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 NONPARTY NORTH DAKOTA LEGISLATIVE ASSEMBLY'S EMERGENCY MOTION FOR EXTENSION

Plaintiffs oppose the Assembly's eleventh-hour request that this Court wait 49 more days before remedying the Section 2 violation. The Assembly's motion to intervene in this case was denied. It is not a party to this case. Yesterday, however—34 days into the 35-day remedial period—the Assembly filed an "emergency" motion asking this Court to delay imposition of a remedial map for another 49 days. Despite labeling its motion an "emergency," the Assembly did not seek to expedite briefing on its motion. When the Assembly filed this same request in the Eighth Circuit, the *Secretary* even opposed it, contending that such a delay would frustrate his administration of the 2024 elections. The Assembly has not shown why such a delay is warranted or appropriate. Its request should be denied.

ARGUMENT

"When a federal court declares an existing apportionment scheme [unlawful], it is . . . appropriate, whenever practicable, to afford a *reasonable opportunity* for the legislature to . . . adopt[] a substitute measure rather than for the federal court to devise and order into effect its own

plan." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (emphasis added). The Supreme Court has explained, however, that "[w]hen those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the unwelcome obligation of the federal court" to devise a remedy. *Id.* (internal citations and quotations omitted). The Assembly's request for an extension should be denied for several reasons.

First, this Court has provided the Assembly with a reasonable time to adopt a remedial plan. The Court permanently enjoined the Secretary's further implementation of Districts 9, 15, 9A, and 9B on November 17, 2023, and provided the Assembly until December 22, 2023—35 days—to adopt a remedial proposal and submit it to the Court for review. Doc. 125 at 39.[1] That period is more than reasonable. Indeed, it *exceeds* the time most courts provide legislative bodies to adopt remedial plans. For example, the Eighth Circuit has affirmed a district court's imposition of a Section 2 remedial plan that provided the government half as much time as this Court has afforded the Legislature here. *See Williams v. City of Texarkana*, 861 F. Supp. 756, 767 (W.D. Ark. 1992) (issuing liability determination on Sept. 29, 1992 and providing until Oct. 15, 1992 to submit remedial plans), *aff'd*, 32 F.3d 1265, 1268 (8th Cir. 1994) (affirming district court's imposition of remedial map). Following the Supreme Court's *Allen v. Milligan* decision this year, the district court provided the Alabama Legislature 31 days—4 fewer than this Court has provided here—to adopt a remedial plan; the Supreme Court has denied a stay of the subsequent remedial order. Order, *Caster v. Allen,* No. 2:21-cv-01536-AMM (N.D. Ala. June 20, 2023), Doc. 156, *stay denied*, *Allen v. Milligan*, __ S. Ct. __, 2023 WL 6218394 (U.S. Sept. 26, 2023) (Mem.). Courts

[1] This Court did not *order* the Assembly to adopt a new plan. *See* Doc. 157 at 2. Rather, it provided a reasonable period of time for the Assembly to adopt a plan—if it wished—after which time the Court would impose a remedial plan in the absence of a legislatively adopted plan. Federal courts cannot order state legislatures to enact or refrain from enacting laws. It can enjoin those laws, but it cannot order their passage or rejection.

across the country routinely provide less time than the district court has afforded the Legislature. *See, e.g.*, *Robinson v. Ardoin*, 37 F.4th 208, 232 (5th Cir. 2022) (affirming order providing 14 days); *Calvin v. Jefferson Cnty. Bd. of Comm'rs*, 172 F. Supp. 3d 1292, 1326 (N.D. Fla. 2016) (providing 16 days); *Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016) (providing 14 days); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1356 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004) (providing 19 days).

The Assembly contends that the Alabama legislature actually had 1.5 years to develop a remedial plan. Doc. 157 at 13. To reach this number, the Assembly counts the entire period in which the district court's preliminary injunction was stayed pending the Supreme Court's decision in *Milligan*. No one in Alabama would say that the legislature was studiously developing its remedial plan during this period—indeed, during the 31 days it was provided, it enacted a plan that flagrantly violated the Supreme Court's decision. But it did manage to adopt a plan in 31 days.

The Assembly's contention that it has not been afforded a reasonable opportunity to propose a remedy is unfounded. Apparently, the Assembly bet that the Eighth Circuit would stay this Court's decision, so it did not act until it was too late to do so. That was the Assembly's gamble to make, but it does not justify delaying the remedy in this case nor does it render the 35-day period this Court provided "unreasonable."

Second, the Assembly misunderstands the nature of the Court's December 22 deadline. It is not a deadline after which the Assembly is prohibited from adopting and filing with the Court a remedial plan for approval, rather it serves as a deadline on the *Court* after which it will no longer stay its hand and instead will undertake to impose a court-ordered plan in the absence of legislative action. The enacted plan is permanently enjoined; this Court is obligated to ensure that a lawful plan is in effect in advance of the existing, relevant statutory election deadlines. If the Assembly

were to—after December 22—adopt a map, submit it to the Court for review, and win approval of the map as compliant with Section 2, that map could be implemented for the next appropriate election in light of the timing and circumstances. The current deadline does not prohibit the Assembly from further action—it merely ensures that the *Court* will timely meet *its* obligation without disturbing existing election deadlines.

