

and tribal governments<sup>3</sup>. At the meeting he explained appeared for “Tatanka Consulting Group representing Turtle Mountain Band of Chippewa here today<sup>4</sup>.”

<https://video.ndlegis.gov/en/PowerBrowser/PowerBrowserV2/20231213/-1/31903> (“12/13/23 Video”) at 1:07:38-1:07:44 (accessed Dec. 20, 2023)<sup>5</sup>. Davis further noted Representative Jayme Davis from District 9A – who is also the Minority Caucus Leader in the Assembly – is his sister.

Id. at 1:17:40-1:18:45. He explained:

[I]t was never the intent for Turtle Mountain to have a shared district and that was very clear to me from Tribal Council from their leadership, and I was tasked to say “hey, what would going back to our own district...what would that look like? Is that possible?” I said “I don’t know, that’s a good question.” One that I would personally would be more in favor than sharing a district with miles and miles of geography between us and our relative Spirit Lake Nation. So that’s...part of the reason why I’m here.

...  
There is possibility here to keep um District 9 as whole and still at the same time suffice Spirit Lake with their subdistrict...it was my understanding this morning that might be a possibility versus creating the dumbbell effect.

Id. at 1:09:06 – 1:09:38.

Further, the Elections Director from the Secretary’s office presented a timeline which provides “April 8<sup>th</sup> is the hard deadline for the state and counties to be able to successfully administer an election.”<sup>6</sup> Thomspson Aff’d at ¶ 7, Exhibit C at p. 24.

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<sup>3</sup> See <https://www.governor.nd.gov/news/burgum-accepts-resignation-indian-affairs-commission-executive-director-scott-davis> (accessed Dec. 21, 2023); <https://www.governor.nd.gov/cabinet-members/scott-davis> (accessed Dec. 21, 2023).

<sup>4</sup> Davis is now the Founder and CEO of Tatanka Consulting Group which “partners with government agencies...to navigate complex systems, challenges, and initiatives. As a Native-owned lobbying and consulting firm” it specializes in Tribal relations. <https://tatankaconsultinggroup.com/> (accessed Dec. 21, 2023).

<sup>5</sup> This website contains a video of the December 13, 2023, Redistricting Committee meeting.

<sup>6</sup> Most of the Secretary’s early deadlines are established by state statute. The Assembly has the ability to pass legislation when it adopts the remedial plan to adjust for this unique situation. There is precedent for this procedure. See S.B. 2456, Section 6 (2001). See <https://www.ndlegis.gov/assembly/57-2001/special/session-law/chpt691.pdf> (accessed Dec. 17, 2023).

**D. Further Filings on Appeal.**

On December 13, 2023, the Secretary asked the Eighth Circuit to stay this Court's judgment. Appellate Case: 23-3655, Entry ID: 5344314. The Secretary's motion asserted the "State needs finality on what election map will be used for the 2024 elections no later than Sunday, December 31, 2023..." *Id.* at p.1. The Secretary correctly disclaimed he did "not purport to speak for or on behalf of the Legislative Assembly" in his motion. *Id.* at p. 11 n. 6. The Eighth Circuit denied the Secretary's Motion for Stay of Judgment Pending Appeal on December 15, 2023. Appellate Case: 23-3655, Entry ID: 5345026.

On December 17, 2023, the Assembly filed an "Emergency Motion for Extension of Deadline to Submit Remedial Redistricting Plan" in the Eighth Circuit because this Court divested itself of jurisdiction and the Assembly had no other means of relief. Appellate Case: 23-3697, Entry ID: 5345207 at pp. 1-2. After allowing for a response, the Eighth Circuit issued a December 20, 2023 Order which held as follows:

The motion for extension of deadline to submit remedial restricting plan has been considered by the court and is denied. This ruling is without prejudice to the filing of motions in the district court for such consideration as may be appropriate. See *Board of Educ. of St. Louis v. State of Missouri*, 936 F.2d 993, 995-96 (8th Cir. 1991).

Appellate Case: 23-3697, Entry ID: 5346668 (Dec. 20, 2023, Order).

