

No. 18-11510

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

**Reply Brief in Support of Emergency Motion
To Vacate or Stay Injunction Pending Appeal**

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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:

Sands, W. Louis

Attorneys for Plaintiff-Appellee:

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McDonald, M. Laughlin
Khondoker, Aklima

Attorneys for Defendant-Appellant:

Braden, E. Mark
McKnight, Katherine L.
Raile, Richard B.
Stanley, Trevor
Reid, Kimberly

Plaintiff:

Wright, Mathis Kears, Jr.

Defendant:

Sumter County Board of Elections and Registration

**Reply Brief in Support of Emergency Motion
To Vacate or Stay Injunction Pending Appeal**

Plaintiff's arguments in opposition to Sumter County's emergency motion are unpersuasive. The Court therefore should vacate the district court's judgment pending appeal or, alternatively, stay it.¹

I. It Is Not Yet Too Late To Stay the District Court's Judgment

Plaintiff's argument that it is too late to grant relief—but somehow was not too late for the district court to interfere with the November election—is incorrect. August 17 was the last date to provide information to the Secretary of State in the ordinary course. But, as Plaintiff's counsel represented to the district court on August 15, it remains possible to act out of the ordinary course:

I think one has to distinguish between the regular process and what is possible. The deadlines that we proposed that included the June 23rd deadline for announcing a new plan, were based on, you know, if everything goes right, here's what we want to be able to do. But the declaration from Robert Brady, which is at ECF 205-1, along with the declaration from Michael Barnes that we submitted with our reply brief last week, which is at ECF 228-2, I think they give a peek under the hood of what the normal process is like. The state, as you know, has 159 counties, and there's a centralized processor of ballots, and so when setting the normal deadline, they do that in a way that gives them time

¹ The County filed a notice of appeal from the district court's August 17 injunction on August 21 and filed it with this Court on the docket of this case on the same date. In an August 21 query to counsel, this Court had asked whether a notice of appeal was necessary, and the County believes the notice of appeal resolves any uncertainty on this question.

to process ballots for 159 counties. But what Mr. Brady did in the spring, which he could do as well in the fall, is to talk to that central processor at the Secretary of State and say, hey, look we've got litigation brewing here, can you put us at the bottom of the stack so that you get to our county later in the process rather than earlier in the process. I mean, I don't know if they do it alphabetically, or how they go about deciding which ballots they process first. But Mr. Brady was able to accomplish that in spring. We think that he can accomplish it in the fall, and that would buy the Court some time within which to implement or order the implementation of a new plan for the fall. But as we point out, the first step in doing that is to order the county to get in touch with the centralized processes at the Secretary of State's Office and ask them to delay as long as possible.

August 15 Hearing Transcript, ECF No. 235 at 17-18 (Attorney Sells for the Plaintiff). The complete transcript is attached as an exhibit to this filing. As Plaintiff's counsel eruditely stated, there is no conflict between the County's declarations and the ability to act out of the ordinary course of the ballot-printing process.

It remains possible, then, for approximately a week for Sumter County to act out of the ordinary course and implement a change in information. The motion is not yet moot, but it will be soon.

II. The Motion Is Not "Procedurally Barred"

After complaining that it is "too late" for the Court to grant emergency relief, Plaintiff then asserts he has no idea "what time constraints the County has in mind." Opp. at 18. Obviously, the "time constraints" are the constraints

imposed by the ballot-printing process—the ones Plaintiff contends make this motion too late. Sumter County filed its emergency motion one business day after the district court issued its injunction and less than two hours after it issued the opinion explaining the bases for the injunction. It seeks relief by Monday at the very latest. The notion that it would be practical to ask the district court to stay its order, conduct briefing, and obtain a response in this tight time frame is absurd.

Moreover, Plaintiff fails to appreciate that this motion is to vacate the district court's grant of *his* motion “for an injunction pending appeal,” ECF No. 218 at 1, and therefore plainly reflects the district court's view on what order should be in place “pending appeal.” To move the district court for a stay “pending appeal,” FRAP 8(a)(1)(A), from its injunction “pending appeal” would be futile and nonsensical when it addressed that very question in its injunction and order.²

Finally, Plaintiff ignores Defendant's motion for vacatur of the injunction, which is not governed by Rule 8. *Frith v. Blazon-Flexible Flyer, Inc.*, 512 F.2d 899, 900 (5th Cir. 1975).

