

Docket Nos. 23-3697 and 24-1171

In the

United States Court of Appeals

For the

Eighth Circuit

Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe; Westley Davis;
Zachery S. King; Collete Brown,

Plaintiffs - Appellees

v.

Michael Howe, in his official Capacity as Secretary of State of North Dakota

Defendant - Appellee

North Dakota Legislative Assembly

Movant - Appellant

On Consolidated Appeal of Order Denying Assembly's Motion to Intervene and
Order Denying Assembly's Motion for Extension of Time and Adopting Plaintiffs'

Proposed Plan 2 as Remedial Map

To The United States District Court for the District of North Dakota

In Case No. 3:22-cv-00022

ADDENDUM OF MOVANT - APPELLANT

Scott K. Porsborg (ND State Bar ID No. 04904)

sporsborg@smithporsborg.com

Brian D. Schmidt (ND State Bar ID No. 07498)

bschmidt@smithporsborg.com

122 East Broadway Avenue

P.O. Box 460

Bismarck, ND 58501

(701) 258-0630

Attorneys for Movant – Appellant

TABLE OF CONTENTS

	<u>Page #</u>
Doc # 153 Order.....	Add3-8
Doc # 164 Order.....	Add9-11

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

Turtle Mountain Band of Chippewa
Indians, et al.,

Plaintiffs,

vs.

Michael Howe, in his Official Capacity as
Secretary of State of North Dakota,

Defendant.

ORDER

Case No. 3:22-cv-22

Defendant Michael Howe, the Secretary of State of North Dakota, moves to stay the remedial order and judgment pending appeal in this Voting Rights Act (“VRA”) case. Doc. 131. Plaintiffs Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachery S. King, and Collette Brown move to amend or correct the remedial order, given the Secretary’s motion to stay. Doc. 134. The Plaintiffs oppose the Secretary’s motion (Doc. 142), and the Secretary opposes the Plaintiffs’ motion (Doc. 140). The North Dakota Legislative Assembly also moves to intervene and moves for a stay. Doc. 137; Doc. 151. All four motions are denied.

A. Motion to Stay Judgment Pending Appeal

The Secretary asks for a stay of the judgment finding a Section 2 violation after trial and a final decision on the merits. Tellingly though, the Secretary does not challenge the merits of the order and decision on the Section 2 claim. Instead, he argues (1) a stay of the judgment is appropriate per Purcell v. Gonzalez, 549 U.S. 1 (2006), and (2) that 42 U.S.C. § 1983 does not apply to the VRA.

1. Purcell Principle

In his motion, the Secretary largely leans on Purcell to suggest a stay pending appeal is warranted. But Purcell does not apply on these facts. And even if it did, it is perhaps more troubling

to suggest that Purcell permits what the Secretary asks for here—that a federal court overlook and stay a proven Section 2 violation because it requires a state to correct the violation well before any election is ever scheduled to occur.

Purcell and its progeny articulated a general principle “that lower federal courts should ordinarily not alter the election rules on the eve of an election.” Republican Nat’l Comm. v. Democratic Nat’l Comm., 589 U.S. ___, 140 S. Ct. 1205, 1207 (2020) (emphasis added). But the context is critical—Purcell and the majority of cases relying on and citing to it are cases involving preliminary injunctive relief, where there is no merits decision on a claim. Purcell, 549 U.S. at 4 (granting stay of preliminary injunction concerning voter identification procedures entered weeks before an election); North Carolina v. League of Women Voters of N.C., 574 U.S. 927 (2014) (granting stay of preliminary injunction entered close to an election date); Wise v. Circosta, 978 F.3d 93, 103 (4th Cir. 2020) (denying preliminary injunction of new absentee ballot rule less than a month before election); Veasey v. Perry, 769 F.3d 890, 895 (5th Cir. 2014) (granting stay of preliminary injunction entered 9 days before election); Genetski v. Benson, No. 20-000216-MM, 2020 WL 7033539, at *2 (Mich. Ct. Cl. Nov. 2, 2020) (declining to grant preliminary injunction the day before an election). As explained in Purcell, there are “considerations specific to election cases” when deciding whether to enjoin an election law in close temporal proximity to an election. Purcell, 549 U.S. at 4. Also of chief concern in Purcell cases is the risk of voter confusion. See Democratic Nat’l Comm. v. Wisconsin State Legislature, 141 S. Ct. 28, 30 (2020) (Gorsuch, J., concurring) (stating, “Last-minute changes to longstanding election rules risk other problems too, inviting confusion and chaos and eroding public confidence in electoral outcomes.”).

This is not a preliminary injunctive relief case. This is a case where a Section 2 violation of the VRA was proven by evidence at trial. Beyond that, there is no imminent election, little risk

of voter confusion, and the final judgment was not issued on the “eve” of any election. It strains credibility to seriously suggest otherwise. As the Plaintiffs correctly point out, the deadlines cited by the Secretary concern the opening date for candidate signature gathering—for elections that are still months away. Indeed, the Secretary’s concern is not as to voter confusion but rather the administrative burden of correcting the Section 2 violation. Because there is no imminent election and no order for preliminary injunctive relief enjoining an election rule, Purcell does not apply, and it does not support granting a stay pending appeal.