**E. The Redistricting Committee Met Again on December 20, 2023.**

On December 15, 2023, Legislative Council published a Notice for Redistricting Committee's December 20, 2023 meeting. Thompson Aff'd at ¶ 8, Exhibit D. The meeting Agenda noted the Redistricting Committee would discuss the "directive to adopt a remedial redistricting plan and consideration of legislative redistricting proposals." *Id.*, Exhibit E. Legislative Council invited the chairs of both the Turtle Mountain Band of Chippewa Indians and

the Spirit Lake Nation to attend the December 20, 2023, meeting of the Redistricting Committee. Id. at ¶ 9; Exhibit F, Exhibit G.

At the December 20, 2023 meeting two additional maps were considered. The first map (Proposed Map # 3) was offered by Senator Klein. [https://video.ndlegis.gov/en/PowerBrowser/PowerBrowserV2/20231220/-1/31927#handoutFile\\_](https://video.ndlegis.gov/en/PowerBrowser/PowerBrowserV2/20231220/-1/31927#handoutFile_) (“12/20/23 Video”) at 10:46:36 – 11:02:07. (accessed Dec. 23, 2023); Thompson Aff’d at Exhibit H. Notably, Proposed Map # 3 connects Spirit Lake and Turtle Mountain and encompasses 429 people in the land bridge between the Reservations. 12/20/23 Video at 10:59:00-10:59:14. Further, the Proposed Map # 3 does not involve the creation of any subdistricts. Thompson Aff’d at Exhibit H.

Additionally, a Proposed Map # 4 was offered by Senator Estenson from District 15. 12/20/23 Video at 11:15:14-11:41:45 (accessed Dec. 20, 2023); Thompson Aff’d at Exhibit I. This map proposed creating a subdistrict in District 15. Id. A comparison of all 4 maps before the Redistricting Committee shows the following:

