Nos. 18-11510 and 18-13510

In the United States Court of Appeals
for the Eleventh Circuit

MATHIS WRIGHT, JR.,

Plaintiff-Appellee

v.

SUMTER COUNTY BOARD OF ELECTIONS AND REGISTRATION,

Defendant-Appellant.

On Appeal from the United States District Court
For the Middle District of Georgia
No. 1:14-cv-00042
The Honorable W. Louis Sands

Opposition of Defendant-Appellant
Sumter County Board of Elections and Registration
To Plaintiff's Motion for Remand

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1-1 of this Court, Appellant certifies that the below listed persons and entities have interests in the outcome of this case:

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Wright, Mathis Kearse, Jr.

Defendant:

Sumter County Board of Elections and Registration

Introduction

This straightforward appeal challenges the district court's injunction against Sumter County's school-board districting plan, which the court concluded violates the Voting Rights Act. When the County filed this appeal over a year ago it promptly moved to expedite, positing that this Court could and should rule before the then-scheduled November 2018 school-board election.

The Plaintiff opposed that request to speed this case up and countered with a stream of motions to slow it down. The Plaintiff defeated the County's motion to expedite, and he also obtained multiple orders delaying the briefing schedule, so that his appellee brief was not filed until over eight months after the County filed its appellant brief. Because the Plaintiff's tactics thwarted any possible appellate ruling before the November 2018 election, it became necessary to determine whether or how it would proceed. The Plaintiff succeeded again on this question, obtaining an injunction pending appeal, even though—as the County observed—this would (and did) extend the terms of board members elected under the plan the Plaintiff calls unlawful. As a result, Sumter's black voters were denied the opportunity to vote for a black candidate who declared his intention to run for a school-board opening created by the

white incumbent's choice not to seek reelection. The white incumbent remains in office thanks to the Plaintiff's litigation choices.

Now that oral argument has at last been scheduled and a final resolution is in sight, the Plaintiff asks for yet more delay and cites problems *he created* as the basis for it. All these cited problems create unimpeachable reasons to move promptly and resolve this appeal, not to conduct yet another round of interim district-court proceedings that may prove pointless. The County implores the Court to disentangle this case from this motion-practice thicket, exercise its jurisdiction, and resolve this appeal without further ado.

Factual Background

Over 13 months ago, on March 17, 2018, the district court issued an order concluding that Sumter County's seven-member school-board districting plan violates the "effects" prong of Section 2 of the Voting Rights Act. On March 30, the district court issued a permanent injunction against the May 2018 election and rescheduled it for November 2018 under a yet-to-be-created remedial districting plan. On April 11, the County appealed under 28 U.S.C. § 1292(a)(1).

The appeal was docketed on April 12, 2018, as case number 18-11510. On April 13, the County moved to expedite, observing that the district court rescheduled the school-board election for November and that the appeal could

be resolved in time to determine whether it should proceed under a remedial plan or the enjoined plan, which the County contends is lawful.

The Plaintiff opposed the motion to expedite and combined it with a motion to dismiss the appeal as moot. Opp'n to Mot. to Expedite and Mot. to Dismiss (filed 4/18/18). The Plaintiff argued that it was too late to resolve the appeal before the November 2018 election but that its resolution in 2019 would allow "plenty of time for the district court to take any other action necessary" to address this Court's ultimate ruling in advance of the May 2020 election. *Id.* at 15.

On May 4, the Court (Pryor, J., J.) denied the County's motion to expedite. On May 9, the Court (Tjoflat, Marcus, & Pryor, J., JJ.) denied the Plaintiff's motion to dismiss.

On May 22, the County filed its appellant brief. It requested that the Court "hold argument…expeditiously to resolve this election case in this election year." Appellant Br. iii (filed 5/22/18). By rule, the Plaintiff's appellee brief was due June 21, 2018. *See* Cir. R. 31-1(a). The Plaintiff, however, moved for and obtained a two-week extension for his counsel's personal needs. The County consented to this request.

On June 21, the district court issued an order concluding that the notice of appeal deprived it of jurisdiction it issue a remedial order during the

pendency of the appeal. District Court Dkt. 214. The district court therefore concluded that the November election would proceed under the enjoined plan.

On June 22, the Plaintiff moved this Court again to dismiss the appeal as moot, contending that the order allowing elections to proceed under the invalidated plan afford the County all available relief.

