UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Mathis Kearse Wright Jr.,

Plaintiff-Appellee,

vs.

Sumter County Board of Elections and Registration,

Defendant-Appellant.

Appeal No. 18-11510-H

Reply in Support of Renewed Motion to Dismiss

Wright v. Sumter County Bd. of Elections and Registration
18-11510-H

Certificate of Interested Persons
and
Corporate Disclosure Statement

Pursuant to Eleventh Circuit Rule 26.1, 26.1-2, and 26.1-3, counsel for the plaintiff-appellee certifies that the following persons and entities have or may have an interest in the outcome of this case:

ACLU Foundation, Inc.

ACLU Foundation of Georgia, Inc.

Baker & Hostetler, LLP

Braden, E. Mark

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Sands, W. Louis

Wright v. Sumter County Bd. of Elections and Registration
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Certificate of Interested Persons
and
Corporate Disclosure Statement
(continued)

Sells, Bryan L.

Stanley, Trevor

Sumter County Board of Elections and Registration

The Law Office of Bryan L. Sells, LLC

There is no nongovernmental corporate party to this proceeding.

/s/ Bryan L. Sells
Bryan L. Sells
Attorney for Mathis Kearse Wright, Jr.,
Plaintiff-Appellee
Dated: June 25, 2018

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Sumter County does not contest the two main arguments in Wright's renewed motion to dismiss.

First, Sumter County does not dispute that the district court's June 21 order gives the County precisely the relief it seeks in this interlocutory appeal. The County had asked this Court to expedite the appeal so that it could hold the school-board election in November using the plan that the district court has found to violate the Voting Rights Act. Sumter County's response does not dispute that it still wants to hold the election in November using the unlawful plan. The County can now do that, so there is no further relief for the Court to grant.

Second, Sumter County does not dispute that the clock is ticking on this Court's ability to afford meaningful relief with respect to the November election. Wright's motion points out that, in the absence of a further injunction, this Court's appellate jurisdiction will expire no later than mid-September, when Georgia law requires ballots for the November election to be available. (ECF 204 at 2.) And because ballots take some time to prepare, the period during which this Court could actually afford meaningful relief with respect to the modified injunction will likely expire several weeks before then. The appellant, which

administers elections in Sumter County, undoubtedly knows that this Court is going to lose jurisdiction before it could even hold oral argument on this appeal.

Sumter County argues instead that the district court's finding on liability is tantamount to a permanent injunction against the unlawful plan and that *that injunction* is what gives this Court jurisdiction under 28 U.S.C. § 1292(a)(1). Of course, if the district court had enjoined the County from holding future elections under the unlawful plan, there would be no question that this Court would have jurisdiction. Ordinarily, a finding of liability in a voting-rights case like this would lead immediately to a final judgment, permanent injunction, and, probably, a remedial order. *See, e.g., Reynolds v. Sims,* 377 U.S. 533, 585 (1964) ("it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan"). But we have none of that here. All we have so far is an injunction that moves this year's school-board elections from May 2018 to November 2018.

Wright wishes that the district court *had* enjoined the County from using the unlawful plan in future elections. The district court

should enjoin further use of the unlawful plan.[1] But this Court should not construe the district court's orders so broadly as the County suggests when the district court itself has so explicitly limited their scope.

The County also suggests that the Supreme Court's recent decision in *Abbot v. Perez*, No. 17-586, 585 U.S. ____ (June 25, 2018), stands for the proposition that any finding of liability under the Voting Rights Act has the practical effect of enjoining further use of the challenged plan. Wright wishes that it did, but it does not. To be sure, the Supreme Court found that the district court's orders in that case—which were not styled as injunctions at all—did have the practical effect of enjoining the plans at issue and were therefore appealable. The "practical effect" doctrine exists to prevent district courts from shielding their orders from appellate review by styling injunctions as something else. *Id.* slip op. at 13. It does not, however, permit this Court to construe an existing injunction more broadly than its terms. And here,

[1] This Court also has the power to enjoin further use of the unlawful plan. *See* 28 U.S.C. § 1651; Fed. R. App. P. 8. Wright reserves the right to seek further relief in an appropriate court if this Court denies the motion to dismiss.

the district court's June 21 order has made very clear that its March 30 injunction will have *no* practical effect beyond the November election.

Furthermore, if the district court's finding on liability were tantamount to a permanent injunction against the unlawful plan, then Sumter County would not be able to use that plan in the November election. The County urges this Court to construe the district court's June 21 order as tantamount to a stay of its finding on liability, but that is even more of a stretch. The district court's June 21 order concludes that it lacks jurisdiction to enjoin the unlawful plan, not that the circumstances in this case warrant a stay. (ECF 214 at 3-5.)[2] Nothing about the June 21 order changes the district court's findings that:

- "Here, the infringement of black voters' right to vote in Sumter County is severe." (ECF 204 at 6.)
- "Were the Court to allow the election to proceed, this vastly disproportionate representation would continue for another two years." (*Id.*)

[2] Wright has filed a motion for reconsideration of the district court's June 21 order. (ECF 215.) Wright argues that reconsideration is justified because the court's conclusion that it lacks jurisdiction to enter a remedial order is clear legal error. Sumter County's response is due on Wednesday, July 11, and no reply brief is permitted under the local rules. The time period for Wright to appeal the district court's June 21 order, should reconsideration be denied, has not yet elapsed.

- "Sumter County has not shown that this is one of the 'unusual cases.'" (ECF 206 at 7.)

- "The Court continues to find the Section 2 violation severe." (ECF 206 at 8.)

- "The Court finds that it would be an undue burden on the rights of affected voters if the 2018 election was permitted to proceed. It would only further complicate and make more difficult implementing an appropriate remedy, whether selected by the Court or the Georgia General Assembly." (ECF 206 at 12.)

Given these findings and the district court's analysis in granting the initial injunction, this Court should not assume that the district court has granted a stay *sub silentio*. There is no "practical effect" doctrine that can create a stay where none exists. No party has yet moved for a stay, and no stay has yet been granted.

Finally, Sumter County laments the possibility that it will have to appeal again soon if the Court dismisses this appeal. Maybe so. Multiple appeals are not unheard-of in voting cases. *See, e.g., Fleming v. Gutierrez*, 785 F.3d 442, 448 (10th Cir. 2015) (dismissing an interlocutory appeal for lack of jurisdiction because the election at issue had passed). It is indeed inefficient. But this is a court of limited jurisdiction, without the power to issue advisory opinions, and inefficiency cannot confer jurisdiction on this Court where it no longer

exists because of the district court's unusual rulings. Unfortunate though it may be, this Court must return the case to the district court for further proceedings necessary for appellate review.

Dated: July 4, 2018

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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 1,137 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 version 16.12 of Microsoft Word for Mac in 14-point Century Schoolbook font.

/s/ Bryan L. Sells
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Attorney for Mathis Kearse Wright, Jr.,
Plaintiff-Appellee
Dated: July 4, 2018

Certificate of Service

I hereby certify that on July 4, 2018, I electronically filed the foregoing REPLY IN SUPPORT OF RENEWED MOTION TO DISMISS 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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