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

Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachery S. King, and Collette Brown Plaintiffs, vs. Michael Howe in his official capacity as Secretary of State of North Dakota, Defendant.	Case No. 3:22-cv-00022 **SECRETARY HOWE'S RESPONSE TO PLAINTIFFS' MOTION TO AMEND REMEDIAL ORDER**

SECRETARY'S RESPONSE TO PLAINTIFFS' MOTION TO AMEND

In an effort to mitigate some of the disruption to North Dakota's 2024 election likely to follow from the Court's Order and Judgment (Dkt. Nos. 125 and 126), Plaintiffs have moved the Court to amend its remedial order to provide as follows:

(A) *If* the State does not adopt a remedial election plan by December 22 (through a duly enacted statute), *then* the Court will order Plaintiffs' Demonstrative Plan 1[1] into effect;

(B) *If* the State does adopt a remedial election plan by December 22 (through a duly enacted statute), *then* Plaintiffs' response to that plan will be due December 26, and the Secretary's reply will be due December 28 (and presumptively the Court would then issue an order on what plan will be given effect no later than December 31).

Dkt. No. 134 at 2-3. Plaintiffs suggest "[d]oing so will resolve all *Purcell* and timing concerns raised by the Secretary in his stay motion." *Id*. at 5. But Plaintiffs are mistaken. The Secretary opposes Plaintiffs' motion to amend and responds as follows.

[1] Plaintiffs also say "if the Court wished to further minimize the changes to the enacted map," they "would also support the imposition of Plaintiffs' Demonstrative Plan 2." Dkt. No. 134 at 5 n.4.

(1) The Secretary and the State of North Dakota need finality on what map will be used for the 2024 election cycle no later than December 31, 2023.

As addressed in significant detail in the Secretary's Motion for Stay of Judgment Pending Appeal (Dkt. No. 132 at 17-22), the State needs finality on what redistricting map will be used for the 2024 election cycle no later than December 31. That is the deadline by which county commissioners are statutorily required to set precinct boundaries for the 2024 election. Dkt. No. 132 at 21-22.[2] And that is the statutory date after which candidates can begin petitioning to be on the ballot in their respective districts. Dkt. No. 132 at 18-20. Consequently, changing the redistricting plan after December 31 cannot be done without imposing significant cost, hardship, confusion, and unfairness for voters, candidates, and election administrators alike. *Contra Purcell v. Gonzales*, 549 U.S. 1 (2006). Plaintiffs' motion to amend does not appear to dispute that December 31 is an important cut-off date for fixing the 2024 election map with finality.

For that reason, the Secretary reiterates that whatever may be decided on appeal regarding the merits of his challenge to this Court's judgment, the State needs final resolution on what redistricting plan will be used for the 2024 election cycle no later than December 31, 2023. *Cf. Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (even if a State's redistricting is ultimately held unlawful, when "a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case"); *Upham v. Seamon*, 456 U.S. 37, 44 (1982) (even if it is determined on appeal that a district court improperly struck down a State's redistricting plan and imposed its own remedial plan, the realities of administering the election may require "allow[ing] the election to go forward in accordance with the [improper court-imposed] schedule.").

[2] Though as a practical matter, the county commissioners will need to know what map will be utilized for the 2024 election cycle prior to that December 31 deadline, as the precinct boundaries must be set through properly noticed public meetings. *See* Dkt. No. 132 at 21.

(2) The State's right to receive meaningful appellate review, and the requirement that Federal courts provide State legislatures a reasonable opportunity to adopt a remedial plan before imposing one by judicial decree, mean the legislatively enacted map should stay in place through the 2024 election cycle.

As addressed in the Secretary's Motion for Stay of Judgment Pending Appeal (Dkt. No. 132 at 6-12), the Secretary has a sound legal basis to seek appellate review of this Court's finding that 42 U.S.C. § 1983 provides a private right of action for claims arising under Section 2 of the Voting Rights Act (VRA). The basis for appeal is a recent decision from the Eighth Circuit—issued *after* this Court made its finding—holding that Section 2 of the VRA does not create a private right of action, because the statute's plain text "intended to place enforcement in the hands of the [Attorney General], rather than private parties." *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, —F.4th—, 2023 WL 8011300, *5 (8th Cir. Nov. 20, 2023) (citation omitted). That decision casts serious doubt as to whether the Plaintiffs in this action ever had a private right of action to enforce Section 2 of the VRA under Section 1983.[3] Plaintiffs will no doubt argue the Eighth Circuit's holding doesn't control in this case. Ultimately the appellate courts may find those arguments right, or they may find them wrong. But it is undeniable the Eighth Circuit's recent holding makes that a serious question in need of resolution, and the Secretary therefore has a sound basis for seeking appellate review.

