UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ALPHA PHI ALPHA FRATERNITY INC., a nonprofit organization on behalf of members residing in Georgia; SIXTH DISTRICT OF THE AFRICAN METHODIST EPISCOPAL CHURCH, a Georgia nonprofit organization; ERIC T. WOODS; KATIE BAILEY GLENN; PHIL BROWN; JANICE STEWART,

Plaintiffs,

vs.

BRAD RAFFENSPERGER, in his official capacity as Secretary of State of Georgia.

Defendant.

Case No. 1:21-cv-5337

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM

The Court is considering whether, at this time, it can enjoin the Voting Rights Act violations at issue here given the recent order in *Merrill v. Milligan*, 2022 WL 354467 (U.S. Feb. 7, 2022). To aid in the Court's resolution of that question, the parties yesterday began—and will today continue—presenting evidence on whether injunctive relief would be in the public interest, and on the balance of the equities. Plaintiffs submit this brief to address the legal framework that should govern this Court's consideration of those issues in light of the *Milligan* order. As explained below, this Court has broad equitable authority to remedy Voting Rights Act violations and ensure Black voters are not irreparably harmed by being denied the right to participate in the political process on equal terms. Such relief must be crafted based on the facts of an individual case and may include moving primaries or other election deadlines. Although these adjustments necessarily require flexibility from state and local election officials, they are not the kind of significant burdens that could justify conducting an election under unlawful maps.

Applying these principles and guided by past practice, this Court can craft a complete remedy here that is in the public interest and consistent with any concern regarding *Milligan.* Here, the evidence adduced thus far shows—and the evidence to be presented will confirm—that Georgia's elections officials have the competence and capacity to successfully implement Plaintiffs' requested remedies. In particular,

and if there were any concern regarding hardship to the State, the evidence has shown and will show that moving the primary elections to July 2022 would allow for the creation and implementation of new General Assembly maps without *any* serious hardship or burden to the State, and that many election officials in Georgia would welcome such a change.

This evidence distinguishes the present case from *Milligan*. There, the Court determined that new congressional maps could be drawn in two months with no change to the primary election date based on a single affidavit from a state official about the relevant election calendar dates. *See Singleton v. Merrill*, 2022 WL 265001, at *76 (N.D. Ala. Jan. 24, 2022) (citing Decl. of Clay S. Helms, Doc. 79-7). The Alabama court recognized that the State presented evidence about "several administrative challenges," and "campaign expense and potential confusion." But it made no specific factual findings and did not weigh the evidence on these issues. Instead, the court in Alabama disregarded evidence about the alleged burdens caused by remedial maps because it concluded that holding the election using new maps was not "undoable." Here, in contrast, the Court is now hearing extensive live testimony from numerous witnesses concerning the feasibility of a remedy and what would benefit the public interest. Unlike the Alabama court, this Court can make factual findings not just about whether holding an election with remedial maps

would be "doable" but also on issues relevant to the cost, confusion, and hardship that doing so may or may not cause. On the strength of that developing record, the Court has the option to weigh the evidence and craft a case-specific remedy that ameliorates any concerns regarding hardship for the State. Nothing of the sort was attempted in *Milligan*.

Such a remedy will ensure that the Voting Rights Act does not become a dead letter in election years. No state is entitled to one free illegal election under *Milligan*, *Purcell*, or any other law.

I. THIS COURT CAN CRAFT A COMPLETE REMEDY WITHOUT SIGNIFICANT COST, CONFUSION, OR HARDSHIP.

Federal courts acting in equity can and must accord relief tailored to the case that ensures an effective remedy, "mould[ing] each decree to the necessities of the particular case" in order to "accord full justice" to the parties. *Curling v. Raffensperger*, 491 F. Supp. 3d 1289, 1295 (N.D. Ga. 2020) (quoting *Kansas v. Nebraska*, 574 U.S. 445, 456 (2015)). In the voting rights context, one form of injunctive relief (in addition to ordering the drawing of new electoral maps) is changing dates in the election calendar in order to prevent the irremediable loss of political rights. Federal courts in Georgia thus frequently change dates on the election calendar, including primary calendars and even election dates themselves. *See, e.g.*, *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 361 F. Supp. 3d