On June 25, the Plaintiff moved this Court for an order holding the case in abeyance. The County neither joined nor opposed this request.

On June 27, the Plaintiff moved the district court for reconsideration of its ruling on jurisdiction. District Court Dkt. 215.

On July 2, the Court (Wilson, J.) granted the Plaintiff's motion to hold the appeal in abeyance. The order provided that the Plaintiff's appellee brief would be due 30 days after resolution of the jurisdictional issue.

On July 23, the district court issued an order denying the Plaintiff's motion for reconsideration. District Court Dkt. 217. The court reaffirmed its prior holding that the appeal deprived it of jurisdiction to issue a remedy but opined that it might have jurisdiction to enjoin the November 2018 election and left that question to future litigation.

On July 31, the Plaintiff filed an emergency motion with the district court for an injunction pending appeal to prohibit elections under the school-board plan. District Court Dkt. 218. As part of the briefing on this motion, the

parties debated the impact of an injunction on the composition of the school board. The Plaintiff argued:

> Removing the special school-board election from the November ballot will cause minimal disruptions to the ordinary process of governance because current board members will remain in office until their successors are elected, and the special school-board election can be reset to coincide with one of several already-scheduled special-election dates in Georgia.

Id. at 8 (citation and footnote omitted). The Plaintiff argued again in his reply brief that there would not be meaningful interference "with the governance of the school board" because, "[u]nder Georgia law, board members…remain in office until their successors are elected." District Court Dkt. 228, at 3–4. As to the futility of extending terms of board members elected under a plan the Plaintiff calls unlawful, the Plaintiff had this to say:

> [T]he County notes that Wright will not benefit from an injunction pending appeal because members elected under the unlawful plan will remain in office until their successors are elected. Wright agrees. The injunction will not benefit him, and it is not intended to do so. It is intended to maintain the status quo and that is all.

District Court Dkt. 228, at 3.

On August 9, this Court (Marcus, Pryor, W., & Jordan, JJ.) issued an order denying the Plaintiff's second motion to dismiss. The order, however, treated the district court's rulings as to its jurisdiction and the possibility of an

injunction as "equivalent to indicative rulings under Fed. R. Civ. P. 62.1(a)(3)" and remanded the case *sua sponte* for the limited purpose of determining whether it was too late to issue a remedial map before the November election and whether that election should otherwise proceed.[1] Aug. 9 Order 2.

On August 17, the district court issued an order (1) concluding that it was too late to issue a remedial districting plan and (2) enjoining the November election. District Court Dkt. 237. As part of its equitable balancing, the district court found that "it…appears that vacancies [on the school board] are filled and incumbents will remain in office until succeeded," a point it weighed as favoring an injunction. District Court Dkt. 238. The Court's enjoined the November election and provided that it "will be reset at a later date." *Id.* at 11.

On August 20, 2018, pursuant to this Court's limited-purpose-remand order, the district court transmitted jurisdiction back to this Court.

The County moved this Court for a stay or vacatur of the district court's injunction pending appeal. In response, this Court issued an order questioning whether the County needed a second notice of appeal to establish appellate

[1] Although the Plaintiff (at 9) expresses disagreement that the district court lacks jurisdiction to implement a remedy, that ruling has been ratified in this Court's rulings—since a limited-purpose remand would have been unnecessary if the district court's jurisdictional ruling were incorrect—and is law of the case.

jurisdiction to review the new injunction. *See* Aug. 21 Order. The County promptly filed a second notice of appeal, which opened case number 18-13510. That case has since been consolidated with case number 18-11510 with the Plaintiff's consent, since the parties agree that no new substantive issues are involved. On August 24, the Court (Tjoflat, Rosenbaum, & Newsom, JJ.) denied the County's stay motion.

Although the transmission of jurisdiction back to the Court on August 20 rendered the Plaintiff's appellee brief due on or about September 19, 2018, the Plaintiff did not file a brief. By rule, the case was then ripe for argument. *See* Fed. R. App. P. 31(b).

But, on October 30, 2018, the clerk of court issued an order noting probable jurisdiction and ordering the Plaintiff to file a brief within 30 days.

The next day, October 31, the clerk of court rescinded the briefing order and provided that the Plaintiff's brief would not be due until 30 days after the County's brief was filed in the 18-13510 case (even though that case raised no new issues relevant to the merits briefing).

