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

NORTH DAKOTA LEGISLATIVE ASSEMBLY'S BRIEF IN SUPPORT OF 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

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I. INTRODUCTION

The North Dakota Legislative Assembly ("Assembly") submits this motion to protect its well-established right to draw its legislative districts. "It is true, of course, that 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). 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). In fact, 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 v. Lipscomb, 437 U.S. 535, 539 (1978). This is why 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 Assembly has not been afforded a "reasonable opportunity" to adopt a remedial plan.

The Assembly's "opportunity" – as provided by the Court - is unreasonable, unrealistic, and illusory. The Plaintiffs' Motion to Amend Remedial Plan acknowledges this is true. Doc. 134 at pp. 2 n.1, p. 3 n.2. Seizing this opportunity, Plaintiffs impermissibly request the Court further obstruct and impede the Assembly's ability to perform its redistricting duties as required by the North Dakota Constitution. See Growe v. Emison, 507 U.S. 25, 34 (1993) ("[A] federal court must neither affirmatively obstruct state [redistricting] nor permit federal litigation to be used to impede it."); see also Doc. 134.

On December 5, 2023, Legislative Management appointed an interim redistricting committee and authorized a Request for Proposal ("RFP") to retain a redistricting expert. This meaningful attempt at due diligence - and compliance with its state constitutional duties - will be an act of futility if this Court does not allow the Assembly a reasonable opportunity to act. The Assembly hereby submits this Brief in Support of Motion to Intervene, Joinder in the Secretary's Motion for Stay of Judgment Pending Appeal (Doc. 131), and Response to the Plaintiffs' Motion to Amend Remedial Order (Doc. 134).

II. FACTS

More than five months after conclusion of trial, this Court issued its November 17, 2023, "Findings of Fact and Conclusions of Law" and entered judgment. Doc. Nos. 112, 125, 126. After noting this was "a closer decision than suggested by the Tribes" the Court ordered the "Secretary and Legislative Assembly shall have until December 22, 2023, to adopt a plan to remedy the violation of Section 2." Doc. 125 at p. 39.

Secretary Howe filed a Notice of Appeal and Motion for Stay of Judgment Pending Appeal on December 4, 2023. Doc. 130, 131. Secretary Howe's motion is supported – in part – by the Eighth Circuit's recent holding that Section 2 of the Voting Rights Act does not provide a private

right of action in Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment, —F.4th—, 2023 WL 8011300 (8th Cir. Nov. 20, 2023). Doc. 132 at p. 2.

Representative Lefor, Chairman of the Legislative Management, called a meeting of the Legislative Management and Legislative Council posted notice on November 30, 2023[1]. Affidavit of Emily Thompson ("Thompson Aff'd."), Exhibit # 1. Legislative Management met on December 5, 2023. Id., Exhibit # 2. During this meeting, Chairman Lefor appointed an interim redistricting committee. Id. Further, Legislative Management approved an RFP to retain an expert statistical consultant to aid in development of a remedial plan. Id.

In an apparent response to Legislative Management's meeting, Plaintiffs filed their "Motion to Amend Remedial Order" and "Motion to Expedite" approximately six and a half hours after Legislative Management adjourned[2]. See Doc. 134, 135, Thompson Aff'd., Exhibit # 2. Plaintiffs' Motion to Amend seeks "an order to clarify that **Plaintiffs' Demonstrative Plan 1** will be ordered into effect as the remedial plan if the Legislature does not adopt, and the Governor does not sign into law,[2] an alternative remedial plan by December 22, 2023." Doc. 134 at pp. 2-3 (emphasis and footnote in original). Footnote 2 of the Plaintiffs' motion acknowledges the Court must provide "an opportunity for the Legislature to enact (through the state's normal process-here bicameralism and presentment) a remedial plan." Id. at p. 3 n. 2. The Plaintiffs' motion further made numerous references to the "Secretary's representations" (Id. at p. 2), despite the Secretary's clarification that he "does not purport to speak for on behalf of the Legislative Assembly." Doc.

[1] The District Court issued its Order on Friday, November 17th; however, Thanksgiving fell on November 23rd. Legislative Management consists of 17 members of the Legislative Assembly.

[2] Per the Notice of Electronic Filing, the Plaintiffs filed Doc. 134 at 5:28 p.m. and Doc. 135 at 5:29 p.m. central time on December 5, 2023. Legislative Management's meeting adjourned at approximately 10:57 a.m. central time on December 5, 2023. Plaintiffs noted the actions taken by Legislative Management merely hours before they filed their motions. Doc. 134 at p.2 n.1.

