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

RICHARD ROSE, *et al.* *Plaintiffs*, v. BRAD RAFFENSPERGER, in his official capacity as Secretary of State of the State of Georgia, *Defendant*.	CIVIL ACTION CASE NO. 1:20-cv-2921-SDG

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR A CONFERENCE REGARDING REMEDIAL PROCEEDINGS

Plaintiffs' Motion for a Conference Regarding Remedial Proceedings [Doc. 170] is premature. As this Court is aware, the Eleventh Circuit expedited Defendant's appeal of this Court's order. August 19, 2022 Eleventh Circuit Order [Doc. 161]. The Eleventh Circuit held oral argument on December 15, 2022—four months ago—meaning that its ruling could arrive from the Eleventh Circuit any day. Starting up a remedial phase *now* makes little sense. Regardless of how the Eleventh Circuit rules, it will greatly impact any remedial phase. Even if it affirms, its opinion will almost certainly guide what remedy is required.

As Plaintiffs concede, the filing of a notice of appeal generally divests the district court of jurisdiction. [Doc. 170, p. 3]; *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982); *United States v. Diveroli*, 729 F.3d 1339, 1341 (11th Cir. 2013). In claiming an exception to this general rule, Plaintiffs cite a single constitutional racial-gerrymandering case where the district court was only moving district lines—not altering the method of election. *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 562 (E.D. Va. 2016)[1] (addressing configuration of Third Congressional District after finding it was a racial gerrymander as drawn).

Other district courts have dealt with the remedial phase of Section 2 cases in a variety of ways in a variety of procedural postures. *See, e.g.*, *Ga. State Conference of the NAACP v. Fayette Cty. Bd. of Comm'rs*, 118 F. Supp. 3d 1338, 1340 (N.D. Ga. 2015) (noting use of remedial plan entered *before* appeal); *Johnson v. Mortham*, 926 F. Supp. 1540, 1543 (N.D. Fla. 1996) (setting timeline for redrawing of existing districts while appeal pending); *Buskey v. Oliver*, 574 F. Supp. 41, 41 (M.D. Ala. 1983) (redrawing plan on expedited basis

[1] One unusual feature in *Personhuballah*, on which Plaintiffs rely heavily, is that the state did not appeal—only the intervenors. That was the reason the United States Supreme Court "ruled against the defendant-intervenors" as noted by Plaintiffs, and it did not rule on the merits of the dispute. *Compare* [Doc. 170, p. 6] *with Wittman v. Personhuballah*, 578 U.S. 539, 541 (2016).

to avoid election delay while appeal was pending). In at least one case, plaintiffs sought a limited remand from the Eleventh Circuit while an appeal was pending to allow for remedial proceedings at the district court. *Wright v. Sumter Cty. Bd. of Elections & Registration*, 979 F.3d 1282, 1299 (11th Cir. 2020) ("Wright moved this Court for another limited remand to allow the district court to conduct remedial proceedings."). Although that also seems unnecessary here, where the Eleventh Circuit should be issuing its decision soon, at least that has the advantage of ensuring that this Court has jurisdiction, should the Eleventh Circuit grant such a request.

Regardless, there is no need to rush to a remedy phase now, with oral argument four months behind us. This is not a situation where an entire appellate process lies ahead, potentially taking up a year or more, while a remedy is urgently needed. Instead, the Eleventh Circuit expedited the appeal, argument was held, and the panel of judges is clearly aware of the need for expedition. Perhaps, in the exceedingly unlikely event that the Eleventh Circuit has still not issued an opinion in six months, it would be time to discuss a potential remedy—now is not that time.

Moreover, the first opportunity for fashioning a remedy belongs with the *legislature*. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *Upham v. Seamon*, 456 U.S. 37, 39 (1982) ("[A] court must defer to legislative judgments on

reapportionment as much as possible."). *See also, e.g.*, *Perry v. Perez*, 565 U.S. 388, 396 (2012) (reversing district court because it "exceeded its mission to draw interim maps that do not violate the Constitution or the Voting Rights Act, and substituted its own" judgment for that of the Legislature). So, should the Eleventh Circuit affirm this Court's ruling, it would be up to the legislature to act in the first instance. The most appropriate course of action would be, almost certainly, to give the State some period of time to solve the problem, without the need for any court-ordered remedy, and order such a remedy only if the State chooses not to act. *See, e.g., Larios v. Cox*, 306 F. Supp. 2d 1212, 1213 (N.D. Ga. 2004) (undertaking drawing redistricting plans when elections were imminent and legislature did not act in prescribed period). Of course, the legislature might not be in session, but the Court should at least give the opportunity for a special session, even if it is not taken, because "districting legislation" is "primarily the duty and responsibility of the State." *Miller v. Johnson*, 515 U.S. 900, 915 (1995).[2]

Moreover, in this case, some action (whether by the State or by this Court) will be required no matter the outcome of the appeal at the Eleventh

[2] The legislature did not address the issue in its most recent legislative session, but that can be chalked up to the fact that the issue is on appeal and legislature believes the Secretary will ultimately prevail.

Circuit. In its order following trial, this Court cancelled the 2022 elections for two seats on the Public Service Commission. [Doc. 151, p. 63]. If the Eleventh Circuit upholds this Court's ruling, then the State or this Court will have to create a remedy and set an election schedule for elections that likely includes a primary, primary runoff, general election, and general election runoff. If the Eleventh Circuit reverses this Court, then again, either the State or the Court will have to address holding statewide special elections because of the cancelled 2022 elections—again, likely requiring a new primary and general election schedule. This is also true because the current structure of the Commission adopted by the General Assembly keys terms of office for particular districts on particular election dates that did not occur. *See* O.C.G.A. § 46-2-1(d). All of these factors must be addressed in combination with the cost of holding special elections regardless of the outcome of the appeal.

Thus, given the significant cost and disruption of devising a remedy and potentially holding special elections, only to be told something different by the Eleventh Circuit in short order, the remedial process should at least wait until this Court and the parties have direction on the resolution of the appeal. Moving to the remedial phase at this point risks significant expenditure of state and county resources that would only be expended again, depending on the Eleventh Circuit's ruling.

Plaintiffs request only "a conference call for the purpose of discussing an orderly schedule for remedial proceedings in this case." [Doc. 170, p. 7]. But remedial proceedings are best crafted following a ruling from the Eleventh Circuit and not before.

Respectfully submitted this 18th day of April, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing Response Brief has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

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