



# North Dakota Legislative Council

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LC# 27.9016.01000  
June 2025

## REDISTRICTING LITIGATION UPDATE

This memorandum provides an update regarding the redistricting litigation in the Eighth Circuit Court of Appeals concerning the North Dakota Legislative Assembly and outlines the potential legislative implications of the recent ruling in *Turtle Mountain Band of Chippewa Indians v. Howe*, 137 F.4th 710 (8<sup>th</sup> Cir. 2025).

### BACKGROUND

#### Judgment

On May 14, 2025, the Eighth Circuit Court of Appeals issued a ruling in the redistricting case of *Turtle Mountain Band of Chippewa Indians v. Howe*, 137 F.4th 710 (8<sup>th</sup> Cir. 2025), holding private plaintiffs may not maintain a private cause of action to enforce Section 2 of the Voting Rights Act [Pub. L. 89-110; 79 Stat. 437; 52 U.S.C. 10301 et seq.] through 42 U.S.C. § 1983. As such, the Eighth Circuit Court of Appeals vacated the judgment of the United States district court, which imposed the plaintiff's redistricting map, and remanded with instructions for the district court to dismiss the case for want of a cause of action. *Id.* at 721. If the ruling takes effect, it will have the practical effect of reverting the district boundaries to those drawn by the Legislative Assembly and approved during the 2021 special legislative session ([Appendix A](#)). The 2021 map would alter the boundaries of Districts 9 and 15, as currently delineated under the 2023 map ([Appendix B](#)).

In the companion case, *Turtle Mountain Band of Chippewa Indians v. Howe*, 137 F.4th 709 (8<sup>th</sup> Cir. 2025), the Legislative Assembly sought to intervene in *Turtle Mountain Band of Chippewa Indians*, 137 F.4th 710, "to appeal the district court's order imposing the remedial map." *Id.* at 710. On May 14, 2025, the Eighth Circuit Court of Appeals held, "Because we concluded in *Turtle Mountain Band of Chippewa Indians*, 137 F.4th 710, that the plaintiffs do not have a cause of action and, therefore, vacated the judgment of the district court, we dismiss this appeal as moot." *Id.* The judgment dismissing the appeal in the companion case became effective on June 6, 2025, upon the issuance of the mandate.

### Post-Judgment Procedures

#### Petition for Rehearing En Banc

Following the issuance of the opinion in *Turtle Mountain Band of Chippewa Indians*, 137 F.4th 710, the appellees, the Turtle Mountain Band of Chippewa Indians, et al, timely filed a petition for rehearing en banc in the Eighth Circuit Court of Appeals. This petition was filed pursuant to Rule 40 of the Federal Rules of Appellate Procedure, which authorizes a petitioner to ask a federal appellate court to rehear a case by all federal appellate judges within the circuit, rather than a panel of judges. Under this rule, a rehearing en banc is not favored and ordinarily will be allowed only if one of the following criteria is met:

- The panel decision conflicts with a decision of the court to which the petition is addressed and the full court's consideration is therefore necessary to secure or maintain uniformity of the court's decisions;
- The panel decision conflicts with a decision of the United States Supreme Court;
- The panel decision conflicts with an authoritative decision of another United States court of appeals; or
- The proceeding involves one or more questions of exceptional importance, each concisely stated.

Fed. R. App. P. 40.

The appellee's petition argued the Eighth Circuit Court of Appeals should grant rehearing en banc to resolve alleged conflicts created by the panel majority and reinstate private enforcement of Section 2 of the Voting Rights Act. The petition also alleged the private enforceability of Section 2 is an issue of exceptional importance. The appellant filed a timely response to the petition for rehearing, arguing the Eighth Circuit Court of Appeals panel properly applied the law to determine the general private cause of action in 42 U.S.C. § 1983 does not apply to vote dilution claims under Section 2 of the Voting Rights Act and requesting the petition be denied. The Eighth Circuit Court of Appeals has not yet denied or granted the petition for rehearing.