**COMPARISON OF PROPOSED MAPS**

| <b>Plaintiff's Map #1</b>   | <b>Plaintiff's Map #2</b>   | <b>Proposed Map #3</b>   | <b>Proposed Map #4</b>  |
|---|---|--|---|
| <b>Native American Population:</b> <ul style="list-style-type: none"> <li>• District 9 (total)                             <ul style="list-style-type: none"> <li>◦ 68.81%</li> </ul> </li> <li>• District 9 (age 18+)                             <ul style="list-style-type: none"> <li>◦ 63.53%</li> </ul> </li> </ul> | <b>Native American Population:</b> <ul style="list-style-type: none"> <li>• District 9 (total)                             <ul style="list-style-type: none"> <li>◦ 72.01%</li> </ul> </li> <li>• District 9 (age 18+)                             <ul style="list-style-type: none"> <li>◦ 66.04%</li> </ul> </li> </ul> | <b>Native American Population:</b> <ul style="list-style-type: none"> <li>• District 9 (total)                             <ul style="list-style-type: none"> <li>◦ 72.05%</li> </ul> </li> <li>• District 9 (age 18+)                             <ul style="list-style-type: none"> <li>◦ 66.1%</li> </ul> </li> </ul> | <b>Native American Population:</b> <ul style="list-style-type: none"> <li>• District 9 (total)                             <ul style="list-style-type: none"> <li>◦ 53.93%</li> </ul> </li> <li>• District 9 (age 18+)                             <ul style="list-style-type: none"> <li>◦ 33.66%</li> </ul> </li> <li>• District 15A (total)                             <ul style="list-style-type: none"> <li>◦ 44.16%</li> </ul> </li> <li>• District 15A (age 18+)                             <ul style="list-style-type: none"> <li>◦ 24.51%</li> </ul> </li> <li>• District 15B (total)                             <ul style="list-style-type: none"> <li>◦ 8.88%</li> </ul> </li> <li>• District 15B (age 18+)                             <ul style="list-style-type: none"> <li>◦ 5.31%</li> </ul> </li> </ul> |
| <b>District 9:</b> <ul style="list-style-type: none"> <li>• Total population: 17,102</li> <li>• Deviation: 3.17%</li> </ul>   | <b>District 9:</b> <ul style="list-style-type: none"> <li>• Total population: 17,339</li> <li>• Deviation: 4.6%</li> </ul>  | <b>District 9:</b> <ul style="list-style-type: none"> <li>• Total population: 17,328</li> <li>• Deviation: 4.54%</li> </ul>  | <b>District 9:</b> <ul style="list-style-type: none"> <li>• Total population: 17,344</li> <li>• Deviation: 4.63%</li> </ul> <b>District 15:</b> <ul style="list-style-type: none"> <li>• Total population: 16,997</li> </ul> <b>District 15A:</b> <ul style="list-style-type: none"> <li>• Total population: 8528</li> <li>• Deviation: -48.55%</li> </ul> <b>District 15B:</b> <ul style="list-style-type: none"> <li>• Total population: 8469</li> <li>• Deviation: -48.91%</li> </ul>  |
| <b>Political Subdivisions Impacted:</b> <ul style="list-style-type: none"> <li>• Counties Split: Rolette, Pierce, Ramsey, Cavalier (same as currently split), Eddy</li> <li>• Does not include Rolla</li> </ul>   | <b>Political Subdivisions Impacted:</b> <ul style="list-style-type: none"> <li>• Counties Split: Pierce, Benson, Eddy, (Cavalier is split, but it stays the same as it is in the current map)</li> </ul>  | <b>Political Subdivisions Impacted:</b> <ul style="list-style-type: none"> <li>• Counties Split: Benson, Eddy, Towner, Ramsey, (Cavalier is split, but it stays the same as it is in the current map)</li> </ul>   | <b>Political Subdivisions Impacted:</b> <ul style="list-style-type: none"> <li>• Counties Split: Bottineau, Towner, Ramsey, Benson, Eddy, Cavalier (same as current plan), Benson, Eddy</li> <li>• Splits Devils Lake</li> </ul>  |
| <b>Districts impacted:</b> <ul style="list-style-type: none"> <li>• 9, 14, 15, and 29</li> </ul>  | <b>Districts impacted:</b> <ul style="list-style-type: none"> <li>• 9, 14, and 15</li> </ul>  | <b>Districts impacted:</b> <ul style="list-style-type: none"> <li>• 9 and 15</li> </ul>  | <b>Districts Impacted:</b> <ul style="list-style-type: none"> <li>• 9, 6, and 15</li> </ul>   |

Thompson Aff'd at Exhibit J<sup>7</sup>.

As shown above, the Redistricting Committee is presented with viable options based both on this Court's Order (Proposed Maps # 3) as well as input received during the December 13, 2023 meeting (Proposed Map # 4). The legislative process is at work and the Committee is reviewing numerous options to develop a remedial plan. As Senator Dever stated at the December 20, 2023 meeting:

I'm not the only one who disagrees with the opinion, but I hope I'm not the only one here that respects the right of the court to make that opinion. That's separation of powers, checks and balances...that's appropriate for them to do that. But they

<sup>7</sup> As noted in the Thompson Aff'd, there is a very small sliver of District 14 that would be impacted by Proposed Map # 3. Thompson Aff'd at ¶ 12.



also...when they set the short deadline that they did, they in essence said okay citizen legislators, drop everything else in your life and devote your full-time attention to this process. I think, as the legislature, we have the responsibility also to assert the fact that we are a co-equal branch of government as well. So I think we need to proceed as we are, in a deliberate fashion to do what we consider to be the right thing to do. We're doing that, and I just encourage us to continue to do that.

12/20/23 Video at 12:03:50-12:04:45 (emphasis added).

