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' OPPOSITION TO DEFENDANT'S MOTION FOR STAY OF JUDGMENT PENDING APPEAL

The Secretary does not contend that he is entitled to a stay because of any error in this Court's ruling that North Dakota's legislative map violates the rights of Native American voters under Section 2 of the Voting Rights Act ("VRA"). Indeed his 25-page stay motion never mentions the merits of this case. Rather, the Secretary contends that § 1983—which Congress enacted pursuant to its Fourteenth Amendment enforcement power for the primary purpose of providing a cause of action for Reconstruction Amendment enforcement statutes—somehow does not apply to the Voting Rights Act, Congress's most significant such law. No court anywhere has ever reached such a radical and illogical conclusion. Even those litigants and dissenting justices who have resisted the expansion of § 1983 have done so by arguing that it *only* provides a cause of action for Reconstruction Amendment enforcement laws, such as the Voting Rights Act. Adopting the Secretary's position would turn § 1983 jurisprudence on its head.

The Secretary also contends that *Purcell* concerns warrant a stay, but those concerns are resolved if the Court grants Plaintiffs' pending motion to modify the remedial order in this case to

ensure that a remedial plan is in place by December 31. The Supreme Court has held that when a district court relies upon a defendant's assertion of the date upon which a Section 2 remedial map must be finalized, the court of appeals cannot issue a stay based upon *Purcell*. *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 equities in this case plainly support enforcing the Court's injunction and remedial order while the Secretary pursues his novel theory—unrelated to the merits of the case—on appeal.

LEGAL STANDARD

"The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken v. Holder*, 566 U.S. 418, 433-34 (2009). In evaluating whether the party seeking the stay has met its burden, Courts consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id*. at 434. While courts must balance the relative strength of all four factors, "[t]he most important factor is the [applicant's] likelihood of success on the merits." *Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011); *see also Nken*, 556 U.S. at 434.

ARGUMENT

The Secretary cannot meet his burden under *Nken* to demonstrate that a stay is warranted. To begin, the Secretary has waived any argument that he is likely to succeed on the merits of Plaintiffs' Section 2 claim—his stay motion is based solely on § 1983. And he has no likelihood of success on that front. Section 1983's primary purpose was to provide a cause of action for

statutes, like Section 2, that enforce the Fourteenth and Fifteenth Amendments. The Secretary's invocation of the *Gonzaga* framework, which is used to determine whether § 1983 applies to Spending Clause statutes, is misplaced. But even if the *Gonzaga* framework applied, Section 2 plainly meets it. The Secretary cannot show that the equities favor a stay when he is not even seeking a stay based upon any claimed error in the Court's Section 2 ruling. Regardless of *who* can sue, this Court has declared that the map violates the VRA; the parties and the public interest favor enforcing the Court's injunction while the Secretary advances his novel appellate theory. Finally, any *Purcell* issue is eliminated by the Court granting Plaintiffs' pending motion to modify the remedial order. For that reason, the Court need not consider the Secretary's suggestion that it apply the heightened stay standard suggested by Justice Kavanaugh, which is not only contrary to *Nken*—which is the binding Supreme Court precedent on point—but is in any event inapplicable where *Purcell* concerns do not exist.

I. The Secretary has waived any argument that he is likely to succeed on the merits of Plaintiffs' Section 2 claim.

The Secretary does not address the underlying merits of the Court's ruling that Districts 9, 15, 9A, and 9B discriminate against Native American voters in his application for a stay. As such, the Secretary should be precluded from making any future argument that a stay is justified because he is likely to prevail on appeal on the underlying merits of Plaintiffs' Section 2 claim. *Cf. Akeyo v. O'Hanlon,* 75 F.3d 370, 374 (8th Cir. 1996) ("As a general rule, we do not address arguments raised for the first time in a reply brief and there are no reasons in this case to depart from this rule").

II. The Secretary is not likely to succeed on his novel theory that Plaintiffs lack a cause of action for Section 2 claims under § 1983.[1]

A. Section 1983 provides a cause of action to enforce statutes, like the Voting Rights Act, enacted pursuant to Congress's Fourteenth and Fifteenth Amendment enforcement powers.

The Civil Rights Act of 1871 provides a cause of action for the redress of violations of federal rights committed by state actors. *See* 42 U.S.C. § 1983; *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 175 (2023) ("That is, any person within the jurisdiction of the United States may invoke this cause of action against any other person who, acting 'under color of' state law, has deprived them of 'any rights, privileges, or immunities secured by the Constitution and laws of the United States."); *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

Specifically, § 1983 provides a cause of action to enforce a statute, like the VRA, enacted pursuant to Congress's Fourteenth and Fifteenth Amendment enforcement powers. Such a statute necessarily prohibits state officials from "subject[ing] any citizen of the United States . . . to the deprivation of [] rights, privileges, or immunities secured by the Constitution and laws," 42 U.S.C. § 1983, because those are precisely the harms the statute proscribes. *See* U.S. Const. amend. XIV, § 3 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws."); *id.* § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."); U.S. Const. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of

[1] Plaintiffs preserve for subsequent appellate review their contention that the Eighth Circuit wrongly decided that Section 2 contains no implied private right of action. *See Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, __ F. 4th __, No. 22-1395, 2023 WL 8011300 (8th Cir. Nov. 20, 2023).

race, color, or previous condition of servitude."); *id.* § 2 ("The Congress shall have the power to enforce this article by appropriate legislation.").