No. 132 at p. 17, n.2. As explained below, the Secretary was correct to provide such a disclaimer.

Additionally, Plaintiffs requested the Court set an expedited deadline of December 8, 2023, for the Secretary to respond to their Motion to Amend Remedial Order. Doc. 135. The Court granted the Plaintiffs' motion to expedite and required a response be filed by the Plaintiffs' proposed deadline. Doc. 136. The Court's December 22, 2023 deadline for the Assembly and Secretary Howe to "adopt" a remedial plan presents a legal impossibility and does not provide the Assembly a reasonable opportunity to carry out its duties.

A. Summary of Applicable North Dakota Law.

Plaintiffs acknowledge the Assembly must be afforded an opportunity to enact a remedial plan through its normal legislative process. See Doc. 134 at p. 3 n. 2. However, the deadline imposed by the Court deprives the Assembly of this requirement.

1. The North Dakota Constitution vests redistricting powers to the Assembly

The North Dakota Constitution provides the power to establish legislative districts rests with the Assembly. N.D. Const. Art. IV § 2 ("The legislative assembly shall…divide the state into as many senatorial districts of compact and contiguous territory as there are senators.") Section 2 of the North Dakota Constitution also provides the "legislative assembly shall guarantee, as nearly as is practicable, that every elector is equal to every other elector in the state in the power to cast ballots for legislative candidates." Id. Further, the "legislative assembly shall enact all laws necessary to carry into effect the provisions of this constitution." N.D. Const. Art. IV § 13. "No bill may become law except by a recorded vote of a majority of the members elected to each house." Id.

In accordance with the above constitutional provisions, North Dakota law contains numerous legislative redistricting requirements. See N.D.C.C. § 54-03-01.5. North Dakota's

legislative districts are enacted into state law. N.D.C.C. § 54-03-01.14. However, the legislative districts of North Dakota cannot be imposed by the Assembly's decree. Rather, the North Dakota Constitution provides an extensive system of checks and balances.

2. The North Dakota Constitution's constraints on the Assembly's power.

The United States Supreme Court recently acknowledged "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto." Arizona State Legislature v. Arizona Ind. Redistricting Com'n., 576 U.S. 787, 808 (2015). North Dakota's prescriptions for lawmaking also include the referendum and Governor's veto. See N.D. Const. Art. III § 1 and Art. V § 9. However, if neither of these unlikely events occur, the soonest a bill could become law is if the Governor orders a special session, in which case the effective date of the law is substantially accelerated.[3] N.D. Const. Art. IV § 13.

3. The Assembly's ability to meet is limited by the North Dakota Constitution.

Unlike most states, the Assembly's ability to meet in regular session is limited to 80 natural days during the biennium. N.D. Const. Art. IV § 7. The Assembly has only 5 natural days remaining during this biennium and can only reconvene as determined by Legislative Management. See N.D.C.C. § 54-03-02(3). Alternatively, the North Dakota Constitution allows only the governor to "call special sessions of the legislative assembly." N.D. Const. Art. V § 7.

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[3] Every law enacted by the Assembly - during its regular session - becomes effective August 1st after its filing with the secretary of state, "or if filed on or after August first and before January first of the following year ninety days after its filing" or a subsequent date as specified in the law. N.D. Const. Art. IV § 13. An exception applies if two-thirds of the members elected to each house declare an emergency measure and includes such declaration in the Act. Id. Alternatively, "[e]very law enacted by a special session of the legislative assembly takes effect on a date specified in the Act." Id.

While Legislative Management may vote to "request the governor call a special session of the legislative assembly," it cannot force the governor to do so. See Id.; N.D.C.C. § 54-03-02.2.

In sum, the Assembly's ability to enact redistricting legislation is not fully within its control. What is absolutely clear is that compliance with the Court's order is impossible as Secretary Howe has no authority to "adopt" redistricting legislation. See Doc. 125 at p. 39; Doc. 126 at p. 2.

4. Various other statutes impact North Dakota elections.

In addition to the above constraints, North Dakota law also provides various timing requirements in advance of elections. These statutory requirements were explained at length by the Secretary. Doc. 132 at *passim.* Therefore, those requirements will not be restated.

