The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

SUSAN SOTO PALMER et al., *Plaintiffs*, v. STEVEN HOBBS, in his official capacity as Secretary of State of Washington, et al., *Defendants*, and JOSE TREVINO et al., *Intervenor-Defendants*.	Case No.: 3:22-cv-5035-RSL INTERVENOR-DEFENDANTS' MOTION TO SUSPEND REMEDIAL PROCEEDINGS FOR WANT OF JURISDICTION OR ORDER AN EVIDENTIARY HEARING NOTE ON MOTION CALENDAR: February 9, 2024

Intervenor-Defendants respectfully submit this motion because Plaintiffs raised a new jurisdictional issue affecting all parties in this case in their opposition to Senator Torres's motion to intervene, and move this Court to suspend all action in these remedial proceedings for want of jurisdiction pending appeal. Alternatively, if this Court does not suspend further proceedings, Intervenor-Defendants move for an evidentiary hearing on the contested remedial issues.

INTRODUCTION

After this Court issued its memorandum and order, it entered a final judgment, finding for Plaintiffs on their Section 2 claim. (Dkts. ## 218, 219.) It then purported to "retain[] jurisdiction over the adoption of the new redistricting plan as set forth in the Memorandum of Decision." (Dkt. # 219.) Plaintiffs argue in their Opposition (*see* Dkt. # 255) that this Court lacks jurisdiction over

Chalmers, Adams, Backer & Kaufman, LLC
701 Fifth Avenue, Suite 4200
Seattle, Washington 98104
Phone: (206) 207-3920

the Motion to Intervene of Senator Nikki Torres (*see* Dkt. # 253) because Intervenor-Defendants' Notice of Appeal (*see* Dkt. # 222) of this Court's Section 2 merits opinion and permanent injunction (*see* Dkt. # 218) divests this Court of jurisdiction over the ongoing remedial proceedings. (*See* Dkt. # 255 at 2–3.)

If this Court agrees with Plaintiffs' jurisdictional argument,[1] as Intervenor-Defendants do, this Court should issue an order holding that it lacks jurisdiction to enter a remedial map. *See, e.g.*, *Wright v. Sumter Cty. Bd. of Elections & Registration*, No. 1:14-CV-42 (WLS), 2018 U.S. Dist. LEXIS 236668, at *6 (M.D. Ga. June 21, 2018) ("The Court issues this order to inform the parties that it does not intend to adopt any remedial district boundaries while the instant appeal remains pending. . . . [T]he Court finds that it lacks jurisdiction to enter any such order."). At most, this Court is permitted to make modifications to its injunction under Federal Rule of Civil Procedure 62(d) within the bounds of Federal Rule of Civil Procedure 62.1, which permits this Court to defer or deny Plaintiffs' remedial plans or issue an indicative ruling that it would grant the motion were the Ninth Circuit to remand the case.

Alternatively, in the event this Court determines that it retains jurisdiction to conduct the remedial proceedings, Intervenor-Defendants move for an in-person, remedial-specific evidentiary hearing in connection with the adoption of any remedial maps. The failure to hold a remedy-specific evidentiary hearing where there are disputed facts (as is the case here) would be reversible error. *See*, *e.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 49 (D.C. Cir.), cert. denied, 534 U.S. 952 (2001).

ARGUMENT

A. This Court Should Issue An Order Finding It Lacks Jurisdiction To Adopt A Remedial Map.

Although Plaintiffs do not explicitly acknowledge the import of their jurisdictional argument, the inescapable corollary of their argument is that if Intervenor-Defendants' appeal divests this Court of jurisdiction over a motion to intervene in the remedial proceedings, then the

[1] Under any other scenario short of this Court correctly finding it lacks jurisdiction over the remedy, Rep. Torres should be permitted to intervene. (Dkt. # 253.)