² Plaintiff's argument (at 19-20) that the facts supporting futility were not before the district court is unavailing; the court was informed at length of the strict time line and was well aware that it was expressing its view on what elections should occur “pending appeal.”

III. The Court Should Stay or Vacate the Injunction

Plaintiff again misconstrues (at 20) the posture of this appeal in asserting that Defendant bears the burden of showing the equitable factors. In the court below, Plaintiff *conceded* that the burden of obtaining an injunction pending appeal was on him. ECF No. 218 at 4. Regardless, all factors weigh in favor of a stay wherever the burden falls.

A. The District Court's Decision Is Unlikely To Survive Appellate Review

The district court's liability finding was predicated solely on low voter turnout from the black community. It conceded that, "of course,...were more African Americans to...turn out to vote..., they would likely be able to elect their preferred candidates." ECF No. 198 at 25. The complaint here is not about an election procedure or state action cognizable under Section 2 of the Voting Rights Act, but about private decisions. That is the scenario addressed in *Salas v. Sw. Tex. Jr. College District*, 964 F.2d 1542, 1555 (5th Cir. 1992). Plaintiff contends (at 22) it is "easily distinguishable," but if that were so, he could say *why*. He does not. And it remains a mystery because the district court did not find the case distinguishable; it found a circuit split:

Sumter County cites an out-of-circuit case requiring evidence linking past discrimination to low turnout today. (Doc. 170 at 8 (citing *Salas v. Sw. Texas Jr. Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992)).) Our circuit has no such stringent requirement.

ECF No. 198 at 26. Plaintiff apparently intends to abandon the district court's reasoning and chart some new path not founded in any determinations the lower court made. That means, in other words, he is likely to lose this appeal.

Plaintiff also mischaracterizes the district court's analysis of his illustrative alternative. The fact-finding the district court made is as follows:

The question for the Court, then, is whether they would have an opportunity to elect the candidate of their choice in illustrative District 6, a single-member district where they represent 54.5% of the voting-age population. *As McBride readily concedes, the answer is "guesswork."* Based on the cohesion and crossover voting patterns, that percentage would be sufficient in some of the current single-member districts, but not others. McBride asserts that a 49.5% district is not a black-majority district, so it would behave like districts with far less black voters. Meanwhile, a 54.5% district is a black-majority district, so it would behave differently from the at-large districts. (Doc. 158 at 13:10–20:3.) *The Court finds no support for the idea that a five percentage point shift would have such a drastic impact on voting behaviors.*

ECF No. 198 at 34 (emphasis added). Thus, the actual fact-finding was *against* the alternative plan. But the court found for Plaintiff anyway because Defendant "it did not ask its expert to conduct any analysis of Wright's illustrative plan in this stage of the case." ECF No. 198 at 35. As in *Abbott v. Perez*, 138 S. Ct. 2305, 2333 (2018), this "twisted the burden of proof beyond recognition"—"it did not ask its expert to conduct any analysis of Wright's illustrative plan in this stage of the case"—and found Section 2 violation "on

the basis of *uncertainty*”—“guesswork.” This issue is an independent basis on which this Court is likely to reverse.

B. The Equitable Factors Weigh in Favor of Vacatur or Stay

Remarkably, Plaintiff discusses the equitable factors without even mentioning the leading Supreme Court cases of *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006), and *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017), both of which caution courts to be attentive to “considerations specific to election cases.” 549 U.S. at 4. Plaintiff’s failure to consider the context of elections explains his many confusing statements.

Take, for instance, his assertion that there is “no irreparable harm” in enjoining an election and changing the terms of office for members. This ignores the “compelling state interest” in administering elections, *Purcell*, 549 U.S. at 7, and the harm to the County in “extend[ing] the terms of incumbents.” *Dillard v. Crenshaw Cty.*, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986); *see also Covington*, 137 S. Ct. at 1626. Instead, Plaintiff nonsensically contends (at 23-24) that, because the County planned the election pursuant to the district court’s own order, not by state statute, it is not harmed by the injunction. But that is backwards: the County would have complied with state law had the district court not forbidden it to do so in enjoining the May election, and the district court’s continued movement of the election goal posts

exacerbates, rather than ameliorates, the type of harm discussed in *Maryland v. King*, 133 S. Ct. 1, 3 (2012).