III. LAW AND ARGUMENT

The Assembly's request to be heard in this litigation is directly supported by Eighth Circuit precedent recognizing "[f]ederal courts are reluctant to devise and impose redistricting and reapportionment plans, because such tasks are traditionally performed by legislative bodies." Williams v. City of Texarkana, Ark., 32 F.3d 1265, 1268 (8th Cir. 1994). In fact, when a federal court declares a plan violates federal law, 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. (quoting Wise, 437 U.S. at 540 (1978) (emphasis added). The Assembly has a strong interest in doing so 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." Id. However, "the district court must fashion a remedial plan" if the Assembly declines to propose a remedy. Id.

The Plaintiffs' Motion to Amend Remedial Order is a clear attempt to usurp these requirements as it impermissibly requests the Court impose their demonstrative map on the North Dakota electorate by judicial fiat. Doc. 134 at pp. 2-3. This is clearly not what is intended by the Voting Rights Act. See Shaw v. Hunt, 517 U.S. 899, 917 n.9 (1996) (Explaining a § 2 plaintiff does not have "the right to be placed in a majority-minority district once a violation of the statute is shown. States retain broad discretion in drawing districts to comply with the mandate of § 2."); Bush v. Vera, 517 U.S. 952, 978 (1996) ("[W]e adhere to our longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting plan...the States retain a flexibility that federal courts enforcing § 2 lack...by respecting their own traditional districting principles, and insofar as deference is due to their reasonable fears of, and to their reasonable efforts to avoid, §2 liability.") This is because a federal court must not permit federal litigation be used to impede the Assembly's redistricting duties. Growe, 507 U.S. at 34.

The Court's December 22, 2023 deadline deprives the Assembly of a "reasonable opportunity" to adopt "a substitute measure" as required by binding precedent. Williams, 32 F.3d at 1268 (8th Cir. 1994); see also Bone Shirt, 461 F.3d 1011, 1022 (8th Cir. 2006) ("As required, the defendants were afforded the first opportunity to submit a remedial plan.") Further, the Plaintiffs' Motion to Amend Remedial Order impermissibly seeks to deprive the State of its important sovereign redistricting interest. See Shaw, 517 U.S. at 917 n.9; Bush, 517 U.S. at 978. The Assembly submits this motion to protect its powers under the North Dakota Constitution, ensure the Court provides it the "reasonable opportunity" to adopt a redistricting plan, and protect its sovereign interests as recognized by binding case law.

A. The Assembly's Motion to Intervene

The Assembly has a strong, well-recognized, and unique interest to protect at this stage of

this litigation. To be sure, the Assembly's and Secretary's interests were aligned through trial with respect to questions regarding whether Plaintiffs could satisfy *Gingles*. However, the initial inquiry under *Gingles* is only "designed to establish liability, and not a remedy." Bone Shirt, 461 F.3d at 1019; see also Cottier v. City of Martin, 445 F.3d 1113, 1117 (8th Cir. 2006) ("[T]he ultimate end of the first *Gingles* precondition is to prove that a solution is possible, and not necessarily to present the final solution to the problem." (citing Thornburg v. Gingles, 478 U.S. 30, 50 n. 17 (1986))) [4]. As explained above, the Assembly – not the Secretary - must be afforded a "reasonable opportunity" to adopt a "substitute measure" to remedy the asserted violation[5]. Williams, 32 F.3d at 1268 (8th Cir. 1994).

Legislative Management - not the Secretary - appointed an interim redistricting committee and authorized an RFP to procure a redistricting expert and ensure a remedial plan comports with both the requirements of § 2 and North Dakota's traditional redistricting principles. Redistricting is a legislative function and not within the Secretary's authority. See Arizona State Legislature, 576 U.S. at 808 (Explaining redistricting is a legislative function to be performed in accordance with a State's lawmaking procedures).

Further, this Court impermissibly ordered both the "Secretary and Legislative Assembly....to adopt a plan to remedy the violation of Section 2." Doc. 125 at p. 39. The Secretary has no power to "adopt" a redistricting plan. The Assembly – not the Secretary – is the only body vested with such power[6]. The Assembly must be allowed to intervene in this action to

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[4] Cottier was reversed on other grounds in Cottier v. City of Martin, 604 F.3d 553 (8th Cir. 2010) (en banc).

[5] The Assembly does not concede its existing plan violated Section 2 or that Plaintiffs met their burden to establish liability and preserves all arguments for appeal.