While the Redistricting Committee has put in a substantial amount of work and made significant progress to date, additional steps are needed before the Assembly can “adopt” a map to comply with this Court’s judgment. Thompson Aff’d. at ¶13. First, Legislative Council staff must prepare a proposed bill draft to translate the map image approved by the Redistricting Committee to the metes and bounds descriptions required for codification. *Id.* at ¶13(a). Legislative Management will need to meet to review the Redistricting Committee’s report and consider whether to approve the recommended bill draft for introduction during a legislative session. *Id.* at ¶13(b)-(c). Legislative leadership will then need to request the Governor call a special session.<sup>8</sup> *Id.* at ¶ 13(d). Only the Governor can call a special session of the Assembly. N.D. Const. Art. V § 7. Based on recent precedent, there will likely be a delay for discussions between the Governor’s office and leadership as to the scope of the special session. Thompson Aff’d. at ¶13(e)-(f), Exhibit K, Exhibit L. Further, recent precedent shows there will be a delay from date the Governor’s calls for a special session and its commencement. *Id.* at ¶13(f), Exhibit L. This is because the Assembly is comprised of 141 citizens who live across the State and serve in the Assembly on a part-time

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<sup>8</sup> Alternatively, Legislative Management may reconvene the Assembly to serve its 5 remaining days of regular session. N.D.C.C. § 54-03-02(3); see also Thompson Aff’d at ¶13(d)(i). However, any laws enacted during a regular session do not become effective for a substantial period of time unless two-thirds the members elected to each house declare an emergency measure and includes such declaration in the Act. See N.D. Const. Art. IV § 13.

basis. *Id.* at ¶ 14; N.D. Const. Art. IV § 5 (“An individual may not serve in the legislative assembly unless the individual lives in the district from which selected”).

In short, this Court’s December 22<sup>nd</sup> deadline does not provide the part-time citizen members of the Assembly with a reasonable opportunity to develop a remedial plan. Under the North Dakota Constitution, this is a role held exclusively by the Assembly. N.D. Const. Art. IV § 2. While even the Assembly’s proposed timeline is tight, it believes it can be accomplished if it is given this time. *See* <https://www.kxnet.com/news/local-news/another-special-session-may-be-in-order-for-legislature-redistricting-committee/> (accessed Dec. 21, 2023) (Senator Sorvaag – Chairman of the Redistricting Committee - explained the Redistricting Committee has “come up with alternative maps that they believe follow the wishes of the judge, but they still need the okay from the rest of the legislature...it’s likely they’ll have a special session to get that approval early next year.”)

### **III. LAW AND ARGUMENT**

The Assembly understands this Court’s judgment is the law unless it is reversed and further understands this Court’s reluctance to enter a stay in these circumstances. However, the Assembly requests an extension of the December 22, 2023 deadline to adopt a remedial redistricting plan. Doc 126 at p. 2.

#### **A. This Court has Jurisdiction to Act on the Assembly’s Request.**

This Court declared it lacked jurisdiction to amend its Judgment (Doc. 153 at p. 6); however, the Eighth Circuit’s December 20, 2023, Order directed the Assembly to request relief from this Court as it retains jurisdiction over its remedial order pursuant to Board of Educ. of St. Louis v. State of Missouri, 936 F.2d 993, 995-96 (8th Cir. 1991).

In Board of Educ of St. Louis, the Eighth Circuit explained:

The Federal Rules of Civil Procedure provide that when an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the district court may “suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.” Fed.R.Civ.P. 62(c). The general rule that an appeal deprives a district court of jurisdiction over the issues appealed therefore is not absolute, and under certain circumstances, the district court retains jurisdiction to modify an injunction pending appeal. *See* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2904, at 320–25 (1973).

The Ninth Circuit has held that:

[I]n the kinds of cases where the court supervises a continuing course of conduct and where as new facts develop additional supervisory action by the court is required, an appeal from the supervisory order does not divest the district court of jurisdiction to continue its supervision, even though in the course of that supervision the court acts upon or modifies the order from which the appeal is taken.

Id. at 995-96 (quoting *Hoffman v. Beer Drivers & Salesmen’s Local Union No. 888*, 536 F.2d 1268, 1276 (9<sup>th</sup> Cir. 1976)).

Therefore, this Court has jurisdiction to act and modify the order from which the Secretary’s appeal was taken. See Id.; Appellate Case 23-3697, Entry ID: 5346668 (Dec. 20, 2023 Order). Thus, the Assembly requests this Court allow it a reasonable opportunity to develop a remedial plan and grant an extension until February 9, 2023 to do so.