The Secretary's reliance on the test developed in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), to support his argument is misplaced. *Gonzaga*'s test is aimed at ensuring that courts do not proliferate § 1983 enforcement for statutes enacted pursuant to Congress's spending power. It does not apply to determining whether Reconstruction Amendment enforcement statutes—which are expressly authorized by the Constitution to regulate State conduct—fall within § 1983's ambit. Section 1983 was *itself* enacted pursuant to Congress's Fourteenth Amendment enforcement power with a "principal purpose" to "ensure that federal legislation providing specifically for equality of rights would be brought within the ambit of the civil action authorized by that statute." *Thiboutot*, 448 U.S. at 7 (internal quotation marks omitted). It therefore necessarily applies to Reconstruction Amendment statutes unless expressly exempted by the statutory text.

Section 1983 was originally enacted by the Reconstruction Congress as § 1 of the Civil Rights Act of 1871, also known as the Ku Klux Klan Act. It was enacted "to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." Act of Apr. 20, 1871, 17 Stat. 13. In 1874, the statute was amended to afford a cause of action to enforce not just rights secured by the *Constitution*, but by the "laws" as well. *Thiboutot*, 448 U.S. at 6-7. As the Supreme Court explained in *Thiboutot*, "a principal purpose of the added language was to 'ensure that federal legislation providing specifically for equality of rights would be brought within the ambit of the civil action authorized by that statute." *Id.* at 7. Indeed, in the same 1874 amendments, Congress revised the accompanying jurisdictional statute—which today is codified at 28 U.S.C. § 1343(3)—to apply to "deprivations of rights secured by 'the Constitution of the United States or of any right secured by any law providing for equal rights.'" *Thiboutot*, 448 U.S.

at 8. In 1957, Congress amended § 1343 again by adding subsection (4), which grants federal court jurisdiction over claims "[t]o secure damages or secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." P.L. 85-315 (Sept. 9, 1957), 71 Stat. 637 (codified as 28 U.S.C. § 1343(4)).

In *Thiboutot*, the Court rejected the petitioners' argument that "the phrase 'and laws' [in § 1983] should be read as *limited* to civil rights or equal protections laws." 448 U.S. at 6 (emphasis added). Although the Court acknowledged that extending § 1983 to laws securing civil rights and equal protection was "a principal purpose" of Congress, the Court reasoned that there were "other purpose[s]" too, permitting a broader interpretation of the statute's reach. *Id.* at 7. The Court thus held that "the plain language of the statute undoubtedly embraces" claims asserting violations of the Social Security Act. *Id.* at *4. Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, dissented and would have held that § 1983 only provides a cause of action for statutes "providing for the equal rights of citizens" *Id.* at *21-22 (Powell, J., dissenting).

Following *Thiboutot*, the Court has cautioned that although § 1983 may provide a cause of action for statutes enacted pursuant to the Constitution's Spending Clause, greater hesitancy is required in that context. In *Pennhurst State School & Hospital v. Halderman*, the Court explained that "[i]n legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." 451 U.S. 1, 28 (1981). In *Gonzaga*, the Court considered whether the Family Educational Rights and Privacy Act ("FERPA"), which was enacted pursuant to Congress's spending power, could be enforced through § 1983. 536 U.S. at 276. In concluding that § 1983 did not apply to FERPA, the Court cited *Pennhurst* and explained that "[w]e made clear that unless Congress 'speak[s] with a clear

voice,' and manifests an 'unambiguous' intent to confer individual rights, *federal funding provisions* provide no basis for private enforcement by § 1983." *Id.* at 280 (quoting *Pennhurst*, 451 U.S. at 17, 28, & n.21) (second bracket in original) (emphasis added). Where Congress does provide a clear intent to confer individual rights in spending power statutes, the *Gonzaga* Court held, § 1983 presumptively applies unless Congress expressly said otherwise or if it impliedly did by "creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* at 285.

In June of this year, the Court issued its most recent § 1983 decision. In *Talevski*, the Court addressed whether portions of the Federal Nursing Home Reform Act ("FNHRA")—enacted pursuant to the Spending Clause—were enforceable via § 1983. 599 U.S. at 171. The Court first rejected petitioners' invitation to overrule *Thiboutot* and hold that spending power statutes are categorically ineligible for § 1983 coverage. *Id.* at 180. The Court then noted that "[f]or Spending Clause legislation in particular," it will be the "atypical" statute that will "'unambiguously confe[r]' individual rights, making those rights 'presumptively enforceable' under § 1983." *Id.* at 183. The Court held that the FNHRA provisions at issue cleared that hurdle and were enforceable under § 1983. *Id.* at 191.

Justice Barrett, joined by Chief Justice Roberts, concurred in *Talevski*, explaining that "*Gonzaga* sets the standard for determining when a *Spending Clause* statute confers individual rights," *id.* at 193 (Barrett, J., concurring) (emphasis added), and that "[c]ourts must tread carefully before concluding that Spending Clause statutes may be enforced through § 1983," *id.* at 195. In dissent, Justice Thomas noted that § 1983 was more appropriately "confined to laws enacted under Congress' Reconstruction Amendments enforcement powers." *Id.* at 225 n.12 (Thomas, J., dissenting).

As the statutory history and caselaw surrounding § 1983 demonstrate, it is universally accepted that statutes enacted to enforce the Fourteenth and Fifteenth Amendments are enforceable through § 1983; even the justices who have dissented from Supreme Court's § 1983 cases have reasoned that it provides a cause of action for civil rights statutes enacted to enforce the Reconstruction Amendments. Indeed, § 1983 *itself* was enacted pursuant to Congress's Fourteenth Amendment enforcement power, and its "principal purpose" was to "ensure that federal legislation providing specifically for equality of rights would be brought within the ambit of the civil action authorized by that statute." *Thiboutot*, 448 U.S. at 7. Congress enacted Section 2 of the VRA pursuant to its Fourteenth and Fifteenth Amendment enforcement powers. *See* Pub. L. 89-110, Aug. 6, 1965, 79 Stat. 437 ("An Act . . . [t]o enforce the fifteenth amendment of the Constitution of the United States . . . ."); S. Rep. No. 97-417, at 27, 39 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 205, 217 (explaining that Section 2 is enacted pursuant to both Fourteenth and Fifteenth Amendment enforcement powers). Its plain-text purpose is to guarantee "equality of rights." *Thiboutot*, 448 U.S. at 7; *see* 52 U.S.C. § 10301(b) (providing that a violation occurs where political process is not "equally open to participation").