[6] However, this power is subject to the people's referendum and governor's veto. N.D. Const. Art. IV § 2, Art. III § 1, Art. V § 9; see also Arizona State Legislature, 576 U.S. at 808. The people of

protect its well-recognized unique redistricting interests.

Intervention is governed by Fed. R. Civ. P. 24 which provides the following in relevant part:

> **(a) Intervention of Right.** On timely motion, the court must permit anyone to intervene who:
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> **(1)** is given an unconditional right to intervene by a federal statute; or
>
> **(2)** claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.
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> **(b) Permissive Intervention.**
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> **(1)** ***In General.*** On timely motion, the court may permit anyone to intervene who:
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> **(A)** is given a conditional right to intervene by a federal statute; or
>
> **(B)** has a claim or defense that shares with the main action a common question of law or fact.
>
> **(2)** ***By a Government Officer or Agency.*** On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:
>
> **(A)** a statute or executive order administered by the officer or agency; or
>
> **(B)** any regulation, order, requirement, or agreement issued or made under the statute or executive order.

Fed. R. Civ. P. 24(a)-(b).

It is well-recognized the Assembly has an interest to propose a remedial plan. Williams, 32 F.3d at 1268; Bone Shirt, 461 F.3d at 1022. The Secretary does not represent the same interest as he has no authority to comply with the Court's directive. See N.D. Const. Art. IV § 2. If the Assembly is not afforded a "reasonable opportunity" to adopt a remedial plan, its ability to protect

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North Dakota has previously and successfully exercised the power of referendum to nullify apportionment legislation. See Chapman v. Meier, 420 U.S. 1, 12 (1975) (explaining the Assembly passed an apportionment act in 1973 providing for five multimember senatorial districts, however, it "promptly was suspended by a referendum petition" and the "Assembly's work to reapportion was thus nullified by the people.") Notably, the power to apportion is inextricably intertwined with the power to establish legislative districts. See N.D. Const. Art. IV at § 2; see also Williams, 32 F.3d at 1268 (acknowledging federal courts are reluctant to impose redistricting and reapportionment plans as they are to be performed by legislative bodies).

this interest will be not only be "impaired," but never recognized. The law does not allow for these circumstances. Williams, 32 F.3d at 1268; Bone Shirt, 461 F.3d at 1022. As a result, the Assembly is entitled to intervene as a matter of right under Fed. R. Civ. P. 24(a).

Alternatively, the Assembly's motion may be appropriately considered under Fed. R. Civ. P. 24(b). The Assembly has a claim for protecting its "reasonable opportunity" to adopt a remedial redistricting plan that complies with the North Dakota Constitution and the VRA. The Assembly clearly has an interest sufficient to justify intervention whether as a matter of right or permissively under Rule 24.

Further, the Assembly's motion is "timely" within the meaning of Rule 24. In Cameron v. EMW Women's Surgical Center, P.S.C., the Court held the Sixth Circuit should have permitted Kentucky's Attorney General to intervene pending *en banc* review even though the State's interests were previously defended by the Kentucky Secretary for Health and Family Services. 595 U.S. 267 (2022). The Court specifically held the Sixth Circuit's "assessment of timeliness was mistaken" when it found "the attorney general's motion was not timely because it came after years of litigation in the District Court and after the panel had issued its decision." Id. at 279. The Court explained "timeliness is an important consideration in deciding whether intervention should be allowed, see, *e.g.*, Fed. Rules Civ. Proc. 24 (a) and (b)(1), but timeliness is to be determined from all the circumstances, and the point to which a suit has progressed is ... not solely dispositive." Id. (quotations omitted) (cleaned up). Rather, "the most important circumstance relating to timeliness is that the attorney general sought to intervene as soon as it became clear that the Commonwealth's interests would no longer be protected by the parties in the case." Id. at 279-80 (quotation omitted). Although the attorney general's motion did not seek intervention until litigation has "proceeded for years, that factor is not dispositive. The attorney general's need to seek intervention did not

arise until the secretary ceased defending the state law, and the timeliness of his motion should be assessed in relation to that point in time." Id. at 280 (emphasis added).

In reaching this decision, the Court noted "our Constitution split the atom of sovereignty...The Constitution limited but did not abolish the sovereign powers of the States, which retained a residuary and inviolable sovereignty...Paramount among the States' retained sovereign powers is the power to enact and enforce any laws that do not conflict with federal law." Id. at 277 (quotations omitted) (emphasis added).