**B. The Assembly Requests a Reasonable Opportunity to Adopt a Remedial Plan.**

The Assembly - not the Secretary - is solely vested with the power to establish legislative districts under the North Dakota Constitution. (N.D. Const. IV at § 2.) The Supreme Court recognizes redistricting “is primarily the duty and responsibility of the State through its legislature...rather than of a federal court.” *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993). Moreover, the Court explained that “of course...States retain broad discretion in drawing districts to comply with the mandate of § 2.” *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 429 (2006). This is why it “has repeatedly held that redistricting and reapportioning

legislative bodies is a legislative task which the federal courts should make every effort not to preempt.” Wise v. Lipscomb, 437 U.S. 535, 539 (1978). Accordingly, it “is therefore appropriate, whenever practicable, to afford a **reasonable opportunity** for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan.” Id. at 540 (Emphasis added).

The Eighth Circuit recognized the importance of the Assembly’s “reasonable opportunity” because if it “offers a remedial plan, the court must defer to the proposed plan unless the plan does not completely remedy the violation or the proposed plan itself constitutes a section two violation.” Williams v. City of Texarkana, Ark., 32 F.3d 1265, 1268 (8<sup>th</sup> Cir. 1994). However, “the district court must fashion a remedial plan” only if the Assembly declines to propose a remedy. Id.

Guidance for the Assembly’s request is found in Caster v. Allen, Case No.: 2:21-cv-1536-AMM (N.D. Ala. June 20, 2023) Doc. 156. In Caster, the district court entered a preliminary injunction on January 24, 2022. Id. at p. 1. In acknowledging “redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt, . . . this court gave the Alabama Legislature the first opportunity to draw a new map. After it appeared increasingly unlikely that the Legislature would act, the court notified the parties of its intent to appoint a special master and cartographer.” Id. at p. 2 (emphasis added). However, the Supreme Court stayed the preliminary injunction on February 7, 2022. Id. The Supreme Court vacated the stay on June 12, 2023. Id. On or about June 16, 2023, the Alabama Legislature indicated its intent to enact a redistricting plan and a request was made to allow the legislature until July 21, 2023, to enact the new plan. Id. at p. 3. The Court directed a status report be provided on “July 7, 2023, and again on July 14, 2023 regarding the status of the Alabama Legislature’s efforts to enact a new congressional districting plan” and further directed defendants to “advise

the court on or before July 21, 2023, whether a new congressional plan has been enacted by the Alabama Legislature.” Id. at pp. 4-5. The court then concluded if the Alabama Legislature enacted a new plan, any objections must be filed on or before July 28, 2023, and responses filed by August 4, and a reply by August 7. Id. at 5.

In short, the Alabama Legislature – after receiving notice of the entry of a preliminary injunction on January 24, 2022, was still provided until July 21, 2023 to develop a remedial plan. Further, the Caster Court did not notify the parties of its intent to appoint a special master and cartographer until “it appeared increasingly unlikely that the Legislature would act.” Id. at p. 2.

Here, the Redistricting Committee is actively working to develop a remedial plan. While a stay would have been preferred by the Assembly and Secretary – as noted in previous briefings – this Court, and the Eighth Circuit, denied such relief. Nonetheless, the Redistricting Committee continued to work diligently to perform its task and this Court “should make every effort not to pre-empt” it from doing so. Wise, 437 U.S. at 539 (1978). The Assembly is not a full-time legislative body, a city commission, or county commission which can quickly and easily assemble to readily adopt legislation. Rather, it is a part-time citizen legislative body that is making significant efforts to perform its constitutional duty. This Court must follow Supreme Court precedent and allow the Assembly its “reasonable opportunity” to adopt a redistricting plan. Id.

