IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

MATHIS KEARSE WRIGHT, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO.: 1:14-cv-42 (WLS)
	)	
SUMTER COUNTY BOARD OF ELECTIONS AND REGISTRATION,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S REPLY IN SUPPORT OF HIS MOTION TO RE-OPEN THE RECORD

Plaintiff Mathis Kearse Wright, Jr. respectfully submits this reply in support of his motion to re-open the record in this case to admit evidence regarding the November 6, 2018, general election. Sumter County opposes.

Sumter County's opposition to Wright's motion is puzzling. It is clear from the County's briefing in the Eleventh Circuit that the County wants evidence of the 2018 general election included in the record of this case. (A copy of Sumter County's brief on the issue is attached.) Indeed, it is *only* because the County wants this evidence in the record that this is an issue at all; Wright simply wants an opportunity to test and rebut the County's evidence because he disputes its admissibility, reliability, and accuracy along with the conclusions that the County draws from the evidence. Yet the County opposes Wright's motion to re-open the record in order to allow the County's evidence in along with his own. The County apparently wants *its* evidence in the record, but it doesn't want Wright to have an opportunity to offer counter-evidence.

The County bases its opposition on two legal arguments. The County contends that this Court would not have the power to reopen the record under Rule 60(b)(2) of the Federal Rules of Civil Procedure, even if the Court of Appeals were to issue a limited remand for that purpose,

because (1) Wright "is in no way burdened by any adverse action from this Court," and (2) "it is doubtful that the injunction in place is 'final' under Rule 60(b)." (ECF 247 at 2.) Neither argument has any merit.

First, there is no requirement under Rule 60(b) that the movant be burdened by an adverse action of the Court. By its text, Rule 60(b) authorizes a court to grant relief to "a party or its legal representative." Wright is a party and is therefore entitled to seek relief under Rule 60(b). While it may seem unusual for a party to seek relief from an order it sought, that posture makes sense here because Rule 60(b) relief is the only way for Wright to offer evidence to test and rebut the County's evidence of the 2018 election. The Court can grant temporary relief from its order on liability for as long as it takes the Court to hear the evidence and amend its findings as appropriate. That's all Wright is asking.

Second, there is no requirement under Rule 60(b) that an order be "final." By its text, Rule 60(b) certainly applies to "a final judgment," but it also applies to an "order" and a "proceeding." Wright seeks temporary relief from an order——specifically, the Court's March 17 order on liability (ECF 198) ——which contains its findings of fact and conclusions of law. If the Court determines, after hearing the new evidence, that it should amend its findings and conclusions, it can issue an amended order. Otherwise, it can keep the original order in place and return the matter to the Court of Appeals.

It is thus clear that this Court would have the power to re-open the record to entertain new evidence if the Court of Appeals were to grant a limited remand. (The Eleventh Circuit has granted Wright's motion to stay the briefing schedule until the issue of a limited remand can be resolved.) Whether the Court wants to re-open the record is another matter. The decision of whether to grant relief under Rule 60(b) "is a matter for the district court's discretion." *Lambrix v. Sec'y, Fla. Dep't of Corr.,* 851 F.3d 1158, 1170 (11th Cir. 2017). Because Sumter County

continues to seek to include new evidence in the record, this Court should issue an indicative ruling under Rule 62.1(a)(3) that it would re-open the record, if the Court of Appeals remands for that purpose, in order to allow *both parties* an opportunity to offer new evidence.

Date: January 2, 2019

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing PLAINTIFF'S REPLY IN SUPPORT OF HIS MOTION TO RE-OPEN THE RECORD with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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Dated this 2nd day of January, 2019.

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No. 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

Response in Opposition to Motions for a Limited Remand, To Strike, and To Stay Briefing Schedule

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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:

Trial Judge:

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Plaintiff:

Wright, Mathis Kearse, Jr.

Defendant:

Sumter County Board of Elections and Registration

Response in Opposition to Motions for A Limited Remand, To Strike, and To Stay Briefing Schedule

This is the third attempt by Plaintiff-Appellee ("Plaintiff") to prevent this Court from reaching the merits of this case. Plaintiff contends that the November 2018 Sumter County election results do not demonstrate that Sumter County's black community has an equal opportunity to elect its preferred candidates in county-wide races. Defendant-Appellant Sumter County ("the County") disagrees, but this is a dispute that courts of appeals routinely adjudicate on the merits.