Further, "a State clearly has a legitimate interest in the continued enforceability of its own statutes...and a federal court must respect...the place of the States in our federal system...This means that a State's opportunity to defend its laws in federal court should not be lightly cut off." Id. (internal quotations and citations omitted). The Court continued as follows:

> The importance of ensuring that States have a fair opportunity to defend their laws in federal court has been recognized by Congress. Under 28 U.S.C. § 2403(b), when a state law "affecting the public interest is drawn in question" in any "court of the United States" and neither the State nor any state agency or officer is a party, the court must notify the state attorney general, and the State must be allowed to intervene. See also Fed. Rule Civ. Proc. 24(a)(1). Even if this provision is not directly applicable in this case because the secretary for Health and Family Services was still a party when the intervention motion was filed, it nevertheless reflects the weighty interest that a State has in protecting its own laws. The way in which Kentucky divides executive authority and the unusual course that this litigation took should not obscure the important constitutional consideration at stake.

Id. at 278 (emphasis added).

Under Cameron, the Assembly is allowed to intervene and protect its reasonable opportunity to exercise its sovereign power to enact laws - that do not conflict with federal law - by the development of a remedial plan. This is why an interim redistricting committee was appointed and Legislative Management authorized an RFP to retain an expert to aid in this process.

Further, the Assembly's interest – distinctly separate from the Secretary's – was not triggered until the Court found § 2 liability. As explained above, a clear distinction exists between a finding of § 2 liability and the development of a remedial plan. Bone Shirt, 461 F.3d at 1019; Cottier, 445 F.3d at 1117. It is clear the Assembly's interest in having a "reasonable opportunity" to adopt a "substitute measure" was not triggered until the Court found liability under § 2 and further placed under attack by the Plaintiffs' Motion to Amend Remedial Order. This motion is certainly "timely" and meets all the requirements for intervention under Fed. R. Civ. P. 24. See Cameron, 595 U.S. 277-80. Therefore, the Assembly's motion to intervene should be granted.

B. Joinder in the Secretary's Motion for a Stay of Judgment Pending Appeal

The Assembly agrees the legal rationale articulated in the Secretary's Brief in Support for Stay of Judgment Pending Appeal certainly justifies a stay and will not restate those legal arguments here. However, the Secretary's interests in administering the election – while certainly legitimate and important – are not the same as the Assembly's redistricting interests. These issues involve two separate branches of North Dakota's government. Much like the Secretary cannot "adopt" legislation, the Assembly cannot administer the 2024 election.

There are additional issues under the North Dakota Constitution to be considered. Obviously, as explained above, redistricting is a legislative function. However, the Assembly's duty to establish legislative districts is not satisfied by simply sitting down and drawing a map. The Assembly must ensure "every elector is equal to every other elector in the state in the power to cast ballots for legislative candidates." N.D. Const. Art. IV § 2. However, the Assembly is constrained by the following statutory requirements:

> A legislative redistricting plan based on any census taken after 1999 must meet the following requirements:

1. The senate must consist of forty-seven members and the house must consist of ninety-four members.
2. Except as provided in subsection 3, one senator and two representatives must be apportioned to each senatorial district. Representatives may be elected at large or from subdistricts.
3. Multimember senate districts providing for two senators and four representatives are authorized only when a proposed single-member senatorial district includes a federal facility or federal installation, containing over two-thirds of the population of the proposed single-member senatorial district.
4. Legislative districts and subdistricts must be compact and of contiguous territory.
5. Legislative districts must be as nearly equal in population as is practicable. Population deviation from district to district must be kept at a minimum. The total population variance of all districts, and subdistricts if created, from the average district population may not exceed recognized constitutional limitations.

N.D.C.C. § 54-03-01.5.

Additionally, the Assembly must also take into consideration the *Gingles* preconditions as well as the totality of circumstances test when developing a remedial plan to ensure it is afforded deference by the court and remedies the asserted violation. See Williams, 32 F.3d at 1268. This Court acknowledged the evaluation of Section 2 "is a complex, fact-intensive task that requires inquiry into sensitive and often difficult subjects." Doc. 125 at p. 38 (quoting Missouri State conf. of the Nat'l Ass'n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist., 201 F. Supp. 3d 1006, 1082 (E.D. Missouri 2016)). In fact, this Court reviewed the existing plan in excess of five months before issuing a decision. However, the Court only provided the Assembly – which is not in session - 35 days (including intervening holidays and weekends) to develop a remedial plan that complies with Section 2. This is not a "reasonable opportunity," but rather an illusory one.