Chalmers, Adams, Backer & Kaufman, LLC
701 Fifth Avenue, Suite 4200
Seattle, Washington 98104
Phone: (206) 207-3920

same appeal divests this Court of jurisdiction over the remedial proceedings themselves. To the extent Plaintiffs make that argument (even if merely implicitly), Intervenor-Defendants adopt it and accordingly seek for this Court to pause remedial proceedings as it lacks the jurisdiction to continue them.

Plaintiffs rightly cite multiple cases for the proposition that a notice of appeal generally divests district courts of jurisdiction. (*See* Dkt. # 255 at 2–3.) "An appeal, including an interlocutory appeal, 'divests the district court of its control over those aspects of the case involved in the appeal.'" *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915, 1919 (2023) (quoting *Griggs v. Provident Consumer Discount Co*., 459 U.S. 56, 58 (1982)).

The Supreme Court in *Coinbase* adopted Judge Easterbrook's formulation in deciding if an aspect of a case is essentially involved in an appeal: The dispositive question is whether that aspect the appellate court is deciding determines whether the "the litigation may go forward in the district court." *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915, 1920 (2023) (quoting *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997)). In Section 2 cases, that means asking whether the district court's remedial authority is bound up in the appeal such that the appeal determines whether the litigation may continue at the district court level. A district court's remedial authority in ordering a remedial map is limited to ensuring plaintiffs are relieved of the "injuries the plaintiffs established" from the challenged map. *North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018) (per curiam). Therefore, for Section 2, a district court's equitable authority in ordering a remedial map is premised on the equitable permanent injunction order finding a Section 2 violation. *See North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) ("Relief in redistricting cases is fashioned in the light of well-known principles of equity.") (internal quotation marks omitted). If a federal appellate court vacates a district court's permanent injunction order, that would destroy the entire basis for the district court's remedial authority, which means the litigation as to the equitable relief (including the drawing of any maps) would no longer go forward. It is axiomatic that, for Section 2, a "district court's remedial proceedings bear directly on and are inextricably bound up in its liability findings." *Wright v. Sumter Cty. Bd. of*

Chalmers, Adams, Backer & Kaufman, LLC
701 Fifth Avenue, Suite 4200
Seattle, Washington 98104
Phone: (206) 207-3920

Elections & Registration, 979 F.3d 1282, 1302–03 (11th Cir. 2020). Therefore, a district court's authority to order a remedial map is an aspect involved in the appeal, and the district court is thereby divested of control as to the remedial map while the "merits" appeal is pending.

It is true, of course, that "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed R. Civ. P. 62(d). Accordingly, "[t]he general rule that an appeal deprives a district court of jurisdiction over the issues appealed therefore is not absolute, and under certain circumstances, the district court retains jurisdiction to modify an injunction pending appeal." *Bd. of Educ. v. Missouri*, 936 F.2d 993, 995 (8th Cir. 1991). The Ninth Circuit has described the surviving jurisdiction in this way:

> [I]n the kinds of cases where the court supervises a continuing course of conduct and where as new facts develop additional supervisory action by the court is required, an appeal from the supervisory order does not divest the district court of jurisdiction to continue its supervision, even though in the course of that supervision the court acts upon or modifies the order from which the appeal is taken.

Hoffman ex rel NLRB v. Beer Drivers & Salesmen's Local Union, 536 F.2d 1268, 1276 (9th Cir. 1976).

But those two defined and narrow exceptions to the rule of divestment do not apply here, for two reasons.

First, as *Coinbase* recently made clear, whatever the district court's "supervisory" jurisdiction to "modify" injunctions is, it cannot encroach on "aspects of the case involved in the appeal." *Coinbase* is an extremely limiting principle: Yes, the district court retains some modification authority over its own injunction while an appeal is pending, but it cannot issue a remedial map when its justification to do so is bound up in the appeal.