Third, the Assembly's shifting positions as to the relevant deadlines counsel against granting its request to delay the imposition of a court-ordered map. The Assembly proposes that the Court delay an additional *49 days* beyond the 35 it has already stayed its hand. Moreover, the Assembly proposes that the remedial briefing schedule extend even further. In its motion to the Eighth Circuit, it suggested the briefing schedule (currently set to end in mid-January were the Assembly to have proposed a plan by today's deadline) should extend through March 1, with a final remedial decision to come sometime thereafter. Now, the Assembly suggests this Court decide what briefing schedule would follow the requested February 9 deadline for the Assembly to adopt and file a remedial plan. Doc. 157 at 14.

This about-face is peculiar, because the Assembly joined the Secretary's arguments in seeking a stay—which focused in part on having a final map in place by December 31. With that date now attainable for a court-imposed map in light of its failure to act, the Assembly says—citing testimony from the Secretary's Elections Director—that "April 8th is the hard deadline for the state and counties to be able to successfully administer an election." Doc. 157 at 5. But two days ago, the Secretary filed an opposition to the Secretary's requested extension in the Eighth Circuit and explained that the Assembly was mischaracterizing the Elections Director's testimony—April 8 is the day that candidate nomination petitions are *due*—not the date the Secretary believes a map should be finalized. *See* Secretary's Howe's Response to Motion to

Extend Deadline at 3, *Turtle Mountain Band of Chippewa Indians v. North Dakota Legislative Assembly*, No. 23-3697 (8th Cir. Dec. 20, 2023). The Assembly does not explain why, after the Secretary *just* clarified this date in a court filing, it is still presenting April 8 to this Court as the date by which the Secretary believes a map must be finalized. In any event, it is troubling that the Assembly's representation to the Court on this timing issue changes depending upon whether it is opposing or seeking relief.

Fourth, the Assembly disingenuously and misleadingly suggests that one citizen who spoke at a redistricting committee meeting—Scott Davis—has altered the Turtle Mountain Band's position in this case. Doc. 157 at 4-5, 14. It says Mr. Davis spoke on behalf of the Tribe in objecting to a unified district with Spirit Lake. Doc. 157 at 4. This is both misleading and disrespectful to the Tribe. Turtle Mountain is a sovereign nation with an elected government. It speaks through its Chair and Tribal Council. Chairman Azure—together with Chairwoman Street from Spirit Lake—submitted written testimony to the Assembly three times since this Court's decision in this case. Each time they reiterated their support for Plaintiffs' proposed plans and a unified district—just as representatives for both Tribes testified at the trial in this matter. Indeed, their most recent written testimony clarified that only Chairman Azure, Chairwoman Street, and their duly authorized representatives, speak for the Tribes with respect to this litigation and the remedial process. Plaintiffs reiterated this in their response to the Assembly's Eighth Circuit motion for an extension earlier this week. *See* Appellees' Response in Opposition to Motion for Extension of Deadline, *Turtle Mountain Band of Chippewa Indians v. North Dakota Legislative Assembly* at 13-14 n.5, No. 23-3697 (8th Cir. Dec. 20, 2023). Yet the Assembly continues to file documents in Court that ignore the testimony submitted by the Tribes and their duly authorized representatives, in favor of a single citizen whose testimony supports the Assembly's position. And it continues to represent

that testimony as coming on behalf of the Turtle Mountain Band, despite knowing it to be untrue. This pattern is concerning.

In any event, it is worth taking time to consider the comments of Senator Judy Estenson, who presented this proposal to the committee at the December 20 meeting. The proposal—attached to the Assembly's motion as Map 4—eliminates the subdistricts from District 9 and alters District 9 by removing part of Towner County and adding part of Bottineau County. This *reduces* the Native American voting age population ("NVAP") of a district this Court has concluded is *already* a Section 2 violation. Then, it subdivides District 15 to create a subdistrict with a 44% NVAP extending from the Spirit Lake Reservation in Benson County into parts of Devil's Lake and rural southern Ramsey County. *See* Docs. 158-9 & 158-10. It violates this Court's decision on its face and would result in *zero* districts in which Native American voters could elect their candidates of choice.

Here is how Senator Estenson—who is the current senator for District 15, which includes the Spirit Lake Reservation area—spoke about the plan and her constituents. First, she asserted, referring to Spirit Lake's citizens, that "I think that Devil's Lake is more their community of interest than Turtle Mountain is." N.D. Leg. Redistricting Comm. Mt'g at 11:18 (Dec. 20, 2023), https://video.ndlegis.gov/en/PowerBrowser/PowerBrowserV2/20231220/-1/31927. Then, Senator Estenson said that drawing a 44% NVAP subdistrict as a "compromise" would

> get Spirit Lake the representation that they think they don't have. And I want to say – that they *think* they don't have. I have lived on the Reservation for over 40 years. I have lived in a community that serves them for forty years. I think their representation very much understands their culture and their people. So, I'm not sure that they don't have representation. But, if they think they don't, I think this gives them the opportunity to get it.