Similarly, Plaintiffs' contention (at 24) that it is irrelevant how "severe" the harm is directly contradicts the Supreme Court precedent he ignores. *Covington*, 137 S. Ct. at 1626 ("obvious considerations include the severity and nature of the particular constitutional violation").

And his contention (at 25) that "the County does not directly address the *public* interest" simply ignores the County's arguments that "forbidding the voters from voting abrogates, rather than vindicates, the right to vote," Mot. at 15—a concern of the *public*—that the erratic election date changes and future election on a non-traditional date "poses a severe risk of voter confusion and may depress future participation, Mot. at 17-18—a concern of the *public*—and that the continued intrusion in local affairs "has a high likelihood of depressing interest in participation on the School Board," Mot. at 19—a concern of the *public*. All of these concerns are addressed in cases involving election-related injunctions. *See Dillard*, 640 F. Supp. at 1363 (refusing to enjoin election because it "would effectively deny the entire electorate the right to vote and thus seem to offend basic principles of representative government"); *Covington v. North Carolina*, 270 F. Supp. 3d 881, 884, 898, 901 (M.D.N.C. 2017)

(declining to order special election that “would generate voter confusion and, likely, poor voter turnout”).

Ultimately, what Plaintiff fails to grasp is that elections must be *administered*. The abstract “right to vote” is not vindicated by confusion and departures from practices that enable and encourage participation by voters and candidates. Indefinitely barring the public from voting, planning an election on a random date when voters are not used to voting, and extending the term lengths of individuals elected under a plan Plaintiff calls discriminatory does far more harm than good.

In short, this case implicates all the election-related concerns the Supreme Court has warned lower courts to respect, and none of the equities weigh in favor of denying the entire populace of Sumter County the right to vote pending appeal.

Dated: August 22, 2018

Respectfully submitted,

/s/ E. Mark Braden

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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 22d day of August, 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: August 22, 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 1,976 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: August 22, 2018

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

MATHIS KEARSE WRIGHT, JR., : Case No. 1:14-CV-42-WLS
: :
PLAINTIFF :
vs. : August 15, 2018
: Albany, Georgia
SUMTER COUNTY BOARD OF :
ELECTIONS AND REGISTRATION, :
: :
DEFENDANT. :

TELEPHONE CONFERENCE
BEFORE THE HONORABLE W. LOUIS SANDS
UNITED STATES DISTRICT JUDGE, PRESIDING

APPEARANCES:

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P R O C E E D I N G S

1
2 **August 15, 2018**

3 **COURTROOM DEPUTY:** Hello. Judge Sands is
4 ready for the conference.

5 **MR. SELLS:** All right.

6 **MS. MCKNIGHT:** Wonderful. Thank you.

7 **THE COURT:** All right. Good afternoon. Good
8 afternoon.

9 **COUNSEL:** Good afternoon, Judge. Your Honor.

10 **THE COURT:** All right. I wanted to make sure
11 everyone can hear me. Why don't you start first with
12 the plaintiffs and give the names of counsel who will
13 be speaking and the client that you represent, starting
14 with plaintiff.

15 **MR. SELLS:** Sure. Judge, this is Brian
16 Sells. I'm representing the plaintiff, and also on the
17 call on the plaintiff's side are Laughlin McDonald and
18 Aklima Khondoker.

19 **THE COURT:** All right. And for the
20 defendant, the defendants?

21 **MS. MCKNIGHT:** Yes. Good afternoon, Your
22 Honor. This is Kate McKnight for the Sumter County
23 Board of Elections and Registration. With me today I
24 have Mark Braden and Richard Raile. I would also like
25 to note that Kimberly Reid is currently in a

1 deposition, so she's going to try to join, but I
2 received notice from her that it's running over. So
3 she apologizes, Your Honor, she will try to make this
4 call, but obviously is upheld with this deposition.