"[T]he public has a strong interest in the appeal right as one component of the constitutional right to due process in enforcement of the nation's laws." *Toomey v. Arizona*, 2021 WL 4915370, *3 (D. Ariz. Oct. 21, 2021) (citation omitted). That is especially true where, as here, a federal court's imposition of its own redistricting plan "represents a serious intrusion on the most vital of

[3] Notably, after acknowledging that pleading failures are occasionally excused, the Eighth Circuit rejected consideration of the Section 1983 argument in that case and modified the district court's judgment to dismiss the action with prejudice. *Arkansas State Conf. NAACP*, 2023 WL 8011300, at *12. If the Eighth Circuit believed Section 1983 provided a private right of action to allege Section 2 violations, it likely would not have denied the opportunity to assert the argument.

local functions." *Miller v. Johnson*, 515 U.S. 900, 915 (1995) (citation omitted); *see also, e.g., Chapman v. Meier,* 420 U.S. 1, 27 (1975) ("reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court"). Indeed, this Court itself has recognized that when it comes to enjoining State election plans, it is required "to weigh the opportunity for appellate review." *Walen v. Burgum*, 2022 WL 1688746, at *6 (D.N.D. May 26, 2022) (citing *Purcell*, 549 U.S. at 5).

However, and unfortunately, the timing of this Court's judgment makes it impossible for the Secretary to receive meaningful appellate review before the December 31 deadline by which a final plan must be locked in place. The Secretary timely filed its notice of appeal shortly after this Court's final judgment, and the Eighth Circuit has scheduled the appellant's merit brief for January 25, 2024, with the appellees' brief due 30 days after the appellants' brief, and a reply brief and oral argument to be scheduled thereafter. *See* Docket No. 23-3655 (8th Cir.). Even if the Secretary and Plaintiffs were to agree to seek expedited argument of the merits on appeal, it is exceptionally unlikely that the Eighth Circuit would be able to hear argument and render a judgment on the merits of the appeal before the December 31 deadline for finalizing the election map (and even if it could, such an accelerated schedule would risk depriving that court of the opportunity for a deliberative review commensurate with the importance of the issue raised).

The timing of the Court's judgment has thus made it impossible for the Secretary to receive meaningful appellate review before the December 31 deadline, and the State's duly enacted legislative map should be left in place for the 2024 election cycle while the Secretary's appeal goes forward in the appellate courts. *Cf. Riley v. Kennedy*, 553 U.S. 406, 426 (2008) ("practical considerations sometimes require courts to allow elections to proceed despite pending legal challenges"). Moreover, as noted in the Secretary's Motion for Stay of Judgment Pending Appeal

(Dkt. No. 132 at 13), the State has already held the November 2022 election using the legislatively enacted plan while this litigation played out in the District Court, and it should continue being allowed to use that legislatively enacted plan while this litigation plays out on appeal. In light of this, the Court should not grant Plaintiffs' motion to impose a remedial map until the appellate courts are able to address the viability of the Plaintiffs' claim.

Furthermore, as addressed in the Secretary's Motion for Stay of Judgment Pending Appeal (Dkt. No. 132 at 16-17), the Secretary respectfully maintains that the Court's order (with or without Plaintiffs' proposed amendments) does not afford the State Legislative Assembly a "reasonable opportunity" to adopt a remedial plan before the December 31 deadline by which the plan must fixed with finality for the 2024 election cycle. *See Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). In North Dakota, the authority to establish redistricting plans lies with the Legislative Assembly—not with the Secretary of State. *See* N.D. Const., art. IV, § 2. And the Supreme Court "has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise*, 437 at 539.

As Plaintiffs note in their motion, the Legislative Assembly has responded to this Court's order by taking action to appoint an interim redistricting committee and retain a redistricting expert for preparing a remedial plan. Dkt. No. 134 at 2 n.1. However, the timing of the Court's order does not give the Legislative Assembly a reasonable chance to respond to the Court's judgment with a remedial plan before the December 31 cut-off by which a final plan must be in place. That factor further weighs against imposing one of Plaintiffs' Demonstrative Plans and weighs in favor of granting the Secretary's motion for a stay of judgment through the 2024 election cycle, which would allow the Legislative Assembly a reasonable opportunity to adopt a remedial plan before one is imposed by a Federal court.

For those reasons, the Secretary has asked this Court to stay its judgment pending appeal and allow the State to continue using its legislatively enacted plan for the 2024 election cycle. Dkt. No. 132. The Secretary has also respectfully asked this Court for its decision on that stay motion no later than December 12, 2023, so that if this Court declines to grant a stay the Secretary has time to seek a stay from the Eighth Circuit before the December 31 deadline. Plaintiffs' motion to amend, however, seeks to short circuit those stay requests and have this Court judicially impose a redistricting plan on the State of North Dakota before the stay motions have been resolved.

CONCLUSION

For the reasons set forth, the State has a right to receive meaningful appellate review of this Court's judgment before its duly enacted redistricting plan is invalidated, but the timing of this Court's judgment makes it impossible to receive meaningful appellate review before the December 31 deadline by which the plan must be set with finality for the 2024 election cycle. The Legislative Assembly should also be given a reasonable opportunity to adopt a remedial plan before the Federal courts impose one. The Secretary therefore maintains that a stay of this Court's judgment pending appeal and through the 2024 election cycle is appropriate and warranted, and on that basis the Secretary opposes Plaintiffs' motion to amend the remedial order to impose Demonstrative Plan 1 (or Demonstrative Plan 2).

Dated this 8th day of December, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **SECRETARY HOWE'S RESPONSE TO PLAINTIFFS' MOTION TO AMEND REMEDIAL ORDER** was on the 8th day of December, 2023, filed electronically with the Clerk of Court through ECF:

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