Section 2 enforces the voting guarantees of the Fourteenth and Fifteenth Amendments even though it proscribes discriminatory *effects* in redistricting, not just discriminatory *intent*. "When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 [of the Fourteenth Amendment] authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause." *Tennessee v. Lane*, 541 U.S. 509, 520 (2004). "Congress's § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000); *see also Lane*, 541 U.S. at 520 (explaining that

Congress may enforce the Fourteenth and Fifteenth Amendments by "prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Id.* (quoting *Kimel*, 528 U.S. at 81)). Congress's 1874 amendment of § 1983 had as its primary purpose providing a cause of action for such statutes so that the full scope of Congress's Fourteenth and Fifteenth Amendment enforcement powers would be subject to § 1983 causes of action, not just conduct that violated the amendments themselves. *See Thiboutot*, 448 U.S. at 7.[2]

Because Fourteenth and Fifteenth Amendment enforcement statutes—like Section 2 of the VRA—sit at the center of Congress's purpose in enacting § 1983, those statutes must be held enforceable by § 1983 absent an express indication that Congress chose otherwise. Nothing in Section 2 removes it from § 1983's ambit. Indeed, a contrary conclusion would be absurd. It would defy reason to conclude that Congress meant for a statute enacted pursuant to its Fourteenth Amendment enforcement power—§ 1983—to be unavailable to enforce a statute enacted pursuant to its Fourteenth and Fifteenth Amendment enforcement powers—Section 2 of the VRA—while simultaneously concluding that a spending power nursing home statute *is* enforceable by § 1983. That would turn § 1983 on its head.

The Secretary's reliance on the *Gonzaga* framework to contend that Section 2 is not enforceable under § 1983 is thus misplaced; "*Gonzaga* sets the standard for determining when a *Spending Clause* statute confers individual rights," *Talevski*, 599 U.S. at 193 (Barrett, J.,

[2] The Eighth Circuit addressed this issue in dicta in *Arkansas State Conference NAACP*, noting that "§ 2 reflects an effort by *Congress* 'to enforce' the Fourteenth and Fifteenth Amendments," but observing that this "issue is not free from doubt." 2008 WL 8011300, at *7 n.3 (emphasis in original). The court did not explain what that doubt could be; there is none. The Supreme Court's rulings leave no doubt whatsoever on this question. Prophylactic enforcement statutes prohibiting discriminatory effects enacted under Congress's enforcement power "carry out the basic objectives of the Equal Protection Clause." *Lane*, 541 U.S. at 520.

concurring) (emphasis added), not whether § 1983 applies to Fourteenth and Fifteenth Amendment enforcement statutes.[3]

B. Section 2 of the VRA confers individual rights enforceable under § 1983.

Even assuming that the *Gonzaga* test applies here—it does not—the test is easily satisfied. Under *Gonzaga*, when analyzing whether Spending Clause statutes create a private right that can be enforced through § 1983, a court must first "determine whether Congress intended to create a federal right" in the statute that a plaintiff seeks to enforce. *Gonzaga*, 536 U.S. at 283 (emphasis in original). If a statutory provision surmounts this hurdle, "§ 1983 can presumptively be used to enforce" those rights. *Talevski*, 599 U.S. at 172, 184.

1. Section 2 of the VRA is a rights-creating statute.

To determine whether Spending Clause statutes confer individual rights enforceable under § 1983, courts "employ traditional tools of statutory construction to assess whether Congress has 'unambiguously conferred' 'individual rights upon a class of beneficiaries' to which the plaintiff belongs." *Talevski*, 599 U.S. at 183–84. The Supreme Court recently confirmed that the test is satisfied where the provision in question is "phrased in terms of the persons benefited" and contains "rights-creating," individual-centric language with an "unmistakable focus on the benefited class." *Id*.

Section 2 of the Voting Rights Act contains distinctly rights-creating language. It protects the "right of any citizen . . . to vote" free from racial discrimination. 52 U.S.C. § 10301(a); *see*

[3] Circuit courts have likewise noted that *Gonzaga* is aimed at Spending Clause statutes. *See, e.g.*, *Colon-Marrero v. Velez*, 813 F.3d 1, 19 (1st Cir. 2016) (concluding that it was "noteworthy" that Help America Vote Act was enacted pursuant to the Elections Clause, which provides more specific authority than Spending Clause); *Qwest Corp. v. City of Santa Fe, N.M.*, 380 F.3d 1258, 1265 n.2 (10th Cir. 2004) (noting that *Gonzaga* addressed Spending Clause legislation where the Court is reluctant to infer congressional intent to create privately enforceable federal rights).

also Chisom v. Roemer, 501 U.S. 380, 392 (1991) (recognizing that Section 2 "grants [individual citizens] a right to be free from" voting discrimination). It explicitly refers to a citizen's "right" and is "phrased in terms of the person benefitted"—the main criteria for whether a statute contains rights-creating language. *See Talevski*, 599 U.S. at 183-84; *Gonzaga*, 536 U.S. at 284; *Osher v. City of St. Louis, Mo*., 903 F.3d 698, 702–03 (8th Cir. 2018). In focusing on the "individuals protected," Section 2's "right of any citizen" language creates an "implication of an intent to confer rights on a particular class of persons," *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (citation omitted). *See also Wisniewski v. Rodale, Inc*., 510 F.3d 294, 302 (3d Cir. 2007) ("With an explicit reference to a right and a focus on the individual protected, this language suffices to demonstrate Congress's intent to create a personal right."). Section 2 also identifies the "class of beneficiaries," *Talevski*, 599 U.S. at 183, to which plaintiffs belongs—individuals denied the right to vote "on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b)." 52 U.S.C. § 10301(a). Section 2 goes on to provide that a violation is established if political processes are not equally open to "members of a class of citizens" so protected. 52 U.S.C. § 10301(b). This is exactly the type of "rights-creating," individual-centric language with an "unmistakable focus on the benefited class" the Supreme Court has referred to. *Talevski*, 599 U.S. at 183.[4]