5 **THE COURT:** I understand. Good afternoon to
6 all. In order that the court reporter may be accurate
7 in taking down statements and identifying the speaker,
8 each time you speak if you would state your name again
9 for us and tell us who you represent so that makes it
10 easier on the court reporter. I think she can do it
11 pretty easy when you all are sitting in front of her
12 because she can put a voice and a face together, but on
13 the phone, it might be a little bit more difficult.

14 First, let's begin by the Court just saying this
15 is in the matter of Mathis Kearse Wright, Jr. as
16 plaintiff, versus Sumter County Board of Elections and
17 Registration as defendant, and this is Civil Action
18 1:14-CV-42-WLS. Primarily this conference, phone
19 conference is held at the request of the plaintiffs
20 which was requested, I believe, late last week or maybe
21 Friday, and the Court was not available -- it may have
22 been Thursday, the Court was not available. So let's
23 hear from the plaintiffs first, I guess, Mr. Sells.

24 **MR. SELLS:** Thank you, Judge. This is Brian
25 Sells again for the plaintiffs, for the plaintiff

1 Mathis Wright. I requested a status primarily to give
2 you an opportunity to tell us, the parties, if there is
3 additional information you need or additional process
4 you think has to take place in order to comply with the
5 mandate of the Eleventh Circuit in its order last week.
6 You know, in response to my request, you asked the
7 parties to lay out what we think are our positions are
8 on the issues that are now before the Court, and as I
9 read both parties' submissions, we both think, both
10 parties think that the Court has all the information it
11 needs, but --

12 **THE COURT:** That's with regard to --

13 **MR. SELLS:** -- if you want --

14 **THE COURT:** Excuse me, I'm sorry.

15 **MR. SELLS:** Go ahead.

16 **THE COURT:** That involves the -- I think
17 before the decision from the court of appeals came
18 down, we were already discussing the matter of the
19 injunction issue with regard to the November election.
20 That's what you're referring to?

21 **MR. SELLS:** Well, no. No, Your Honor. We --
22 well, we had briefed that and the injunction of the
23 November election is one of the issues that the
24 Eleventh Circuit mentions in its order. But, as I read
25 the Eleventh Circuit mandate, it directs this Court to

1 decide a different question before it addresses our
2 motion for an injunction pending an appeal. And that
3 question is whether it is still feasible to issue an
4 interim map for the November election that this Court
5 previously said it was going to do by July 23rd, but
6 then concluded that it did not have jurisdiction to do
7 so. The mandate of the Eleventh Circuit returns
8 jurisdiction to the Court, and so the Court has the
9 jurisdiction now that it concluded that it lacked
10 before, and so Eleventh Circuit is essentially asking
11 this Court whether it is still feasible to enter a
12 remedial plan that could be used for the November
13 election. We take the position that it is still
14 feasible to enter that relief and have it -- have the
15 new plan in place for the November election, and we
16 think the Court has everything it needs in order to
17 make that determination, but that's obviously something
18 that the Court needs to tell us.

19 **THE COURT:** All right. Let me hear from the
20 defendant.

21 **MS. MCKNIGHT:** Good afternoon, Your Honor.
22 This is Kate McKnight. On the narrow issue of whether
23 the Court has time to implement a new map, the answer
24 to that is no, it does not have time, it is too late.
25 That's one of the reasons why the Court agreed with

1 plaintiff back in the spring to a schedule which would
2 require the Court to identify a new map by July 23rd.
3 You'll note, as you know, given the number of orders in
4 the spring that those dates came from plaintiff, and we
5 would agree with plaintiff on that point. But
6 identifying a new map and putting in a map into place
7 now after July 23rd and after other dates have already
8 been passed in the electoral process, including the
9 qualifying period, that it is simply too late to issue
10 a new map.

11 **THE COURT:** Do I understand it that the
12 qualifying period, I think you filed something this
13 morning, earlier today, that the qualifying period has
14 begun and closed?

15 **MS. MCKNIGHT:** That is correct, Your Honor.
16 This is the qualifying period that the Court ordered
17 back in the spring. The election was -- a call to the
18 election was published in the legal organ in Sumter
19 County. The qualifying period for that election was
20 identified as last week. It was August 6th through the
21 10th. The qualifying period closed at noon last
22 Friday, August 10th, and we identified for you in our
23 -- that notice in an affidavit from Mr. Brady, the
24 Sumter County, Minister of Elections in Sumter County
25 -- which candidates who have qualified, has satisfied

1 the qualification requirements for the election during
2 the qualifying period. So that is what we filed
3 yesterday, Your Honor, in that notice.