Second, the adoption of a remedial plan in Section 2 litigation is an extraordinary step in our governmental system, because it involves a district court supplanting the ordinary role of the

State in redistricting. *See Chapman v. Meier*, 420 U.S. 1, 27 (1975) "(We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court."). Therefore, the "supervision" over a state's remedial redistricting is qualitatively distinct from a federal court's own remedial process. In this case, this Court has asserted that it will order the map drawn. That is not supervision over the implementation of its injunction against a state-adopted map. That is the districting itself. What this Court is doing is no mere supervisory role contemplated by Rule 62(d). Instead, it is the type of proceedings that could only be conducted when general jurisdiction over the case has not been transferred to the appellate court.

The Eleventh Circuit has dealt well with this Section 2 procedural problem well, creating a helpful roadmap in *Wright*. Admittedly—but sensibly—taking care of jurisdiction does result in a bit of yoyoing between courts:

> The County Board appealed, challenging the district court's order permanently enjoining the May 2018 school board elections "and all orders forming the basis of or relating to that injunction," including the district court's order finding liability under section 2. With that appeal pending -- after the County Board had filed its opening brief, and while we awaited Wright's response -- the district court sua sponte modified its injunction. Since the County Board's notice of appeal had deprived it of jurisdiction, the court concluded it was without power to draw a new map. Therefore, school board elections would proceed under H.B. 836's districting regime. The court denied Wright's motion for reconsideration.
>
> A panel of this Court then sua sponte remanded the case to the district court on a limited basis, for the second time. We construed its orders -- modifying the injunction and denying Wright's motion for reconsideration – "as equivalent to indicative rulings under Fed. R. Civ. P. 62.1(a)(3)." On remand, we directed the district court to determine whether it was "still feasible to issue a new map with interim boundaries for the November election in a timely manner." "If so," we said, the court should draw a new district map "before returning the case and the record to this Court." If not, however, the district court should enter an order saying so "and then return the case to this Court."

Wright v. Sumter Cty. Bd. of Elections & Registration 979 F.3d at 1298–99. The Eleventh Circuit thus endorsed (1) the district court's power to modify the injunction but *not* to "draw a new map,"

and (2) the importance of having only one court at a time exercise jurisdiction over the entire Section 2 case.

Moreover, this Court purported to issue a final judgment—not an interlocutory order—in this Section 2 case. (*See* Dkt. # No. 219.) Ordinarily, "[a] final judgment 'end[s] the litigation on the merits and leave[s] nothing for the court to do but execute the judgment.'" *Demartini v. Demartini*, Nos. 19-16603, 19-16940, 2023 U.S. App. LEXIS 15034, at *2 (9th Cir. June 16, 2023) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). And "[t]he United States Supreme Court has affirmed the general rule that "the whole case and every matter in controversy in it [must be] decided in a single appeal.'" *Galaza v. Wolf*, 954 F.3d 1267, 1270 (9th Cir. 2020) (quoting *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017)).

This Court, in issuing its final judgment, nonetheless stated that it "retains jurisdiction over the adoption of the new redistricting plan as set forth in the Memorandum of Decision." (Dkt. # No. 219.) But, again, it is an extraordinary thing for a district court to *both* (1) retain jurisdiction over a case *after* final judgment; *and* (2) assert its authority to draw a state's legislative districts. Such exceptional exercises of federal judicial power is not present in any other area of law. The federal courts should instead treat Section 2 cases as ordinary federal cases. A final judgment divests a district court of jurisdiction. As such, all remedial processes must cease so that the appellate process may run its course.

All that notwithstanding, this Court may act within the strictures of Fed. R. Civ. P. 62.1 while Intervenor-Defendants' appeal is pending: "If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue."

Plaintiffs timely filed their opening "Brief in Support of Remedial Proposals" on December 1, 2023. (Dkt. # 245.) That document requested "this Court to adopt one of Plaintiffs' five proposed remedial plans, which fully and effectively remedy the Section 2 violation in the region, with a

preference." (*Id.* at 7.) The brief, then, is the functional equivalent of a Motion to Adopt a Remedial Map. This is especially true because, based on this Court's current scheduling, that brief will be the only option for the Plaintiffs to so move. Indeed, this Court has explained that it will, in cooperation with the special master, adopt one of those maps (whether or not modified) and then inform the parties. (*See generally* Dkt. # 246.) As such, Plaintiffs' filing of December 1, 2023 is best construed as moving this Court to adopt one of their proposals.