Legislative Management acknowledges this issue requires expertise and is actively pursuing an expert to aid the newly appointed interim redistricting committee. This is reasonable

and necessary. See Caster v. Merrill, 2022 WL 264819 at *3 (N.D. Ala. Jan. 24, 2022) (In granting a motion for a stay, the district court ordered that if the Legislature were unable to pass a remedial plan in its timeframe the defendants were "to advise the court so that the court may retain (at the expense of the Defendants) an eminently qualified expert to draw on an expedited basis a map that complies with federal law for use in Alabama's 2022 congressional elections.") The Assembly cannot perform any meaningful due diligence under the Court's current schedule.

This Court recognized "the Legislative Assembly did carefully examine the VRA and believed that creating subdistricts in district 9 and changing the boundaries of districts 9 and 15 would comply with the VRA." Doc. 125 at p. 38. This is undoubtedly true; however, despite its best efforts, this Court found "those efforts did not go far enough to comply with Section 2." Id. A common sense reading of the Court's decision indicates the Assembly needs to go further to develop a redistricting plan for the Court's satisfaction. The Assembly desires to do so, but it is impracticable to perform this task by December 22, 2023.

In sum, the Assembly seeks protection of its "reasonable opportunity" to develop a map that complies with traditional redistricting principles and this Court's interpretation of the VRA[7]. Establishing these districts dictates who is eligible to run for office. N.D. Const. Art. IV § 5 (All individuals "elected...to the legislative assembly must be, on the day of the election...a qualified elector in the district from which the member was selected...An individual may not serve in the legislative assembly unless the individual lives in the district from which selected.") Additionally, redistricting impacts the existing legislators and any individuals who wish to run for office or vote for their preferred candidate. This is why redistricting is a legislative function afforded to the

[7] As the Secretary correctly noted, recent Eighth Circuit case law provides a strong indication that Plaintiffs did not have the right to bring this lawsuit. See Doc. 132.

people's representatives and "federal courts are reluctant to devise and impose redistricting…plans." Williams, 32 F.3d at 1268. This is a serious issue, and the Assembly merely desires a reasonable opportunity to treat it as such.

Therefore, although for additional reasons than articulated by the Secretary, the Assembly joins in the Secretary's Motion for Stay of Judgment Pending Appeal. Doc. 131.

C. The Assembly's Response to Plaintiffs' Motion to Amend Remedial Order.

As explained above, the Plaintiffs' filed their Motion to Amend Remedial Order (Doc. 134) approximately 6 and a half hours after Legislative Management appointed an interim committee and authorized an RFP to procure an expert. Plaintiffs tacitly acknowledge this was a motivating factor for their motion. Doc. 134 at p. 2 n. 1. It is abundantly clear the Plaintiffs want this Court to simply adopt their Demonstrative Plan 1 on December 22, 2023. Their motion is clearly an attempt to further deprive the Assembly of any meaningful opportunity to enact a remedial plan through redistricting legislation. The Supreme Court does not condone this practice and this Court should follow its precedent. See Shaw, 517 U.S. at 917 n.9 (explaining a § 2 plaintiff does not have the right to be placed in their preferred district once a § 2 violation is established, but rather the States retain discretion to comply with § 2's mandate). This Court must not permit the Plaintiffs' litigation strategies to obstruct or impede the Assembly's right to perform its redistricting duties. Growe, 507 U.S. at 34.

The Supreme Court "repeatedly held" federal courts should "make every effort not to pre-empt" a legislative body's redistricting tasks. Wise, 437 U.S. at 539. The Plaintiffs openly request the Court ignore this long-standing Supreme Court precedent and impose their will on the North Dakota electorate. Supreme Court precedent clearly explains this task should only be assumed by the federal courts as a last resort, not because it is the most expedient or convenient option.

Nonetheless, that is exactly what Plaintiffs desire. The Plaintiffs' Motion to Amend Remedial Order should be denied.

IV. CONCLUSION

For the aforementioned reasons, the Assembly's Motion to Intervene should be granted, the Secretary's Motion for Stay of Judgment Pending Appeal (Doc. 131) should be granted, and Plaintiffs' Motion to Amend Remedial Order (Doc. 134) should be denied.

Dated this 8th day of December, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of December, 2023, a true and correct copy of the foregoing **NORTH DAKOTA LEGISLATIVE ASSEMBLY'S BRIEF IN SUPPORT OF 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** 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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