On November 26, to comply with the clerk's request for a second brief, the County filed an appellant brief in the 18-13510 case. The brief incorporated the County's May 22 brief by reference and, in addition, pointed the Court to the results of the November 2018 elections in which black candidates won the

Sumter County total vote in multiple races. That is not surprising, since Sumter County's total population is over 52% black.

On November 27, Plaintiff moved the district court to reopen the case for consideration of the 2018 election results. District Court Dkt. 246.

On November 28, the Plaintiff moved this Court to remand the case for district-court consideration of the 2018 election results or, in the alternative, to strike references to those results from the County's brief.

On November 30, the Plaintiff moved to stay the briefing schedule yet again pending his motion. The County opposed this request. *See* Opp'ns to Mots. for a Limited Remand, To Strike, and To Stay Briefing Schedule 11–12 (filed 12/06/18).

On December 26—the day the Plaintiff's brief was due—the Court (Rosenbaum, J.) issued an order granting the Plaintiff's motion to stay briefing.

On January 9, 2019, the Court (Wilson & Pryor, J., JJ.) issued an order denying the motion for remand and ruling that the motion to strike would be carried with the case.

On February 1, the Plaintiff filed his appellee brief. On February 22, the County filed its reply brief.

On March 26, the clerk of court issued an order stating: "The Court has determined that oral argument will be necessary in this case." On March 29,

the clerk of court issued an order tentatively calendaring the argument for the week of July 22, 2019.

On March 28, 2019, the district court issued an order denying the Plaintiff's motion of November 27, 2018, to reopen the district-court case. District Court Dkt. 249.

On April 16, the Plaintiff filed the pending motion in this Court to remand the case. The County opposes.

Argument

The Plaintiff's motion to remand should be denied. His contention that more procedural gymnastics would help resolve problems of his own making rings hollow. The only reason this appeal has not already been decided is that the Plaintiff opposed the County's efforts to obtain a resolution last summer and directed a constant stream of motions—including for scheduling abeyances—to this Court and the district court. The procedural labyrinth proves that further stays and remands are precisely the wrong way to proceed to a prompt resolution—or any resolution at all. The way to proceed expeditiously is to conduct argument in July as tentatively scheduled.

The Plaintiff's contrary position relies on inaccuracies about the current situation. His position (at 2) that "the district court" needs "time to devise a remedy in time for the 2020 school-board elections" is inexplicable. There are

no 2020 school-board elections scheduled because the Plaintiff obtained an injunction against school-board elections "*pending appeal*." District Court Dkt. 218, at 1 (emphasis added). The County cannot conduct elections while the appeal is pending because the district court enjoined its use of the current plan and has not issued a remedy. That is why the district court's injunction, per the Plaintiff's request, provides that elections "will be reset at a later date." District Court Dkt. 238, at 11. That "later date" is to be determined. This ruling adopted the Plaintiff's position that elections could occur at any number of special-election dates during any given year, not only in May or November. District Court Dkt. 218, at 8. Having already persuaded the district court to depart from May and November election dates in favor of some other date to be determined after the appeal, the Plaintiff cannot credibly assert that the May 2020 election date is even in force, let alone sacrosanct.

Even if it were, a remand would still be improper because that date is over a year away. If the Plaintiff's prior briefing is any indicator, there is ample time for this Court to resolve the appeal and for the district court to implement its ruling. In opposing the County's motion to expedite, the Plaintiff contended that a 2019 resolution would allow "plenty of time" for subsequent proceedings before a May 2020 election date. Opp'n to Mot. to Expedite and Mot. to Dismiss 15 (filed 4/18/18). And that tracks the Plaintiff's remedial

arguments in district court, where he contended on January 22, 2018, that the district court could enter a remedial order any time before February 26, 2018, which would give "adequate" time for the *May 2018* elections. District Court Dkt. 174, at 13. The Plaintiff now claims that remedial proceedings must commence in April or May of 2019 in time for the *May 2020* elections. If that timeline were correct, then by the time the case was tried in December 2017, it was already too late to impact the May 2018 elections. That position never occurred to either party or the district court—and for good reason.

The current timeline is well ahead of the timeline in place in the district-court proceeding. An odd-year July argument is a full six months ahead of the December 2017 trial, and the Plaintiff provides no reason to think that, if an opinion were issued in, say, October 2019 there would be insufficient time for a remedy by May 2020. That, again, is a far more comfortable timeframe than confronted the parties and the district court in 2017 and 2018.