### **Effective Date of Judgment**

Under Rule 41(b) of the Federal Rules of Appellate Procedure, if the petition for rehearing en banc is denied, the Eighth Circuit Court of Appeals must issue the court's mandate 7 days after the entry of an order denying the petition. The mandate becomes effective upon issuance by the court. Fed. R. App. P. 41(c). According to the explanatory note for Rule 41(c), "A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed." *Id.* Since a petition for rehearing en banc is pending, the court has not issued its mandate. Thus, the court's May 14, 2025, judgment is not yet effective and will become effective only upon the court's issuance of the mandate.

### **Petition for a Writ of Certiorari**

To appeal the judgment issued by the Eighth Circuit Court of Appeals, the appellee must file a petition for a writ of certiorari with the United States Supreme Court. A petition for a writ of certiorari requests the Supreme Court to issue a writ of certiorari, which is an order requiring an appellate court to deliver its record for review by the Supreme Court. If the Supreme Court issues a writ of certiorari, the Supreme Court has agreed to hear the case on appeal.

Supreme Court Rule 10 indicates the Court may consider the following factors when determining whether to issue a writ of certiorari:

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
- (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeals;
- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Supreme Court Rule 13 requires a party seeking a petition for a writ of certiorari to review a judgment issued by a United States Court of Appeals to file the petition with the United States Supreme Court within 90 days after the entry of judgment. Under this rule, "[t]he time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate." U.S. Sup. Ct. R. 13. However, if a petition for rehearing has been filed with the appropriate United States Court of Appeals, the deadline to file a petition for a writ of certiorari "runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment." *Id.*

This rule further provides that while "an application to extend the time to file a petition for a writ of certiorari is not favored," if good cause can be demonstrated, a Justice of the United States Supreme Court may extend the time to file the petition for no more than 60 days. U.S. Sup. Ct. R. 13. The request for the extension must "set out specific reasons why the extension of time is justified." *Id.*

Since the appellees filed a petition for rehearing en banc, under Supreme Court Rule 13, the time for calculating the deadline does not begin to run until after "the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment." Since the issue of whether the Eighth Circuit Court of Appeals will rehear the case has yet to be determined, the exact deadline for the appellee to file a petition for a writ of certiorari is uncertain.

### **Motion to Stay Ruling Pending a Petition for a Writ of Certiorari**

If the appellee files a petition for a writ of certiorari with the United States Supreme Court, the appellee likely would file a motion to stay the mandate with the Eighth Circuit Court of Appeals pending a petition for a writ of certiorari. Under Rule 41(d) of the Federal Rules of Appellate Procedure, "A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the petition would present a substantial question and that there is good cause for a stay." Under this rule, the stay may not exceed 90 days, unless the period can be extended for good cause. *Id.* The stay also may exceed 90 days if "the time for filing the petition for certiorari has been extended, in which case the stay continues for the extended period, or if the petition for certiorari has been filed, in which case the stay continues until the Supreme Court's final disposition." *Id.* This rule also provides, if the United States Supreme Court denies the petition for a writ of certiorari, "the court of appeals must issue the mandate immediately on receiving a copy of a [United States] Supreme Court order denying the petition, unless extraordinary circumstances exist." *Id.*

### **Potential Effects on Members of the Legislative Assembly**

The May 14, 2025, ruling by the Eighth Circuit Court of Appeals vacated the district court ruling and remanded with instructions that the case be dismissed for lack of a cause of action. Practically speaking, the ruling renders the district court judgment as though it never existed, reverting to the 2021 district lines approved by the Legislative Assembly during the 2021 special legislative session. Uncertainty surrounds the actual effects on the members of the Legislative Assembly, given the unknowns regarding whether the petition for rehearing will be granted or denied, whether the ruling will be appealed to the United States Supreme Court, or whether a stay will be granted on the imposition of the appellate court's mandate if an appeal to the United States Supreme Court is pending. One of the potential issues facing members residing outside their respective districts is whether they will be legally authorized to continue serving in their current offices.