1296, 1305 (M.D. Ga. 2018) (postponing board of education election until a new, Section 2-compliant map was drawn), *aff'd*, 979 F.3d 1282 (11th Cir. 2020); *United States v. Georgia*, 892 F. Supp. 2d 1367, 1378 (N.D. Ga. 2012) (extending UOCAVA ballot receipt deadline by seven days); *Ga. State Conf. of the NAACP v. Georgia*, No. 1:17-cv-1397-TCB, 2017 WL 9435558, at *6 (N.D. Ga. May 4, 2017) (extending voter registration deadline from March 20 until "no earlier than May 21"); *Martin v. Augusta-Richmond Cnty., Ga., Comm'n*, No. CV 112–058, 2012 WL 2339499, at *6 (S.D. Ga. June 19, 2012) (adopting court-drawn, VRA-compliant map and moving qualifying dates for county commission and board of education seats from May 23-25 to August 6-8). So have other courts within the Eleventh Circuit. *See, e.g.*, *Straw v. Barbour County*, 864 F. Supp. 1148, 1151, 1157 (M.D. Ala. 1994); *Meek v. Metropolitan Dade County*, 805 F. Supp. 967, 969 (S.D. Fla. 1992), *aff'd*, 985 F.2d 1471 (11th Cir. 1993).[1] Such injunctive relief is available

[1] So too have courts within other circuits, *see, e.g.*, *NAACP, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368, 417 (S.D.N.Y. 2020) (enjoining election to be held in 15 days and ordering defendant to "propose a remedial plan that fully complies with the VRA within thirty days"), *aff'd sub nom. Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021); *Thomas v. Bryant*, No. 19-60133 (5th Cir. Mar. 15, 2019) (extending state senate candidate filing deadline from March 15 to April 12 to accommodate redrawing of map in order to remedy Section 2 violation); *Perez v. Perry*, 891 F. Supp. 2d 808, 812 (W.D. Tex. 2012) (ordering state to hold its primary elections on May 29, 2012, after having twice pushed back the primaries due to redistricting dispute), and state courts as well, *see, e.g.*, *Harper*

because the "cautious protection of the Plaintiffs' franchise-related rights is without question in the public interest." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005).

To be sure, when a federal court is asked to grant relief "on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)), the public interest in preventing confusion and costs may outweigh other equitable considerations. This is the so-called *Purcell* principle. But *Purcell* speaks of equitable balancing and weighing, not any bright line test. *See Purcell*, 591 U.S. at 4-5. Justice Kavanaugh's concurrence in the *Milligan* stay order is in accord, describing the *Purcell* principle as "a sensible refinement of ordinary stay principles for the election context" and "not absolute." *Milligan*, 2022 WL 354467, at *2.[2]

Indeed, Justice Kavanaugh explains that, in his view, Plaintiffs may "overcome" *Purcell* "even with respect to an injunction issued close to an election."

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v. Hall, 865 S.E.2d 301, 302 (N.C. 2021) (ordering a two-month delay in the state's primary elections from March 8, 2022 to May 17, 2022 as a result of the state's unlawful redistricting), *reconsideration dismissed*, 867 S.E.2d 185 (N.C. 2022).

[2] As noted by counsel already at argument, Justice Kavanaugh's non-precedential concurrence to a one-paragraph stay order, signed by less than a quarter of the Court, does not change the law in any respect. Indeed here, where the other three Justices who voted for a stay in *Milligan* issued no opinion, we cannot even know whether Justice Kavanaugh's was the narrower (and thus controlling) opinion. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

Milligan, 2022 WL 3544467, at *2. His concurrence suggests that this will be true when "(i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Id.* That inquiry, and any consideration of the *Purcell* principle, is necessarily highly sensitive to the particular facts of the case.

Yesterday's hearings accordingly focused on the fourth element of Justice Kavanaugh's formulation, and on the broader set of issues that go to the public interest and the possibility of an effective and feasible remedy for Voting Rights Act violations in the drawing of Georgia's legislative lines.