4 **THE COURT:** And they are qualified according
5 to the existing plan; is that right?

6 **MS. MCKNIGHT:** I'm sorry, Your Honor. I
7 didn't quite hear you. The phone has been real -- what
8 was the question?

9 **THE COURT:** Yeah. Also I leaned back from
10 the phone too. I said those who qualified, qualified
11 according to the present existing districts or plan; is
12 that right?

13 **MS. MCKNIGHT:** That is correct, Your Honor.

14 **THE COURT:** All right. Okay. Mr. Sells?

15 **MR. SELLS:** Right, Your Honor, we don't view
16 the fact that the qualification period closed as being
17 particularly significant here. Of course, the
18 injunction that you issued in March also came after the
19 qualification period closed and literally on the eve of
20 the printing and distribution of ballots. It came
21 approximately 51 to 53 days before the election. We
22 are now more than 80 days, if I've got my numbers
23 right, before the election, and we think --

24 **THE COURT:** But we are not talking about
25 simply to the date of an election, we are talking about

1 a time that the election can be noticed, the parties
2 would be able to qualify, and I guess have some
3 opportunity to campaign. In other words, we wouldn't
4 just issue it the day before.

5 **MR. SELLS:** No, that's absolutely right. But
6 we have set forth the outlines of what an interim
7 remedial qualification process could look like in our
8 response to the Court's order, that there could be a
9 reopened qualification process as early as next week if
10 the Court is able to act quickly to order one of the
11 remedial proposals into effect. That would give
12 candidates time to qualify, and the ballots could be
13 printed and campaigning could begin.

14 **THE COURT:** What about the parties'
15 opportunity to review or to have input on any plan the
16 Court might either put in place, as suggested by the
17 plaintiff, or as the Court might itself determine, what
18 would be the process of that being evaluated and given
19 some consideration, or is this just the Court's
20 100 percent activity?

21 **MR. SELLS:** Well, the Court currently has two
22 proposals in front of it from the plaintiff. Both
23 parties have had an opportunity to submit remedial
24 proposals, but the defendant declined to do so. So we
25 think that the Court has the ability to enter either

1 one of the plaintiff's proposals without further due
2 process concerns. There is, I think, a potential issue
3 if the Court were to make up its own plan at this point
4 without giving the parties an opportunity to comment on
5 it, and I believe that was an issue in *Sumter* versus --
6 or *Edge versus Sumter County*, the Eleventh Circuit case
7 over the district boundaries from the 80s, where the
8 Court went ahead with a plan that the parties believed
9 was insufficient, and the Eleventh Circuit agreed that
10 the parties should have an opportunity to comment on
11 that. Now, I hope I'm remembering that case correctly.

12 **THE COURT:** I don't remember the case
13 specifically, but in principle I agree with you. The
14 Court could not see how it could initiate its own plan
15 without some opportunity for both sides to have some
16 ability to object and have some input. And so that
17 would have to be a reasonable and that would add time
18 if that were the case. What about the situation where
19 the -- as you say, there were two plans submitted by
20 the plaintiffs, but upon the Court's earlier rulings
21 there's been an appeal filed, which in the Court's view
22 froze everything, and I think implicitly that the
23 circuit has finally agreed with me by sending it back.
24 So, in a way nothing happened in this case after the
25 appeal was filed, which is still technically in the

1 background, I guess, a shadow appeal in a sense, and so
2 I would like to know from the defendant with regard to
3 plaintiff's indication that there are two plans before
4 the Court that have been -- had the opportunity to be
5 reviewed and vetted to both sides, and the defendant
6 has chosen not to file anything further. So what, if
7 any, rights would be lost to the defendants or what
8 prejudice would it be to them if the Court limited its
9 consideration simply to the two plans that are before
10 the Court today for the plaintiffs?

