

United States Court of Appeals
for the Eighth Circuit

**Turtle Mountain Band of Chippewa Indians,
Spirit Lake Tribe, Wesley Davis, Zachery S.
King, and Collette Brown,**

Plaintiff-Appellees,

v.

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

Defendant-Appellant.

APPEAL FROM DECISION OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NORTH DAKOTA
(No. 3:22-cv-00022)

APPLICATION TO FILE AN OVERLENGTH MOTION

Pursuant to Rule 27A(a)(1) of the Local Rules of the United States Court of Appeals for the Eighth Circuit, Appellant Michael Howe, in his official capacity as Secretary of State of North Dakota, requests that the Court grant this application to file an overlength motion in excess of the 5200-word limit set forth in Rule 27(d)(2)(A) of the Federal Rules of Appellate Procedure.

The Secretary requests leave to file an overlength motion in order to fully apprise the Court as to why the district court’s judgment threatens to substantially disrupt North Dakota’s 2024 elections, and to present why the Secretary is likely to prevail on appeal in its argument that 42 U.S.C. § 1983 does not create a private right of action for claims brought under Section 2 of the Voting Rights Act—an argument with nationally important implications.

In a judgment issued November 17, 2023, the district court found that North Dakota’s 2021 redistricting plan “dilutes” Native American voting strength in violation of Section 2 of the Voting Rights Act, it enjoined the Secretary of State from “administering, enforcing, preparing for, or in any way permitting the nomination or election” of candidates in several legislative districts, and it set a schedule for adopting a remedial plan that extends to at least January 19 (and potentially even longer). R.Doc. 126 at 2. The district court denied the Secretary’s motion for a stay pending appeal yesterday, December 12. The district court’s judgment, absent a stay, will significantly impact North Dakota’s ability to administer the 2024 statewide elections, as the realities of administering the election and meeting myriad statutory requirements with fairness and transparency mean that the State must have finality on its 2024 election map no later than December 31, 2023. Given the urgency created by the timing of the district court’s judgment, the Secretary requests leave to file an overlength motion so that the Court may be fully

apprised of the disruptions and unfairness likely to afflict North Dakota's 2024 elections absent a stay.

Secondly, the Secretary requests leave to file an overlength motion in order to establish why he is likely to prevail on his argument that 42 U.S.C. § 1983 does not create a private right of action for claims brought under Section 2 of the Voting Rights Act, and why this Court's recent holding in *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, —F.4th—, 2023 WL 8011300 (8th Cir. Nov. 20, 2023), *pet. for rehearing filed* (Dec. 11, 2023), supports that conclusion. In the wake of this Court's recent decision, that is a relatively novel—and nationally important—argument.

This Court has granted applications for filing overlength motions to stay in similar cases which concerned district court orders threatening to disrupt State elections. *E.g., Brakebill, et al. v. Jaeger*, No. 18-1725, 932 F.3d 671 (8th Cir. 2019) (Entry IDs 4657360, 4662359). Other Courts of Appeals have similarly granted requests to submit overlength motions and briefs in support of stay applications when district court decisions threaten to disrupt the administration of state elections. *E.g., Robinson v. Ardoin*, No. 22-30333, 37 F.4th 208 (5th Cir. 2022) (Docs. 142-2, 192-2, 193-2, 200-2).

The Secretary believes a full explanation of these issues is critical to the Court's understanding of the issues and to North Dakota's interests in obtaining a

stay of the district court's judgment, which threatens to impose significant confusion, cost, hardship, and unfairness on voters, candidates, and election administrators for the 2024 elections, and which invalidates the State's duly enacted election map before the State has had a meaningful opportunity for appellate review.

Because of the urgency by which resolution of this motion for a stay is required, the Secretary is filing the overlength motion for a stay simultaneous with this application. The overlength motion is 6,864 words.

Dated this 13th day of December, 2023.

State of North Dakota
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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this motion contains 632 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because: this document has been prepared in a proportionally spaced typeface using Microsoft Word in Time New Roman 14 point.

3. This brief has been scanned for viruses and the brief is virus-free.

/s/ David R. Phillips _____

David R. Phillips

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2023, I electronically submitted the foregoing to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system and that ECF will send a Notice of Electronic Filing (NEF) to all participants who are registered CM/ECF users.

/s/ David R. Phillips

David R. Phillips