The Eighth Circuit acknowledged this in *Arkansas State Conference NAACP*, citing this same language and noting that it "unmistakabl[y] focus[es] on the benefited class": those subject

[4] In this regard, Section 2 parallels Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d—a statute the Supreme Court has pointed to as an exemplar of "rights-creating" language. *Sandoval*, 532 U.S. at 288–89; *League of United Latin Am. Citizens v. Abbott*, 2021 WL 5762035, at *1 & n.1 (W.D. Tex. 2021) ("*LULAC* II") (noting that § 601 of Title VI "seems to mirror Section 2" of the VRA).

to discrimination in voting." 2023 WI 8011300, at *4 (brackets in original). But in *dicta*,[5] the court noted that the opening sentence of Section 2(a) "focuses on what states and political subdivisions cannot do, which is "impose[] or apply[y]" discriminatory voting laws." *Id.* (brackets in original). For this reason, the Eighth Circuit observed that "[i]t is unclear whether § 2 creates an individual right," *id.* at *3, because "[i]t is unclear what to do when a statute focuses on both" individual rights and what "states and political subdivisions cannot do," *id.* at *4.[6]

But the Supreme Court expressly answered that precise question in the context of § 1983 in *Talevski*. The petitioners in *Talevski* contended that FNHRA did not create individual rights because it "establish[es] who it is that must respect and honor these statutory rights; namely, the Medicaid-participant nursing homes in which these residents reside." 599 U.S. at 185. The Supreme Court rejected the argument, reasoning "that is not a material diversion from the necessary focus on the nursing home residents" and that "it would be strange to hold that a statutory provision fails to secure rights simply because it considers, alongside the rights bearers, the actors that might threaten those rights (and we have never so held)." *Id.* The Court emphasized the point with an example: "[t]he Fourteenth Amendment hardly fails to secure § 1983-enforceable rights because it directs state actors not to deny equal protection." *Id.* at 185 n.12. *Talevski* controls the § 1983 analysis in this regard.

For decades, "[b]oth the Federal Government and individuals have sued to enforce § 2," seeking injunctive relief "in appropriate cases to block voting laws from going into effect." *Shelby Cnty.*, 570 U.S. at 537. Since 1982, more than 400 Section 2 cases have been litigated in federal

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[5] The Eighth Circuit's discussion of whether Section 2 creates an individual right is *dicta* because the court did not base its holding on the presence of an individual right. *See Ark. State Conf. NAACP*, 2023 WL 8011300, at *4, *see Boaz v. United States*, 884 F.3d 808, 810 (8th Cir. 2018) (explaining that statements not necessary to the court's holding are *dicta*).

[6] The Secretary does not rely on this *dictum* in his stay motion.

court. And private plaintiffs have been the primary driver of Section 2 litigation.[7] The Supreme Court has heard at least 11 Section 2 cases since 1982 in which private plaintiffs have participated.[8] Over the past forty years, there have been at least 182 successful Section 2 cases; of those 182 cases, only 15 were brought solely by the Attorney General.[9]

Section 2 of the VRA unambiguously conferred individual rights on the Plaintiffs here.

2. Section 2 does not create "aggregate rights."

The Secretary contends that although Section 2(a) "appears, on a glance, to describe individual rights," it actually "only confers rights on minority groups in the ***aggregate.***" Doc. 132 at 8 (emphasis in original). This is so, the Secretary contends, because Section 2(b) provides that a violation of Section 2(a) occurs when elections are not "equally open to participation by ***members of a class of citizens*** protected by subsection (a)." Doc. 132 at 9 (emphasis in original). According to the Secretary, "Congress's addition to the language in subsection (b) thus starkly de-individualized the Section 2 right." Doc. 132 at 9.

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[7] *See* Ellen D. Katz et al., Section 2 Cases Database, Univ. of Mich. L. Sch. Voting Rights Initiative (2022), https://voting.law.umich.edu/database (hereinafter "Katz Study") (VRI_Dataset_2021.12.31 listing 439 electronically-reported cases with judicial decisions between 1982 and 2021 addressing a substantive Section 2 claim).

[8] *See e.g., Brnovich*, 141 S. Ct. 2321; *Abbott v. Perez*, 138 S. Ct. 2305 (2018); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) ("*LULAC* I"); *Holder v. Hall*, 512 U.S. 874 (1994); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Growe v. Emison*, 507 U.S. 25 (1993); *Voinovich v. Quilter*, 507 U.S. 146 (1993); *Houston Lawyers' Ass'n v. Attorney General of Tex.*, 501 U.S. 419 (1991); *Chisom*, 501 U.S. 380; *Thornburg v. Gingles*, 478 UK.S. 30 (1986).

[9] *See* Katz Study, supra note 7, at Codebook, https://voting.law.umich.edu/wp-content/uploads/2022/02/VRI_Codebook.pdf (defining successful cases as those where "the ultimate outcome of the lawsuit was that a plaintiff achieved success on the merits by proving a violation of the VRA," or where "a positive real-world outcome could be determined from the opinions reviewed, e.g. a consent decree or a positive settlement").