Id. at 11:18-:19. She acknowledged that the subdistrict would be below a majority NVAP but observed that "it certainly should improve their chances" and that "their vote would be less diluted

by the entire district . . . so it should be closer to allowing them a chance for the representation that they would like." *Id.* at 11:19-:20.

Then, commenting on the fact that her proposal would deprive Native American voters of an opportunity to elect a state senator, Senator Estenson observed that she did not think "one less senate seat is going to make any difference in the senate" and that "I think actually I can represent *those people*"—*i.e.*, the citizens of Spirit Lake—"better than whatever would be their preferred candidate." *Id.* at 11:30.[2]

Speaking about the enacted version of District 15—with its 23% NVAP—Senator Estenson commented that "I firmly believe they could have elected somebody different had they turned out to vote." *Id.* at 11:30. More: "I know many, many of these people and what happens out there is that there is a lot of disinterest other than by the Tribal government." *Id.* at 11:32. About her 2022 campaign against Plaintiff Collette Brown, Senator Estenson said that she "stepped onto that Reservation" to get votes. *Id.* at 11:34. Contrary to the testimony this Court heard at trial from Collette Brown, Senator Estenson asserted that her "challenger did not do *any* campaigning, anywhere. So when they say they can't win a race, you have to put forth the effort. And so I won that race. She still got over 30% of the vote. She got a very high percentage, obviously, from Benson County and the Reservation, but she also got a pretty decent percentage from Ramsey County. They *can* win." *Id.* at 11:34.

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[2] Senator Estenson was the deciding vote in the senate rejecting HB1491, which would have provided free school lunches to families at 200% of the federal poverty level and was advocated for by Spirit Lake tribal leaders. N.D. Leg., Journal of the 68th Leg. Assembly, 52nd day, at 1150-51 https://ndlegis.gov/assembly/68-2023/regular/journals/sr-dailyjnl-52.pdf. Speaking about the bill, Senator Estenson observed she had to "chuckle" about it because she had "paid for a lot of school lunches" and that when as a parent she had an outstanding school lunch bill, "I paid the bill – *quickly* – because as a parent I didn't want my children to go hungry." N.D. Leg. Senate Floor Session at 2:23 (Mar. 27, 2023), https://video.ndlegis.gov/en/PowerBrowser/PowerBrowserV2/20230327/-1/29864.

Wrapping up her comments, Senator Estenson said that "I think that their saying they cannot win is just absolutely hogwash." *Id.* at 11:36.

These comments are insulting. And now the Assembly wants 49 more days of this.

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The Court provided a reasonable amount of time—double what courts normally provide—for the Assembly to adopt a plan to remedy the Section 2 violation. The Assembly waited until 18 days into that period to even meet to vote to attempt to intervene in this case and to appoint an interim redistricting committee. Eighteen days is more than the total time most courts provide legislative bodies to adopt a remedial plan. Since then, it held just *one* meeting—*two days ago* and 33 days into the remedial period—at which it discussed potential maps and took no action. The above discussion ensued.

CONCLUSION

For the foregoing reasons, the nonparty Assembly's motion should be denied.

December 22, 2023

Respectfully submitted,

/s/ Michael S. Carter
Michael S. Carter
OK Bar No. 31961
Matthew Campbell
NM Bar No. 138207, CO Bar No. 40808
mcampbell@narf.org
NATIVE AMERICAN RIGHTS FUND
250 Arapahoe Ave.
Boulder, CO 80302
Telephone: (303) 447-8760
Counsel for Appellees

Samantha B. Kelty
AZ Bar No. 024110, TX Bar No. 24085074
kelty@narf.org
NATIVE AMERICAN RIGHTS FUND
950 F Street NW, Ste. 1050
Washington, DC 20004
Telephone: (202) 785-4166
Counsel for Appellees

/s/ Timothy Q. Purdon
Timothy Q. Purdon
N.D. Bar No. 05392
TPurdon@RobinsKaplan.com
ROBINS KAPLAN, LLP
1207 West Divide Avenue, Suite 200
Bismarck, ND 58501
Telephone: (701) 255-3000
Fax: (612) 339-4181
Counsel for Appellees Spirit Lake Nation and Turtle Mountain Band of Chippewa

/s/ Mark P. Gaber
DC Bar No. 988077
mgaber@campaignlegal.org
Molly E. Danahy
DC Bar No. 1643411
mdanahy@campaignlegal.org
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Ste. 400
Washington, DC 20005
Telephone: (202) 736-2200
Fax: (202) 736-2222
Counsel for Appellees

Bryan Sells
GA Bar No. 635562
bryan@bryansellslsaw.com
THE LAW OFFICE OF BRYAN L. SELLS, LLC
PO Box 5493
Atlanta, GA 31107-0493
Telephone: (404) 480-4212
Counsel for Appellees

CERTIFICATE OF SERVICE

I certify that the foregoing was served on all counsel of record via the Court's CM/ECF system.

/s/ Mark P. Gaber
Mark P. Gaber
Counsel for Plaintiffs