It is *not* a dispute about the accuracy or authenticity of election results—which the Georgia Secretary of State has now certified, and which are the proper subject of judicial notice in this Court. Instead, this is a dispute about what those results mean for this case. It is, in fact, merely an extension of Sumter County's argument in its appellant brief in the lead consolidated case that the district court erroneously ignored "election results in county-wide votes" where black and Democratic Party candidates have routinely succeeded. *See* Appellant Brief, *Wright v. Sumter Cty. Bd. of Elections and Registration*, 18-11510 at 3, 57-59 (filed May 22, 2018). Plaintiff did not move to remand after the County raised that argument, and there is no reason for a remand here for what is merely another set of results proving the County's point that the black community has an equal opportunity to elect its preferred

candidates. If Plaintiff believes the lack of expert testimony regarding the 2018 election results defeats any inference that can be drawn from them (a position the County disputes), he is free to say so in his appellee brief. The merits panel can then decide. That is how appellate procedure works.

This case has now been pending since 2014. The County is confident in its position in this appeal; Plaintiff seems less confident in his. But, whatever the ultimate result, this case is ripe for review now. There is no cause for a remand, no cause for a delay in the briefing, and no cause to strike any argument raised by either party. Rather, the Court should allow the case to proceed so that the parties can reach closure.

Background

Plaintiff filed this case on March 7, 2014, alleging that the two at-large seats in Sumter County's seven-member school board districting plan violate Section 2 of the Voting Rights Act. In July 2015, the district court issued summary judgment in the County's favor. On appeal, this Court reversed and remanded. *Wright v. Sumter Cty. Bd. of Elections and Registration*, 657 F. App'x 871 (11th Cir. 2016).

On remand, the district court conducted a second discovery phase and a trial in December 2017. On March 17, 2018, the district court entered an order and opinion finding liability under Section 2. District Court

Record/Appellant's Appendix Tab No. 198 ("T198"), Case No. 18-11510.[1] The district court subsequently entered an injunction cancelling the May 2018 elections under the school-board plan. The County filed a timely notice of appeal from that injunction on April 11. *See* 28 U.S.C. § 1292(a)(1). The resulting appeal is the 18-11510 case.

On May 22, 2018, Sumter County filed its appellant brief in the 18-11510 case, challenging the district court's liability holding that was the predicate of its permanent injunction. One of the County's arguments is that the district court "turned a blind eye to dozens of races where Democratic Party candidates (black and white) won the Sumter County total vote, some by large margins." Appellant Brief, *Wright v. Sumter Cty. Bd. of Elections and Registration*, 18-11510 at 3, 57-59 (filed May 22, 2018). The County concedes that "neither party's expert offered estimates of voting behavior in these specific races," but contends that the information is probative of minority opportunity because it is undisputed that black and Democratic Party candidates are ordinarily the candidates preferred by black voters. *Id.* at 57-58. This argument was presented to the district court, and the district court determined that no weight should be

[1] Because Sumter County has filed its brief and appendix in both the lead case, 18-11510, and this consolidated case, 18-13510, the Court has the benefit of relevant record items, and the County cites appendix tabs here for the sake of convenience.

afforded to election results that were not probed by expert analysis. T198/23-24. The County challenges this ruling on appeal (among many others).

Plaintiff did not move to remand the case to open the record in response to the County's May 22 brief. Presumably, Plaintiff expects to respond to the County's argument that county-wide election results showing that Democratic Party and black candidates win the county-wide vote are probative.

Over the course of summer 2018, Plaintiff twice moved to dismiss the appeal for lack of jurisdiction and moved to stay briefing pending these motions. The Court denied both motions to dismiss, but it stayed briefing while those motions were pending.

The injunction challenged in the 18-11510 case originally forbade only the May 2018 school-board elections and affirmatively required that special elections for school board be held in November. However, after the district court concluded that it lacked jurisdiction to implement a remedial plan, this Court on August 9, 2018, issued a limited-purpose remand under Federal Rule of Appellate Procedure 12.1 and Federal Rule of Civil Procedure 62.1(a)(3) to allow the district court jurisdiction to address how and if the November election would proceed. On August 17, 2018, the district court issued a second injunction barring the November elections as well. T237. On August 20, the

district court issued an opinion explaining the basis of the second injunction. T238.