The Court need not spend much time on this argument, because the Supreme Court has expressly rejected it. In *Shaw v. Hunt*, the Supreme Court rejected the argument that a Section 2 violation that is "proved for a particular area" of a state could be remedied by drawing a minority opportunity district elsewhere in the state, because Section 2 creates individual, not group, rights. 517 U.S. 899, 917 (1996).

> Arguing . . . that the State may draw the district anywhere derives from a misconception of the vote-dilution claim. To accept that the district may be placed anywhere implies that the claim, and hence the coordinate right to an undiluted vote (to cast a ballot equal among voters), belongs to the minority as a group and not to its individual members. It does not. *See* § 1973[[10]] ("the right of any citizen.").

Id.

That suffices to defeat the Secretary's argument. But even if the Supreme Court had not already rejected the Secretary's position, it would still fail because the Secretary misapprehends *Gonzaga*'s caution about statutes that have an "aggregate focus" to assert that the phrase means something that it does not. *Id*. at 9-10. By cherry picking language, the Secretary asserts that "rights must be individual, not aggregate." Doc. 132 at 8 (citing Gonzaga, 536 at 275; *Id*. at 10 (citing *Midwest Foster Care & Adoptions Ass'n v. Kincade*, 712 F.3d 1190, 1200 (8th Cir. 2013). But the Supreme Court recently confirmed that Spending Clause statutes that create federal rights must have an "unmistakable focus on the benefited class." *Talevski*, 599 U.S. at 183; *Gonzaga*, 536 U.S. at 284 (courts look at whether statute by its terms grants rights to "any identifiable class."). Thus, to create a right in the first instance, the statute must have some aggregate "benefit" or "identifiable" class in mind. Contrary to the Secretary's assertion, when courts discuss this aggregate focus question, it is not a dichotomy of individual rights against "aggregate minority group" rights, as the Secretary promotes. *Id*. at 9. Rather, it is a question about whether a given statute has a focus

[10] Section 2 was recodified after *Hunt* from 42 U.S.C. § 1973 to 52 U.S.C. § 10301.

on "aggregate services that are provided through spending clause legislation" as opposed to individual rights. *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1196 (8th Cir. 2013).

Moreover, if the Secretary's "aggregate right" theory were correct, then any member of the minority group would have standing to sue. But "[i]n vote dilution cases, the harm arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district." *Anne Harding v. County of Dallas, Tex.*, 948 F.3d 302, 307 (5th Cir. 2020); *see also Roberts v. Wamser*, 883 F.2d 617, 621 (8th Cir. 1989) (holding that plaintiff lacked standing under Section 2 because he did not allege that his "right to vote has been infringed because of his race"). And no one questions that Section 2 prohibits intentional discrimination as well as discriminatory effects. *See, e.g. Veasey v. Abbott*, 830 F.3d 216, 229 (5th Cir. 2016). For example, if a poll worker were to explicitly deny an individual the right to vote because they were American Indian or because their great grandfather was an American Indian, a successful Section 2 claim could be brought to vindicate that individual's Section 2 and Constitutional rights. *See*, *e.g.*, *Guinn v. United States*, 238 U.S. 347, 360–365 (1915) (grandfather clause); *Myers v. Anderson*, 238 U.S. 368, 379–380 (1915) (same). The Secretary's position is incompatible with this accepted law.

C. The Secretary has failed to show that enforcement of Section 2 under § 1983 is incompatible with the VRA's enforcement scheme.

"By its terms, § 1983 is available to enforce every right that Congress validly and unambiguously creates." *Talevski*, 599 U.S. at 192. Under the Court's Spending Clause analysis, once it is established that a statute protects individual rights, defendants cannot rebut the presumption that § 1983 provides a cause of action to enforce those rights unless they "demonstrate[] that Congress shut the door to private enforcement either [1] expressly, through specific evidence from the

statute itself" or "[2] impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Gonzaga*, 536 U.S. at 285 n.4 (quotation marks omitted); *see Talevski*, 599 U.S. at 186.

The Secretary does not contend that Congress expressly shut the door to private enforcement of Section 2 of the VRA under § 1983. As such, the Secretary must demonstrate that Congress impliedly foreclosed enforcement under § 1983 by creating a "comprehensive enforcement scheme *that is incompatible* with individual enforcement under § 1983." *Talevski*, 599 U.S. at 186 (emphasis in original) (internal citations and quotation marks omitted). But the Secretary merely contends that "Section 12 of the Voting Rights Act provides a comprehensive scheme to enforce Section 2 by the Attorney General" and therefore that private enforcement under § 1983 is precluded. Doc. 132 at 11. The Secretary fails to demonstrate that private enforcement of Section 2 claims under § 1983 would be "incompatible" with public enforcement of those claims by the Attorney General under Section 12. This is fatal to the Secretary's claim. *See*, *e.g., Talevski*, 599 U.S at 188 ("HHC's single-minded focus on comprehensiveness mistakes the shadow for the substance"); *see also*, *id.* at 188-89 ("§ 1983 can play its textually prescribed role as a vehicle for enforcing [statutory] rights, even alongside a detailed enforcement regime that also protects those interests, so long as § 1983 enforcement is not incompatible with Congress's handiwork."); *id.* at 187 (noting Court has described inquiry as whether § 1983 enforcement would be "incompatible," "inconsistent," or "thwar[t]" statutory enforcement scheme (bracket in original)).