2. Traditional Stay Pending Appeal Factors

Setting Purcell aside, in deciding whether to grant a stay pending appeal, courts consider four factors: (1) whether the stay applicant has made a strong showing that the applicant is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Chafin v. Chafin, 568 U.S. 165, 179 (2013). “The most important factor is likelihood of success on the merits, although a showing of irreparable injury without a stay is also required.” Org. for Black Struggle v. Ashcroft, 978 F.3d 603, 607 (8th Cir. 2020). Stays pending appeal are disfavored, even if the movant may be irreparably harmed. Nken v. Holder, 556 U.S. 418, 427 (2009).

First, the Secretary has not made a strong showing he is likely to succeed on the merits. Once again, nowhere in the Secretary’s motion does he challenge (or even address) the merits of the Section 2 claim and the Court’s finding of a Section 2 violation after trial. He instead focuses on a new legal theory that 42 U.S.C. § 1983 provides no cause of action for private plaintiffs to bring a Section 2 claim. This issue was addressed in an order denying the Secretary’s motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), though both

parties raise new arguments that were not raised during the initial briefing of that issue. No doubt this issue is ripe for appellate review given the Eighth Circuit's recent decision in Arkansas State Conference of NAACP v. Arkansas Board of Apportionment, __ F.4th __, No. 22-1395, 2023 WL 8011300 (8th Cir. Nov. 20, 2023). But simply because the issue is set for appellate review does not mean the Secretary has made a strong showing that he is likely to succeed on the merits. This seems particularly true when he does not challenge or address the merits of the substantive Section 2 claim at issue. So, the first factor does not weigh in favor of a stay pending appeal.

Next, the Secretary will not be irreparably injured absent a stay. The Secretary largely rehashes his Purcell analysis to show irreparable injury absent a stay. As noted above, Purcell does not apply, and the Court struggles to understand how the Secretary would be irreparably injured by complying with Section 2 of the VRA. And per Nken, even if the Secretary may be irreparably harmed, a stay pending appeal is not a matter of right. 556 U.S. at 433. The second factor does not weigh in favor of a stay pending appeal.

Third, granting a stay would substantially injure the Plaintiffs and all other Native Americans voting in districts 9 and 15. A stay would effectively allow an ongoing Section 2 violation to continue until a decision on the § 1983 issue is reached by a reviewing court. There is substantial harm inherent in the deprivation of the Plaintiffs' fundamental voting rights. See Martin v. Kemp, 341 F. Supp. 3d 1326, 1340 (N.D. Ga. 2018). As such, the third factor weighs heavily against a stay.

Finally, the public interest lies in correcting Section 2 violations, particularly when those violations are proven by evidence and data at trial. Concerns as to the logistics of preparing for an election cycle cannot trump violations of federal law and individual voting rights. This factor also weighs against a stay pending appeal.

Again, it is worth emphasizing that this motion for a stay pending appeal is not made in the context of any preliminary injunction, where there is no final decision on the merits of a claim. And it is not made in the context of any imminent election. Instead, it is a request for a stay after a full and final decision on the merits, after a trial, on a Section 2 claim—a merits decision the Secretary does not address or even challenge in his motion. In that context, the law and the four factors conclusively instruct that a stay pending appeal is inappropriate, and the Secretary’s motion to stay is denied.

B. Motion to Amend or Correct Remedial Order and Motion to Intervene

Turning to the Plaintiffs’ motion to amend or correct the remedial order, the motion presents an issue of jurisdiction. The filing of a notice of appeal generally divests the district court of jurisdiction over the case, and the district court cannot reexamine or supplement the order being appealed. See Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982); Liddell v. Board of Educ., 73 F.3d 819, 822 (8th Cir. 1996). Here, the Plaintiffs ask the Court to reexamine the deadlines in the remedial order in response to the Secretary’s Purcell concerns. But the Court cannot reexamine the remedial order because the Secretary filed his notice of appeal before the motion to amend or correct. The Court lacks jurisdiction to amend or correct the remedial order, and the motion (Doc. 134) is denied.

The same is true for the Legislative Assembly’s motion to intervene and motion to stay. It is axiomatic that the motion to intervene is untimely per Federal Rule of Civil Procedure 24, but again, this Court lacks jurisdiction to reexamine or supplement the order and judgment on appeal. Adding the Legislative Assembly as a party at this late stage is a rather extraordinary request to supplement the order and judgment on appeal, and the motions (Doc. 137; Doc. 151) are denied.

C. Conclusion

After a trial, and careful review of all of the evidence and data, the Court concluded the 2021 redistricting plan violated Section 2 of the VRA. Put simply, the facts and the law do not support a stay of the remedial order and judgment pending appeal. The Secretary's motion to stay pending appeal (Doc. 131) is **DENIED**. Because the notice of appeal divested this Court of jurisdiction over this case, the Plaintiffs' motion to amend or correct the remedial order (Doc. 134) and the Legislative Assembly's motion to intervene (Doc. 137) and motion to stay (Doc. 151) are also **DENIED**.