By comparison, remanding the case and delaying the appeal further would—if the May 2020 date were in fact the target—cast doubt on whether this Court can resolve the appeal in time to impact that date. By far the optimal way to proceed is to allow an appellate ruling in 2019 and hold an election *informed by* that ruling in 2020, whether in May or on some other date. The Plaintiff's purpose here appears to be to obtain an election under a map *not*

informed by this Court's ruling. He wants the district court's ruling to be the last word as a matter of procedural sparring rather than the merits. Why he is so fearful of appellate review is unclear. Perhaps he appreciates how vulnerable the decision is to reversal. But, regardless, it is self-evident that *this* Court's ruling should control the next school-board election.

Allowing this appeal to proceed does not compromise the Plaintiff's ability to obtain an election under a remedial plan if this Court affirms, and the Plaintiff provides no persuasive reason to think otherwise. The Plaintiff's contention (at 9) that remedial proceedings "could take a considerable amount of time" neglects to mention that remedial plans have already been proposed in the district court, and discovery and briefing have already been conducted and completed. *See* District Court Dkt. 174 (remedial proposals); *id*. at 176 (response); *id*. at 177–180, 182–84 (further briefing and order on remedial proposals); *id*. at 196–197, 199–200 (supplemental briefing and order on remedial proposals). So, aside from possible post-appeal supplemental briefing on this Court's ruling (which can occur in short order), all that remains is for the district court to review the evidence already adduced and arguments already filed and issue its decision. There is no reason to tell the district court "to begin" a remedial "process," Plaintiff's Mot. to Remand 10, that is largely

complete. This, again, is a better position than the parties were *vis a vis* the 2018 elections as of February 2018.

Undergoing remedial proceedings now rather than after this Court rules makes even less sense when litigant and judicial resources are factored in. If this Court reverses, no remedial order will be necessary—a good reason itself that it should issue after, not before, this Court rules. And, because the efficacy of the Plaintiff's illustrative remedy at the liability phase is one of the core issues in the appeal, *see* Appellant's Br. 39–51, this Court's decision may touch on remedial issues and inform the type of remedy appropriate if one is required.

The Plaintiff's other arguments are even less persuasive. His newfound concern (at 9) that "three members of the board are now holdovers" is remarkable as compared to his prior position that an injunction would "cause minimal disruptions…because current board members will remain in office." District Court Dkt. 218, at 8 (citation and footnote omitted). Both the Plaintiff and the district court cited these "holdovers" as evidence in favor of preserving the status quo, not altering it as the Plaintiff now demands. The County observed during the injunction-pending-appeal briefing that extending current

members' terms made little sense.[2] But the County lost, and Plaintiff won. Plaintiff is estopped from changing course or, at a minimum, is acting inequitably in his contradictory positions.

Indeed, the Plaintiff's urging last fall that an injunction was justified to "maintain the status quo," District Court Dkt. 228, at 3, cannot square with his assertion (at 8) that "[a] limited remand…is appropriate here for the same reasons that the Court remanded the case last year." One limited remand does not recommend others. To the contrary, the point of the limited remand last August was to address these very election-related issues, and they were resolved largely how the Plaintiff wanted them to be resolved: by preserving the status quo with an injunction against elections pending appeal. No elections can proceed, and the district court will, by the express terms of its order, chose a special-election date on remand under a plan appropriate in light of this Court's forthcoming ruling. That is the fruit of the limited remand, and there is no need for—and an enormous cost to—another one.

[2] This point has been proven manifestly correct, since black candidates were successful in winning the county-wide vote in November 2018 on the same day a black candidate had hoped to compete for an at-large school-board seat. That is no surprise when the total population of the County is over 52% black.

Conclusion

The Plaintiff's latest effort to thwart this Court's consideration of this appeal on the merits should be denied.

Dated: April 26, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Rule 27(d)(2)(A) of the Federal Rules of Appellate Procedure because, excluding the cover page, tables, certificates, and signature blocks, this document contains 3,233 words. This document complies with the typeface and type-style requirements of Local Rule 27-1(a)(10) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Calisto MT font.

Dated: April 26, 2019

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing will be filed electronically with the Court by using the CM/ECF system on the 26th day of April, 2019. I further certify that the foregoing document will be served on all those parties or their counsel of record through the CM/ECF system.

Dated: April 26, 2019

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