The Secretary appears to suggest that because Section 2 lacks any express private right of action, Congress impliedly precluded private enforcement under § 1983. But this gets the Supreme Court's holdings backwards. The Court has found implicit preclusion of a cause of action under § 1983 in just three cases and has done so *only* where the rights-creating statute contains an express

private right of action. *See Talevski*, 599 U.S. at 189 (finding that the "incompatibility evinced in our three prior cases finding implicit conclusion" turned on the fact that each statute had "a dedicated right of action" for private parties). Thus, the fact that Section 2 lacks an express private right of action confirms that Congress did *not* intend to preclude enforcement under § 1983. *Cf. City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) ("[T]he existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which we have held that an action would lie under § 1983 and those in which we have held that it would not."); *see also* Op. Denying Mot to Dismiss at 11, Doc. 30 ("An express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a remedy under 1983.") (*citing Blessing v. Freestone*, 510 U.S. 329, 341 (1997)). Absent its own express private enforcement scheme, the Secretary cannot show that Section 2 impliedly precluded private enforcement under § 1983.

This is because, as the Court recognized in *Talevski*, private enforcement under § 1983 is only "incompatible" with a statute's comprehensive enforcement scheme when it would allow plaintiffs to "circumvent[] . . . presuit procedures" and "give[] plaintiffs access to . . . remedies that were unavailable" under an express private right provided for in the underlying statute. *Id.* at 189.[11] Here, because there is no express private right of action under Section 2, there is no concern that § 1983 enforcement would supplant the "careful congressional tailoring" evidenced by "a private judicial right of action" or a "federal administrative remedy." *Talevski*, 599 U.S. at 190.

[11] Notably, the VRA's enforcement provisions explicitly state that there are no mandatory administrative exhaustion requirements for persons suing to enforce the VRA. 52 U.S.C. § 10308(f) ("The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of chapters 103 to 107 of this title shall have exhausted any administrative or other remedies that may be provided by law.").

Because private enforcement under § 1983 merely "complement[s]" rather than "supplant[s]" the enforcement scheme set forth in the VRA, the Secretary cannot demonstrate that private enforcement is impliedly precluded. *Id.*[12]

Moreover, when Congress amended Section 2 to cover discriminatory results claims in 1982, it would have been especially cognizant of § 1983's application to the law. The Supreme Court had just two years prior clarified that § 1983 applied to statutes—especially Reconstruction Act enforcement ones—and not just constitutional claims. *See Thiboutot*, 448 U.S. at 7. There would have been no reason to expressly provide for a cause of action in the Act itself.[13]

Next, the Secretary faults this Court for its conclusion that decades of simultaneous VRA enforcement by private parties and the Department of Justice indicates that there is no incompatibility between public and private enforcement of the VRA. Doc. 132 at 12. The Secretary claims that because these suits did not address the question of whether there was a private right of action under the VRA, they cannot "control the analysis in a case where the question is actually presented." *Id*. But this Court did not decide whether there was a private right of action under the VRA, and that question—while preserved by Plaintiffs—is not currently presented here. Instead, the Court is tasked with determining whether private enforcement of Section 2 under § 1983 is "incompatible" with the VRA's express provisions governing public enforcement. It was not error

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[12] The Secretary faults this Court for, in its order denying its motion to dismiss, failing to show why the VRA was an "atypical situation" warranting a private remedy. Doc. 132 at 11. But the case cited by the Secretary, *Cannon v. University of Chicago*, 441 U.S. 677 (1979), is not about § 1983, which has a different test than courts apply to find an implied right of action.

[13] The Eighth Circuit highlighted the Civil Rights Act of 1964 as a law that expressly provides a private right of action. *Ark. State Conference NAACP*, 2023 WL 8011300, at *3. But § 1983 by its terms does not apply to the hotels, restaurants, stores, and other privately-owned public accommodations regulated by the Civil Rights Act of 1964 because those entities are not government officials acting under color of law. 42 U.S.C. § 1983. Whatever relevance that law has in the implied right of action analysis, it is not relevant to the § 1983 analysis.

for this Court to consider the fact that private actions to enforce Section 2 have coexisted with DOJ enforcement for decades without conflict in concluding that the two are not incompatible.

Finally, the Secretary contends that this Court was wrong to cite the VRA's fee-shifting provision, 52 U.S.C. § 10310(e), as evidence that the VRA anticipates litigation by private plaintiffs. Doc. 132 at 11-12. The Secretary's argument—that § 10310(e) only applies to suits that "directly" enforce the Fourteenth and Fifteenth Amendment—is misplaced. The statute does not use the word "directly," and the Supreme Court has held that statutes prohibiting discriminatory effects *do* enforce the amendments. *See e.g.*, *Lane*, 541 U.S. at 520; *see also Dillard v. City of Greensboro*, 213 F.3d 1347, 1353 (11th Cir. 2000) (holding that § 10310(e) applies to prevailing plaintiffs under Section 2 because that statute enforces the "voting guarantees of the Fourteenth and Fifteenth Amendments"). In any event, this Court need not—and given the Eighth Circuit's reasoning, *see Ark. State Conference NAACP*, 2023 WL 8011300, at *7 n.4—should not, rely upon § 10310(e) at this stage. The fee-shifting provision was a minor point in this Court's motion-to-dismiss order—and that point is not dispositive to the pertinent inquiry of whether § 1983 is *incompatible* with the VRA's enforcement scheme. Plaintiffs who prevail in a § 1983 suit to enforce Section 2 are eligible for fees under 42 U.S.C. § 1988, and because both § 1988 and § 10310(e) confer fee awards on the "prevailing party," the two cannot be incompatible with each other. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598, 603 & n.4 (2001) (explaining that the Supreme Court has treated the phrase "prevailing party" consistently across the U.S. Code in fee-shifting provisions, citing in particular the VRA provision and § 1988).