IT IS SO ORDERED.

Dated this 12th day of December, 2023.

/s/ Peter D. Welte
Peter D. Welte, Chief Judge
United States District Court

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

Turtle Mountain Band of Chippewa
Indians, et al.,

Plaintiffs,

vs.

Michael Howe, in his Official Capacity as
Secretary of State of North Dakota,

Defendant.

ORDER

Case No. 3:22-cv-22

The North Dakota Legislative Assembly moves for an extension of time to file (Doc. 156) and to expedite (Doc. 162). Plaintiffs Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachery S. King, and Collette Brown oppose the motion (Doc. 161) and move for a remedial order (Doc. 159). The Legislative Assembly opposes the Plaintiffs' motion. Doc. 163. Defendant Michael Howe, Secretary of State of North Dakota, has not responded to either motion.

As to the Legislative Assembly's motion for extension of time to file, the Assembly asks for an extension of time to file a remedial plan until February 9, 2024. An initial problem with the Legislative Assembly's request is that it is not a party to this case, and it did not seek leave to file its motion for an extension of time to file. Another problem is that the two parties to this case oppose the extension sought by the Legislative Assembly. The Plaintiffs actively oppose the extension, and the Secretary did not file a response, though he did oppose the same motion made by the Legislative Assembly to the Eighth Circuit Court of Appeals.

After finding a Section 2 violation of the Voting Rights Act, federal law requires that, "whenever practicable," the state be "afford[ed] a reasonable opportunity . . . 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). Here, that is what the Court ordered. The Secretary was provided a reasonable time, until December 22, 2023, to propose a remedial plan. The Plaintiffs are correct that the Court did not order the Secretary (or the Legislative Assembly) to adopt a new plan by that date; it provided a reasonable opportunity to the Secretary to propose his own plan to correct the proven Section 2 violation. The law requires nothing more and nothing less. But if the Secretary elects to not offer a proposed remedial plan (as is the case here), then it becomes the “unwelcome obligation of the federal court” to devise a remedy. Id. (internal citations and quotations omitted). And that is where we find ourselves now. On this record, an extension of time is not warranted because the Secretary was provided a reasonable opportunity to propose a remedial plan, and an extension has not been requested by either party to this case. So, the motion for extension of time to file (Doc. 156) and the motion to expedite (Doc. 162) are **DENIED**.

Given that the Secretary did not submit a proposed remedial plan by December 22, 2023, the Plaintiffs now move for a remedial order. Doc. 159. Substantively, the Eighth Circuit stated in Bone Shirt v. Hazeltine, 461 F.3d 1011, 1022-23 (8th Cir. 2006):

In formulating a remedial plan, the first and foremost obligation of the district court is to correct the Section 2 violation. See Westwego Citizens for Better Gov’t, 946 F.2d at 1124. Second, the plan should be narrowly tailored, and achieve population equality while avoiding, when possible, the use of multi-member districts. Abrams v. Johnson, 521 U.S. 74, 98, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997); Chapman v. Meier, 420 U.S. 1, 26-27, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975). Third, the plan must not violate Sections 2 or 5 of the Voting Rights Act. Finally, the plan should not “intrude on state policy any more than is necessary” to uphold the requirements of the Constitution. Upham v. Seamon, 456 U.S. 37, 41-42, 102 S.Ct. 1518, 71 L.Ed.2d 725 (1982) (per curiam) (quoting White v. Weiser, 412 U.S. 783, 794-95, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973)).

Here, the Plaintiffs’ proposed plan 2 meets all four requirements. It corrects the Section 2 violation, is narrowly tailored, and achieves population equality. Per this Court’s findings, proposed plan 2 “comports with traditional redistricting principles.” Doc. 125 at 18-19. Proposed plan 2 does not

violate Section 2 of the Voting Rights Act. Doc. 125. It requires changes to only three districts (Doc. 65-2 at 41) and is the least intrusive option that complies with the Voting Rights Act and the Constitution.

Procedurally, the Court notes that the Secretary did not respond to the motion, and Civil Local Rule 7.1(F) states that an adverse party's "failure to serve and file a response to a motion may be deemed an admission that the motion is well taken." D.N.D. Civ. Local R. 7.1(F). The Court deems the Secretary's lack of response as an admission that the motion for a remedial order encouraging the Court to adopt proposed plan 2 is well taken.

Because the motion (Doc. 159) is unopposed and is in the interest of justice, it is **GRANTED**. The Court **ORDERS** that the Plaintiffs' proposed plan 2 be adopted and implemented as the remedial map to correct the Section 2 violation.

IT IS SO ORDERED.

Dated this 8th day of January, 2024.

/s/ Peter D. Welte
Peter D. Welte, Chief Judge
United States District Court