For the reasons stated above, this Court "lacks authority to grant" that request because of Intervenor-Defendants' appeal. That limits the Court to three options. It can simply defer considering Plaintiffs' proposals, deny the motion entirely, or give an indicative ruling. *See* Fed. R. Civ. P. 62.1.

This Court, therefore, could give an indication of which map as modified is its chosen remedy, but it lacks the jurisdiction to actually adopt a remedial map and impose it on the State.

B. <u>Alternatively, Should This Court Find It Retains Remedial Jurisdiction During the Pending Appeal, This Court Must Hold An In-Person Remedy-Specific Evidentiary Hearing To Determine Disputed Factual Matters.</u>

If this Court determines that it indeed retains remedial jurisdiction notwithstanding the pending appeal, prior to adopting any remedial map, this Court must conduct an in-person remedy-specific evidentiary hearing because it cannot adopt a new map without first deciding disputed factual matters. Further, this Court cannot decide disputed factual matters without first conducting a hearing.

The right to an evidentiary hearing with live witnesses and the opportunity for cross-examination is deeply rooted in our judicial system. Reflecting this deeply rooted tradition, the law of the Ninth Circuit for more than two decades has been that "[g]enerally the entry or continuation of an injunction requires a hearing. Only when the facts are not in dispute, or when the adverse party has waived its right to a hearing, can that significant procedural step be eliminated." *Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988). Nearly every other circuit is in accord. "It is a cardinal principle of our system of justice that factual disputes must be

heard in open court and resolved through trial-like evidentiary proceedings." *Microsoft*, 253 F.3d at 101; *see also Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1211 (11th Cir. 2003); *In re Rationis Enters., Inc. of Panama*, 261 F.3d 264, 269 (2d Cir. 2001); *Prof'l Plan Examiners of N.J., Inc. v. Lefante*, 750 F.2d 282, 288 (3d Cir. 1984); *United States v. McGee*, 714 F.2d 607, 613 (6th Cir. 1983).

The leading modern case on this issue is *United States v. Microsoft*. In *Microsoft*, the D.C. Circuit, sitting *en banc*, unanimously reversed a district court's imposition of an injunction without an evidentiary hearing. 253 F.3d at 101. The court grounded its analysis on the "cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings," and its recognition that "[a]ny other course would be contrary 'to the spirit which imbues our judicial tribunals prohibiting decision without hearing.'" *Id.* (quoting *Sims v. Greene*, 161 F.2d 87, 88 (3d Cir. 1947)).

In *Microsoft*, the district court below, following a finding for the plaintiff on the merits regarding liability in an antitrust case, moved forward with the remedial stage and restructured Microsoft without holding an in-person remedy-specific hearing to determine disputed factual matters. *Id*. at 49. In reversing the district court, the D.C. Circuit held that "[a] hearing on the merits—i.e., a trial on liability—does not substitute for a relief-specific evidentiary hearing unless the matter of relief was part of the trial on liability, or unless there are no disputed factual issues regarding the matter of relief." *Id*. at 101.

The present matter is analogous to *Microsoft*. Here, the Court issued a finding for Plaintiffs at the "trial on liability." (Dkts. ## 218, 219.) Now, the Court is engaging in the remedy phase, and apparently intends to restructure the duly enacted legislative district map for Washington state without any further evidentiary hearings. (*See* Dkt. # 253 at 32 ("Clerk of Court is directed to enter judgment in plaintiffs' favor on their Section 2 claim."); *see also* Dkt. # 246 at 3 (stating that the Court will schedule a hearing in the beginning of March "to discuss the Court's preferred remedial option" but saying nothing regarding any remedy-specific evidentiary hearing where experts and witnesses can be cross examined.))