III. The Secretary cannot establish an irreparable harm absent a stay.

The Secretary asserts that that the State would be irreparably harmed absent a stay because this case involves redistricting and the Court's final judgment against the Secretary resulted in a

permanent injunction against the use of legislatively enacted discriminatory districts. While it may be true that a state may suffer some form of injury when its laws are enjoined, it is also true that states asserting that type of injury have typically made at least some showing that the laws in question were validly enacted and the state is likely to succeed in demonstrating that on appeal. Here, however, the Secretary contends only that he is likely to succeed in showing that the Attorney General has to sue him. The Secretary has made no showing that the challenged districts were in fact lawfully enacted and that he is likely to succeed in demonstrating that on appeal. Having failed entirely to make that showing, the Secretary also cannot demonstrate that he would be irreparably harmed if the injunction against those districts remains in place.

Regardless, "[a] stay is not a matter of right, even if irreparable injury might otherwise result." *Nken*, 556 U.S. at 433 (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)). Rather, a stay is "'an exercise of judicial discretion' and '[t]he propriety of its issue is dependent upon the circumstances of the particular case.'" *Id*. If an irreparable injury of the type asserted by the Secretary were sufficient to justify a stay, judgments against states would be automatically stayed, and there would be no need for the *Nken* factors. *Cf. Allen v, Milligan*, 600 U.S. __, 23A241 (U.S. Sept. 26, 2023) (order denying application for a stay of court-ordered remedial redistricting plan pending appeal). As such, the mere fact that the injunction implicates state law is not sufficient to meet the Secretary's burden under *Nken*.

Next, the Secretary claims that the State would be irreparably harmed absent a stay because there is not sufficient time under the Court's original schedule for a remedial plan to be adopted and approved without disrupting the 2024 elections. As such, the Secretary asserts that the *Purcell* principle counsels in favor of a stay. But the Secretary's *Purcell* concerns, though catalogued in exhaustive detail, are entirely resolved by Plaintiffs' proposed amendments to the remedial

schedule. *See* Mot. to Amend Remedial Plan, Doc. 134. Under Plaintiffs' proposed schedule, if the Legislature declines to adopt a plan to remedy the discriminatory effects of Districts 9, 9A, 9B, and 15 by the Court's deadline of December 22, 2023, as seems likely, *see* Mot. to Amend at 2, Plaintiffs' Demonstrative Plan 1 will be ordered into effect as the remedial plan. If the Legislature changes course and adopts a remedial plan by December 22, Plaintiffs have proposed an expedited schedule for the parties and the Court to review the plan in advance of the December 31 deadline. Either way, Plaintiffs' proposed schedule would ensure that a remedial map is in place by December 31—the date identified by the Secretary as the final deadline for the election map to be finalized. *See* Mem. in Support of Mot. to Stay at 2, Doc. 132. The Supreme Court has vacated a stay issued by a court of appeals on *Purcell* grounds where the district court abided by the deadline suggested by the state. *See Rose v. Raffensperger*, 143 S. Ct. 58 (2022) (Mem.).

To be clear, Plaintiffs disagree that December 31 is the deadline for relief after which *Purcell* concerns arise. January 1 is merely the *opening* of candidate signature gathering—candidates have over three months to collect signatures. Doc. 132 at 19; N.D.C.C. § 16-1-11-06, 16.1-11-15. Legislative candidate must collect the signature of just 1% of the total population of their districts. *Id.* § 16-1-11-06(1)(b)(3)(d). The ideal population of a North Dakota senate district is 16,576. So candidates must collect around 166 signatures. The suggestion that it would cause confusion and disrupt the electoral process if candidates from the three or four affected districts have from late January through April 8—rather than from January 1—to collect 166 signatures is simply not credible. And the Supremacy Clause means that precinct adjustments necessary to implement the Court's order could after December 31. *See* N.D.C.C. § 16.1-04-01(3). Although the existing remedial schedule causes the Secretary no irreparable harm, the Court should grant Plaintiffs' motion to amend it to eliminate the Secretary's *Purcell* arguments.

Even if a remedial plan is in place by December 31, the Secretary suggests that *Purcell* may remain at issue because there is not sufficient time for the appellate process to play out before December 31. But that was so in *Rose* too, and the Supreme Court did not permit a stay on that basis. *See id.* Instead, the Court remanded for the Eleventh Circuit to consider the request for a stay "on the traditional stay factors and a likelihood of success on the merits." *Id.* Every injunction is effective upon issuance unless the stay factors are met. The operation of injunctions pending appeal is the rule; a stay is the exception. The general rule is especially applicable where, as here, the Secretary is not seeking a stay on the merits of the case.

IV. Plaintiffs would be substantially injured by allowing discriminatory maps to remain in place for the 2024 elections.

Plaintiffs would face substantial injury if the Court were to stay its judgment and allow the 2024 elections to take place under discriminatory maps. The right to vote is the "fundamental political right . . . preservative of all rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). Plaintiffs have proven after a full trial on the merits that Districts 9, 9A, 9B, and 15 "deny or abridge" the right to vote of the individual Plaintiffs and the members of the Plaintiff tribes by denying them the opportunity to elect candidates of their choice to the North Dakota state legislature on account of their race. Forcing Plaintiffs to endure another election tainted by vote dilution and discrimination would be unconscionable and constitutes not only a substantial injury but an irreparable harm in its own right. *See, e.g.*, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("Courts routinely deem restrictions on fundamental voting rights irreparable injury" in part because "once the election occurs, there can be no do-over and no redress."); *Portz v. St. Cloud State Univ.*, 196 F. Supp. 3d 963, 973 (D. Minn. 2016) ("[W]hen the constitutional right at issue is protected by the Fourteenth Amendment, the denial of that right is an irreparable harm regardless of whether the plaintiff

seeks redress under the Fourteenth Amendment itself or under a statute enacted via Congress's power to enforce the Fourteenth Amendment.").