Historically, when a redistricting cycle results in a member no longer residing in the member's district, the member has been allowed to serve until after the next general election, at which time a new member may be elected to serve the district. It is unclear whether this practice would be applied to members who are no longer residing in their district, given the novel scenario of the appellate court entirely vacating the lower court's ruling.

However, an argument also could be made that a member residing outside the member's district is now disqualified from continuing to serve because Section 5 of Article IV of the Constitution of North Dakota prohibits an individual from serving in the Legislative Assembly unless the individual lives in the district from which the individual was selected. A member living outside the district would not become "unqualified" under this argument until the original 2021 map takes effect.

A member who is disqualified from serving creates a vacancy under Sections 44-02-01(7) and 44-02-03.1(8). Section 44-02-03.1 outlines the procedure for filling a vacancy in the office of a member of the Legislative Assembly. Section 44-02-03.1(1) requires the Secretary of State to notify the Chairman of the Legislative Management of the vacancy. If the former member belongs to a political party, the Chairman of the Legislative Management must inform the corresponding district committee of the political party of the former member's vacancy. N.D.C.C. § 44-02-03.1(2). Within 21 days of the notification from the Chairman of the Legislative Management, the district committee must appoint an individual to fill the vacancy. *Id.* If the district committee does not make an appointment within 21 days after receiving the notice from the Chairman of the Legislative Management, the Chairman of the Legislative Management is required to appoint a resident of the district to fill the vacancy. *Id.*

A complicating factor is the reorganization of the political parties. Under Section 16.1-03-17, the political parties in certain districts are "required to organize or reorganize" in accordance with Chapter 16.1-03 if a legislative redistricting plan becomes effective after party organization and before a primary or general election. These districts required to organize or reorganize include, "[a] district that does not share any geographical area with the pre-redistricting district having the same number" and "[a] district with new geographic area that was not in that district for the 2020 election and which new geographic area has a 2020 population that is more than twenty-five percent of the district's population as determined in the 2020 federal decennial census." However, these districts are not required to organize or reorganize until a new redistricting plan is implemented. Since the judgment of the Eighth Circuit Court of Appeals is not yet effective, districts subject to Section 16.1-03-17 are not required to organize or reorganize at this time. Section 16.1-03-07(7) provides if a party is required to organize or reorganize after redistricting of the Legislative Assembly, "the state party chair may appoint a temporary district party organization chair in any newly established district or a district that lacks a district committee able to carry out the responsibilities of [Chapter 16.1-03]." These responsibilities include organizing the district to comply with filing deadlines for a primary election.

Section 44-02-03.1(6) requires the Governor to call a special election to fill a vacancy occurring in the Legislative Assembly if petitioned by at least 4 percent of the qualified electors of the district in which the vacancy occurred. If a petition for a special election is not filed within 30 days of the appointment by the district committee or the Chairman of the Legislative Management under Section 44-02-03.1(2), that appointment stands. However, if a petitioner files a valid special election petition, the Secretary of State is required to notify the Governor that a special election must be called to fill the vacancy. N.D.C.C. § 44-02-03.1(6). The Governor is then required to issue a writ of election directed to the Secretary of State, which mandates the administration of a special election at a time designated by the Governor. *Id.* The special election must conform with the timelines outlined in Title 16.1 and be called at least 15 days before the deadline for candidates to file for office before a regularly scheduled primary or general election. *Id.* The Governor may not schedule a special election from a general election through 80 days following the adjournment of the ensuing regular session of the Legislative Assembly. *Id.* Under Section 44-02-03.1(5), an individual elected at a special election may serve for the remainder of the term of office the disqualified member would have served.

ATTACH:2