Chalmers, Adams, Backer & Kaufman, LLC
701 Fifth Avenue, Suite 4200
Seattle, Washington 98104
Phone: (206) 207-3920

In the present matter, there are disputed facts the Court must decide before it can enter a final remedy, i.e., a new legislative map. For example, Plaintiffs' remedial expert, Dr. Oskooii, an expert who did not appear in the trial on liability, prepared five different proposed remedial maps. (Dkt. # 245.) Dr. Oskooii claims that his maps (1) respect traditional criteria and the redistricting criteria set forth in Washington law; and (2) that LD-14 (his proposed remedial district in the Yakima Valley) unites population centers in the Yakima Valley. *Id.* Dr. Collingwood, another remedial expert for Plaintiffs, provides his opinion for the first time before the Court that Dr. Oskooii's proposed remedial maps comply with Section 2 of the Voting Rights Act. *Id.* Both Dr. Oskooii's and Dr. Collingwood's expert opinions are factual assertions which Intervenor-Defendants dispute. (*see* Dkts. ## 251, 252.) It is essential that Dr. Oskooii and Dr. Collingwood face cross examination regarding their disputed factual claims.[2]

CONCLUSION

For the foregoing reasons, Intervenor-Defendants respectfully request that this Court recognize that it lacks jurisdiction to conduct remedial proceedings and issue an order placing all remedial proceedings in this case in abeyance pending action by the Ninth Circuit. Alternatively, in the event this Court determines that it retains jurisdiction for the remedial proceedings, Intervenor-Defendants move this Court to hold an in-person remedial-specific evidentiary hearing prior to adopting any remedial maps.

[2] Additionally, Intervenor-Defendants would like to discuss with Drs. Oskooii and Collingwood why, despite the Court ordering that the remedy map include "a majority-Latino" population in Yakima, they put forth a map that contains a sub-majority Latino population? (*See* Dkts. ## 70 at 41, 218 at 32 (Plaintiffs ask that the Court order the implementation of a map that "that includes a majority-Latino state legislative district in the Yakima Valley region" and the Court "enter[s] judgment in plaintiffs' favor on their Section 2 claim.")) Other disputed issues include: location of incumbents, adjusting partisan performance in non-Yakima Valley districts, what data was consulted by the experts while creating and analyzing Plaintiffs' proposed remedial maps, etc.

DATED this 19th day of January, 2024.

Respectfully submitted,

s/ Andrew R. Stokesbary

Andrew R. Stokesbary, WSBA No. 46097
CHALMERS, ADAMS, BACKER & KAUFMAN, LLC
701 Fifth Avenue, Suite 4200
Seattle, WA 98104
T: (206) 813-9322
dstokesbary@chalmersadams.com

Jason B. Torchinsky (admitted pro hac vice)
Phillip M. Gordon (admitted pro hac vice)
Andrew B. Pardue (admitted pro hac vice)
Caleb Acker (admitted pro hac vice)
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK PLLC
15405 John Marshall Hwy
Haymarket, VA 20169
T: (540) 341-8808
jtorchinsky@holtzmanvogel.com
pgordon@holtzmanvogel.com
apardue@holtzmanvogel.com
cacker@holtzmanvogel.com

Dallin B. Holt (admitted pro hac vice)
Brennan A.R. Bowen (admitted pro hac vice)
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK PLLC
Esplanade Tower IV
2575 East Camelback Rd
Suite 860
Phoenix, AZ 85016
T: (540) 341-8808
dholt@holtzmanvogel.com
bbowen@holtzmanvogel.com

Counsel for Intervenor-Defendants

I certify that this memorandum contains 3,192 words, in compliance with the Local Civil Rules.

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing document with the Clerk of the Court of the United States District Court for the Western District of Washington through the Court's CM/ECF System, which will serve a copy of this document upon all counsel of record.

DATED this 19th day of January, 2024.

Respectfully submitted,

s/ Andrew R. Stokesbary
Andrew R. Stokesbary, WSBA No. 46097

Counsel for Intervenor-Defendants