The Secretary asserts, however, that Plaintiffs will not be irreparably harmed, because in his view, Plaintiffs had no right to challenge the discriminatory maps in the first place. But it is indisputable that even if Plaintiffs lacked a cause of action bring their case—they did not—that would not transform discriminatory districts into lawful ones. As such, Plaintiffs are harmed by the State's infringement on the fundamental right to vote regardless of whether they or the Attorney General can sue for relief. The Secretary cannot seriously suggest that using a procedural loophole to continue subjecting the individual Plaintiffs and the members of the Plaintiff Tribes to open and ongoing discrimination at the hands of the State imposes no substantial harm.

Finally, the Secretary contends that because Plaintiffs have already been subjected to unlawful maps for one election cycle, they cannot show that irreparable harm. But that compounds rather than mitigates their injury. And the Secretary's suggestion that Plaintiffs somehow acquiesced to voting under discriminatory maps in 2022, despite the fact that Plaintiffs challenged the maps as violative of federal law in this Court nine months before the election took place, is astonishing. And it is particularly disingenuous given that the Secretary concedes that Plaintiffs moved promptly to secure their rights when they filed suit, yet asserts that, nearly two years later and nearly one year out from the next election, it is already too late for Plaintiffs to obtain relief for 2024.

V. The public interest weighs against allowing discriminatory maps to remain in place for the 2024 elections.

The public interest also weighs against allowing discriminatory maps to remain in place for the 2024 elections. Like Plaintiffs, election officials, candidates, voters, and the general public all have an obvious interest in elections that are free from discrimination on the basis of race.

Moreover, having forgone any attempt to demonstrate that he is likely to prevail in showing that the challenged districts are nondiscriminatory, the Secretary cannot in good conscience claim that the public interest would be served by keeping them in place pending appellate review.

Nor is there any risk of harm or confusion to the general public absent a stay. As noted above, Plaintiffs' proposed amendments to the remedial schedule will ensure that a remedial map is in place by December 31, the deadline the Secretary has identified to ensure that the 2024 elections are not affected.

Finally, given that the Secretary's justification for the stay rests solely on procedural arguments rather than the merits of the judgment against him under Section 2, he cannot show that the public interest would be injured by holding the 2024 elections under maps that are fair and nondiscriminatory while the appeals process plays out. Even if the Secretary were to ultimately prevail on his novel procedural argument, the Legislature is on notice that Districts 9, 9A, 9B, and 15 violate Section 2 of the VRA. A procedural victory would not relieve the Legislature of its statutory obligation to draw nondiscriminatory maps. Indeed, leaving in place districts that are known to have a discriminatory effect on Native Americans would risk claims that the Legislature was engaged in intentional discrimination on the basis of race. Only a reversal on the merits would result in leaving the enjoined maps in place, and the Secretary has not even attempted to demonstrate that such an outcome is likely such that he warrants a stay. Allowing a court-ordered remedial map to go into effect pending appeal serves the public interest under these circumstances. And this is particularly so if the Legislature forgoes the opportunity to draw its own map.

VI. The Court is bound by *Nken*.

Finally, it is worth addressing the Secretary's assertion that there is a separate framework for analyzing stays in cases where *Purcell* is implicated. First, there is no need for the Court to

reach this issue because, as discussed above, adopting Plaintiffs' proposed remedial schedule would vitiate any concerns under *Purcell*, and thus render the Secretary's proposed alternative framework inapplicable. Second, the framework relied on by the Secretary, which shifts the burden to Plaintiffs to oppose a stay under a heightened standard, has not been adopted by the Supreme Court or the Eighth Circuit and is expressly precluded by *Nken*, which controls here. *See*, *e.g.*, 566 U.S. at 433-34 ("The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion."). While more clarity on when *Purcell* applies would be helpful, and the framework proposed by Justice Kavanaugh in *Merrill* may "provide helpful guidance," in determining when it applies, *Walen v. Burgum*, No. 1:22-CV-31, 2022 WL 1688746, at *5 (D.N.D. May 26, 2022), *Nken* still controls. As such, demonstrating that the extraordinary remedy of a stay is warranted is the Secretary's burden under the relevant and controlling *Nken* factors. Moreover, even assuming there is an additional framework to consider under *Purcell*, nothing in Justice Kavanaugh's concurrence suggests that framework relieves the party seeking a stay from their obligations under *Nken*, nor could it.

Regardless, Plaintiffs easily meet the Secretary's test. To begin, the Secretary does not contend that the test applies to the merits of Plaintiffs' Section 2 claim, but rather only to the § 1983 question. But the underlying merits of Plaintiffs' § 1983 cause of action to enforce Section 2 are similarly clearcut, as addressed above. The Secretary's novel theory to the contrary is not only untested but unfounded in context or case law. The merits could not be more clearcut in Plaintiffs' favor on this issue.

Third, Plaintiffs would suffer irreparable harm if a stay were entered. *See supra* Part IV.

Fourth, as the Secretary concedes, Plaintiffs did not unduly delay in seeking relief, and in fact have sought at every opportunity to ensure that this case would be decided in time to avoid

any potential disruption to the 2024 elections. These efforts include expediting their response to the stay motion and seeking to amend the remedial schedule to resolve the Secretary's concerns.

Finally, the Secretary concedes that the changes in question are feasible so long as the remedial map is in place by December 31, as it would be under Plaintiffs' proposed schedule. Nor do the changes necessary to remedy Plaintiffs' injuries impose significant costs, confusion, or hardship on the Secretary. *See* Mot. to Amend Remedial Plan at 4-5 (explaining that the minimum changes necessary to remedy the violations alleged by Plaintiffs require altering just two precinct lines and just four of the districts in the 2021 plan). As such, even under the Secretary's proposed test, a stay is not justified here.

CONCLUSION

For the foregoing reasons, the Court should deny the Secretary's motion to stay its final judgment pending appeal.

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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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