The Assembly wants to propose a remedy. The Redistricting Committee will continue to perform its due diligence to create a plan it believes satisfies both State and Federal law. This is why it created an interim Redistricting Committee. This is why that committee heard and considered testimony on December 13, 2023. This is why the Redistricting Committee met again on December 20, 2023. This is why the Redistricting Committee considered two more alternative map proposals. Notably, Proposed Map # 3 connects Spirit Lake and Turtle Mountain, while

making only a negligible change to the boundaries of District 14 in comparison to the change made to District 14 by Plaintiff's Map 2. Thompson Aff'd at ¶ 11-12 Exhibit H. Further, Proposed Map # 4 follows the recommendations received from Davis at the December 13, 2023, meeting. Thompson Aff'd at ¶¶ 7, 11, Exhibit C at p. 2; Exhibit I; see also [https://www.ndlegis.gov/files/committees/67-2021/23\\_5024\\_03000appendixh.pdf](https://www.ndlegis.gov/files/committees/67-2021/23_5024_03000appendixh.pdf) (accessed Dec. 21, 2023) (Collette Brown's August 26, 2021 testimony on behalf of Spirit Lake Nation requesting the Assembly analyze whether Spirit Lake should have a subdistrict); [https://www.ndlegis.gov/files/committees/67-2021/23\\_5061\\_03000appendixd.pdf](https://www.ndlegis.gov/files/committees/67-2021/23_5061_03000appendixd.pdf) (accessed Dec. 21, 2023) (Collette Brown's September 15, 2021 testimony on behalf of Spirit Lake Nation explaining "Spirit Lake Nation requests that the Legislature create two single-member districts for the State House of Representatives..."); [https://www.ndlegis.gov/files/committees/67-2021/23\\_5049\\_03000appendixb.pdf](https://www.ndlegis.gov/files/committees/67-2021/23_5049_03000appendixb.pdf) (accessed Dec. 21, 2023) (Statement from North Dakota Native Vote asserting "Turtle Mountain is its own community of interest and should remain in a single legislative district.").

The Redistricting Committee desires the ability to continue to evaluate these options – and others - to determine whether an alternative plan can be adopted for the Court's consideration. See 12/20/23 Video. Legislative Management would not take these affirmative steps, invest the time to perform its due diligence, and make this request if did not intend to adopt a remedial plan. Unfortunately, as explained above, the December 22, 2023, deadline is impracticable and does not afford the Assembly a "reasonable opportunity" to perform its constitutional redistricting duty. Nonetheless, the Redistricting Committee will continue to move forward and perform its legislative duties provided the Court allows it the chance to do so. See 12/20/23 Video at 12:03:50-12:04:45.

While the Assembly understands the Secretary's previously stated desire to meet all statutory deadlines (Appellate Case: 23-3655, Entry ID: 5344314 at p. 1), the Assembly's interest in its constitutional duty to establish legislative districts outweighs administrative hurdles. In this situation, it is no doubt "practicable" to afford the Assembly a "reasonable opportunity" to adopt a remedial plan. The Secretary has voiced concerns about potential administrative burdens; however, he made clear that if an extension is granted "the Secretary's Office will faithfully endeavor to administer the election laws it is directed to administer on whatever timeline is provided." Appellate Case: 23-3697, Entry ID 5346613 at p. 2.

The Assembly requests an opportunity to develop a plan for the Court's review and approval in a reasonable timeframe in advance of the 2024 Election. In light of the circumstances, the Assembly requests the December 22, 2023, deadline be extended to February 9, 2024. Provided the Assembly is afforded its reasonable opportunity to develop such plan, it has no objection to whatever briefing deadlines may be imposed by the Court to allow all parties a reasonable opportunity to be heard. The Assembly asserts this is necessary for it to be afforded a "reasonable opportunity" to perform its constitutional duty to prepare a redistricting plan.

#### **IV. CONCLUSION**

For the aforementioned reasons, the Assembly requests the December 22, 2023, deadline to adopt a remedial plan be extended to February 9, 2024.

Dated this 21st day of December, 2023.

SMITH PORSBORG SCHWEIGERT  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 21st day of December, 2023, a true and correct copy of the foregoing **BRIEF IN SUPPORT OF NORTH DAKOTA LEGISLATIVE ASSEMBLY'S EMERGENCY MOTION FOR EXTENSION OF DECEMBER 22, 2023, DEADLINE TO ADPOT A REMEDIAL PLAN** was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following:

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