The County filed an emergency motion in the 18-11510 case to vacate or stay that second injunction enjoining the November elections. In response, a panel of this Court posed the question whether an additional notice of appeal was required for this Court to have jurisdiction over the second injunction. The County promptly filed a second notice of appeal. T240. Then it renewed its stay motion in the 18-11510 case. (The second notice of appeal was then being processed, and no new case had yet been docketed in this Court.) In the same filing, the County moved the Court to consolidate the 18-11510 case to the new case that would be opened following the second notice of appeal. In his briefing, Plaintiff conceded that the new notice of appeal conferred jurisdiction for this Court to address the motion to stay or vacate the second injunction. He also agreed that the cases should be consolidated, observing that "the new appeal does not present any new issues"—just a new injunction. Plaintiff's Response to Jurisdictional Question, *Wright v. Sumter Cty. Bd. of Elections and Registration*, 18-11510 (filed August 23, 2018).

The appeal eventually docketed as a result of that second notice of appeal is this case, marked 18-13510. On August 24, the Court in the 18-11510

case denied the County's motion for a stay, but it granted the County's motion to consolidate the 18-13510 case with the 18-11510 case.

The 18-11510 case remains open, but only Sumter County's appellant brief has been filed. Plaintiff has not yet filed his appellee brief in either case.

On November 26, 2011, the County filed its brief in this case (18-13510).[2] The County observed that the 18-13510 case raises no new issues, that its May 22 brief stated its arguments for both cases, it incorporated its May 22 brief by reference, and did not "repeat the same arguments here" out of "concern for judicial economy." Appellant Brief, *Wright v. Sumter Cty. Bd. of Elections and Registration*, 18-13510 at 4 (filed November 26, 2018). The brief addressed only "one relevant factual development" since its May 22 brief, which is that several black and Democratic Party candidates won the Sumter county-wide vote in the November 2018 election, including Stacey Abrams, a gubernatorial candidate in a hotly contested, racially charged contest. *Id.* at 7-11. As the County explained, these developments support the County's position "discussed at length in Sumter County's briefing in the 18-11510 case" that the district court should have given weight to "the repeated wins of black and Democratic Party candidates." *Id.* at 9.

[2] Although the County believed no additional brief was necessary because the cases were consolidated, an officer in the Clerk of Court's office instructed the County to file a separate appellant brief in the 18-13510 case.

Rather than address this argument in his merits brief, Plaintiff filed a new flurry of motions—one in the district court (which Plaintiff concedes lacks jurisdiction over the case), asking that the record be re-opened, and two in this court, asking for a briefing stay and for a limited-purpose remand.

Argument

The County's appellant brief in this case (18-13510) provides no cause for a limited-purpose remand. The brief does almost nothing new: it simply refers the Court to the County's May 22 brief in the lead case (18-11510) and incorporates it by reference. Then, it specifically refers the Court to that May 22 brief's argument that the district court should have weighed election results showing Democratic Party and black candidate wins in the county-wide vote—an argument Plaintiff has not previously identified as meriting a remand of any kind. The only additional information the County's brief identifies is the November 2018 election results where black and Democratic Party candidates won the county-wide vote yet again.

Those election results are recorded in publicly available government documents. *See* Georgia Secretary of State, *Official Election Results Sumter County*, Georgia.[3] Election results are properly the subject of judicial notice

[3] https://results.enr.clarityelections.com/GA/91639/Web02-state.221451/#/p/all/vt/ALL/pr/Sumter

because they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Although Plaintiff claims to dispute "the admissibility, reliability, and accuracy of the evidence," Mot. for Remand at 9, he provides no good-faith basis to dispute that accuracy of *certified* public records and elections results. Indeed, if there were a good-faith basis to dispute the accuracy of certified election results, that would be newsworthy. And Plaintiff's own actions in this case indicate that he has no basis for such a dispute: Plaintiff asked the district court to take judicial notice of voter-registration data produced by the Georgia Secretary of State "and published on the Secretary's website," because Plaintiff believed its "accuracy cannot reasonably be questioned." Plaintiff's Motion for Judicial Notice of Voter Registration Data at 1 (1:14-cv-42) (Dkt. 166) (Jan. 11, 2018). It strains credulity for Plaintiff to take the position that the Secretary of State's website has information that is more reliable, and more worthy of judicial notice, than results of an election that have been officially certified by the State.