II. ORDERING THE IMPLEMENTATION OF VRA-COMPLIANT MAPS IS FEASIBLE AND THE PRIMARY DEADLINE CAN BE MOVED TO ALLEVIATE HARDSHIP

The evidence heard already has shown, and the evidence to come will show, that effective relief that furthers the public interest is feasible here. This Court can order the implementation of maps that comply with the Voting Rights Act and, if necessary to alleviate undue hardship to the State while affording Plaintiffs relief, it can move the primary election date from May (still months away) to July. Indeed,

and as the Court knows, Georgia primary elections were held in July as recently as 2012. *See United States v. Georgia*, 892 F. Supp. 2d at 1371.[3]

The evidence adduced thus far indicates that the burden on the State from implementing new legislative maps would be modest, and that, to the extent that there is any concern about whether current election deadlines cannot accommodate the implementation of new legislative maps that comply with the Voting Rights Act, an extension of the primary election deadlines in this case would address those concerns. Indeed, such an extension would be welcomed by state officials.

Michael Barnes, Director of the Center for Election Systems in the Georgia Secretary of State's Office, indicated that much of the work required to prepare post-redistricting ballots is already being done. Mr. Barnes testified that County officials are currently updating information related to various local election districts. He indicated that further modifications to the state legislative maps will only require his office to enter updated information regarding the altered state legislative districts, without repeating work regarding local electoral boundaries or unchanged state

[3] *United States v. Georgia*, 892 F. Supp. 2d 1367 (N.D. Ga. 2012), involved a challenge to Georgia's primary election scheme on the ground that it conflicted with the timing requirements set by UOCAVA. Since then, the General Assembly has remedied that conflict by enacting a ranked choice voting system, and shifting the date of the primary would accordingly have no affect on the State's ability to fulfill its UOCAVA obligations.

legislative districts. It is reasonable to conclude based on Mr. Barnes' testimony that any additional work required of his office in order to implement court-ordered VRA-compliant state legislative maps would be modest.

Mr. Barnes also testified that, were the Court to order new remedial state legislative maps, his office would be able to meet existing deadlines associated with the 2022 primary election. And Mr. Barnes testified unequivocally that election administrators would welcome an extension of those deadlines.

In addition, mapping and redistricting expert Blakeman Esselstyn explained that his illustrative state legislative plans leave a large proportion of legislative districts in the Senate and House—and 90 counties overall—untouched compared to the 2021 Senate and House Plans. That testimony supports the conclusion that remedial plans could be adopted that minimize the burdens on county and state officials in revising ballot combinations. Similarly, amici Fair Districts Georgia and the Election Law Clinic at Harvard Law School have explained that in a matter of days, they were able to draw thousands of illustrative plans that implement the additional Black-majority Senate and House districts drawn by William Cooper while (again) keeping roughly half of all the 2021 Senate Plan districts and over one-half of all 2021 House Plan districts unchanged. *See* Dkt. 90-1 at 14.

Those are just the first two witnesses on these remedies issues. The additional evidence that the Court will hear today from election administrators, former candidates, and civic leaders will further demonstrate that a remedy for the Voting Rights Act violations here is feasible without any undue hardship for the State, for candidates, or for voters. The evidence will also show that the public interest strongly supports injunctive relief to ensure that Georgia's elections are run on fair and lawful districts that do not dilute the voting strength of Black Georgians.

Whatever the Court's conclusion after weighing this evidence, the factual record that is developing here, including evidence supporting moving the primary date if necessary to alleviate any arguable hardships on the State from the implementation of new electoral maps, sets this case squarely apart from *Milligan*.

Dated: February 9, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 5.1

The undersigned hereby certifies that the foregoing document has been prepared in accordance with the font type and margin requirements of Local Rule 5.1 of the Northern District of Georgia, using a font type of Times New Roman and a point size of 14.

/s/ Rahul Garabadu

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served the foregoing ***Plaintiffs' Supplemental Memorandum*** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all counsel or parties of record on the service list:

This 9th day of February, 2022.

/s/ Rahul Garabadu