Unsurprisingly, courts routinely take judicial notice of election results.[4] *Schaffer v. Clinton*, 240 F.3d 878, 885 n.8 (10th Cir. 2001) (taking judicial notice

[4] *Levy v. Lexington Cty.*, 589 F.3d 708, 715 (4th Cir. 2009), is not on point because, in that case, one party asked the district court to supplement the record regarding new election results, and the court of appeals held that the

that a congressman's percentage of votes increased each time he ran for reelection using, *inter alia*, certified election results posted on the secretary of state's website); *Libertarian Party v. D.C. Bd. of Elections & Ethics*, 768 F. Supp. 2d 174, 177 n.3 (D.D.C. 2011), (taking judicial notice of results related to the 2008 Presidential Election based on the Federal Election Commission 2008 Presidential General Election Results); *Missouri State Conference of the Nat'l Ass'n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1019 (E.D. Mo. 2016) (taking judicial notice of the certified election results); *Solomon v. Liberty County, Fla.*, 957 F. Supp. 1522, 1556 (N.D. Fla. 1997); *see also Gov't of the Canal Zone v. Burjan*, 596 F.2d 690, 694 (5th Cir. 1979) (recognizing official government maps proper subject of judicial notice). Plaintiff cites no reason the Court should not take judicial notice of the results here.

That leaves only Plaintiff's disagreement with the "inferences presented in the County's brief." Mot. for Remand at 9. But that is no basis for remand. Plaintiff is free to challenge those inferences in his appellee brief, including by arguing that the results are not in the record or by pointing to other election

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district court should have afforded the litigant that opportunity. It also held that the opportunity to extend in *both* directions: either party could present evidence on the new results. Here, the County has not requested that the record be re-opened or to present evidence other than what can be the subject of ordinary judicial notice.

results Plaintiff believes support his position.[5] That opportunity is "in accordance with due process." *Id.* The County has *not* presented additional evidence, such as an expert analysis of the results, but merely an *argument* that can be answered with an *argument*. For example, if Plaintiff believes election results bear no legal meaning in Section 2 cases without expert analysis, he can argue that to the merits panel. The County is prepared to rebut any such argument on reply and in oral argument. There is no need for expert testimony to respond to the County, when the County has offered no expert testimony.

In fact, a remand would be especially futile here because this dispute is merely an extension of an argument that *was* presented to the district court, *was* addressed by the district court, and has been raised already on appeal: that black and Democratic Party candidate victories in the county-wide vote are germane to assessing minority opportunity in county-wide races. The district court gave prior results no weight because "[n]either side has presented a statistical analysis of these race." T198/24. No doubt, the district court would make the same ruling regarding the 2018 elections. There is no reason for a months-long delay to learn the district court's stance on an issue it has already

[5] Plaintiff's lead case, *Turner v. Burnside*, 541 F.3d 1077, 1086 (11th Cir. 2008), illustrates this exact point: the Court's decision not to consider evidence (which was not amenable to judicial notice) outside the record was issued by the merits panel after a hearing on the merits. It was not issued by a motions panel ordering a remand or striking portions of a brief.

addressed. The County has challenged the district court's position, and the challenge is ripe for review in this Court.[6]

For the same reasons, there is no basis to strike portions of the County's brief. Plaintiff's disagreement with the County's argument does not provide a basis for a motions panel to remove these issues from the merits panel's purview. Similarly, a motions panel's view that "evidence is not especially probative," *see* Mot. for Remand at 11, is no basis to strike anything; the merits panel should decide these issues on full briefing and argument. The election results are the proper subject of judicial notice, and the parties' positions are amenable to resolution on the merits.

Finally, there is no basis to stay briefing. Plaintiff's argument that he "cannot effectively know what to brief" at this time is exaggeration. Motion to Stay at 4-5. Plaintiff presumably intends to respond to the County's argument in its May 22 brief that the district court should have weighed election results showing black and Democratic Party candidate wins in the county-wide vote. Responding to the argument that yet another set of results bolsters this point

[6] To be sure, the County's position here is simply that a remand *before* the merits panel addresses the case would be futile; it takes no position at this time on other possible remand issues *after* the merits panel rules.

involves hardly any additional marginal cost.[7] These arguments are indistinguishable.

Conclusion

The Court should not delay this case further. All issues are ripe for review on the merits, and further stays or remands are unnecessary. Plaintiff's motions to remand, to strike, and to stay briefing should all be denied.

Dated: December 6, 2018

Respectfully submitted,

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[7] Plaintiff presumably can file a consolidated brief for both of the consolidated cases. The only reason the County did not file a consolidated brief is that, when it filed its brief in the 18-11510 case, the 18-13510 case did not yet exist.

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 6th day of December, 2018. 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: December 6, 2018

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 2,693 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: December 6, 2018

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