11 **MS. MCKNIGHT:** Thank you, Your Honor. I have
12 a few points on that question. First, issuing a new
13 plan, whether it's the plaintiff 1 or 2 or a plan
14 proposed by the Court, at this point would be a
15 tremendous burden on election administration. The
16 whole issue, and this goes back to objections that we
17 filed back in the spring, and you can look back at the
18 affidavit filed by Mr. Brady at docket number 205-1
19 where he describes some of the burden of trying to
20 implement new district boundaries, particularly late in
21 July, but even more so when he is within the thick of
22 preparing for a general election this November. Now,
23 part of the problem, let me also identify an issue with
24 just of the confusion of voters, of knowing which
25 districts they reside in, which new district they would

1 vote for. There's simply not enough time to educate
2 the public about where they are and in any meaningful
3 way for them to get behind a candidate. Let's go to
4 point number three, I would urge you to look at the
5 filing by Mr. Brady that we prepared and submitted to
6 the Court yesterday showing six candidates who
7 qualified for the districts as they're currently drawn.
8 These are individuals who are ready to run and ready
9 represent the members of Sumter County. Now, here,
10 it's listed six people. There are four seats, two of
11 the seats are contested. There are incumbents at
12 issue. The flavor of this election is that it's
13 shaping up to be an election where it is competitive
14 and you have candidates who are ready to run and want
15 to represent Sumter County on the school board. Now,
16 we do have concerns that using either plaintiff's 1 or
17 2 would pair some of these candidates who are running,
18 meaning pair them in the same districts so they would
19 be knocked out immediately, you know, they wouldn't --
20 meaning they would not be competing against someone
21 else in an adjoining district. It also has the
22 possibility of emptying districts. And on these
23 points, Your Honor, we are prepared to provide an --
24 you know, an additional affidavit if you are interested
25 in trying to determine what new plaintiff's district

1 would do to these qualified candidates. Now, I can't
2 reiterate enough that have -- implementing either one
3 of plaintiff's plans at this point, first of all, would
4 be harmful to election administration, and we also find
5 that it is -- it goes to the heart of this appeal, Your
6 Honor. We do not think these districts will fairly
7 represent members of the Sumter County's community, and
8 so we would welcome an opportunity to provide the Court
9 with more information about why these districts are not
10 sufficient to represent the county.

11 **THE COURT:** Okay. Well, I think the
12 plaintiff implied at least that you all chose not to
13 address that issue. So are you saying that you are
14 limiting your comments to a criticism of the two plans
15 before the Court, or are you suggesting that there
16 might be a better idea that you didn't put forward as
17 part of the defense?

18 **MS. MCKNIGHT:** Your Honor, it -- right. It's
19 simply not true that we did not -- we had an
20 opportunity to address them and did not. We filed very
21 thorough briefs in this matter about why their plans
22 are not sufficient and do not work. So, and there are
23 a number of deposition transcripts that are an
24 additional -- if you recall, Your Honor, additional
25 discovery --

1 **THE COURT:** Yeah, yeah. I'm sorry, I'm
2 sorry. I don't mean to interrupt you, but I agree with
3 you on that. I understand that you all addressed the
4 submission by the plaintiffs, but plaintiff points out
5 that you all made no suggestion as to what would be an
6 appropriate -- I don't think you all put forward a
7 plan, am I correct? My memory is correct; is that
8 right?

9 **MS. MCKNIGHT:** Pardon me, Your Honor. You
10 are correct that defendant did not submit an
11 alternative plan. And, frankly, what the point is,
12 Your Honor, that it's up to the legislature, we
13 believe, to prepare an alternative plan, and we believe
14 they should have time to do that if the Court's order
15 stands that the county needs a new map.

16 **THE COURT:** All right. Mr. Sells, you got
17 any further response to either what the Court observed
18 or asked about and what was stated by defense?

19 **MS. SELLS:** Well, I agree with Ms. McKnight
20 that the defendant did have an opportunity to offer a
21 remedial proposal, that the Court made that clear in
22 its order that is at ECF 147 on post-trial briefings.
23 The two remedial proposals that are on the table now
24 have been fully briefed. The defendant had an
25 opportunity to not only file a response to the

1 plaintiff's remedial proposals, but, as you may recall,
2 there was some -- the Court allowed some limited
3 discovery and supplemental briefing regarding the
4 remedial proposal. That supplemental briefing is at
5 docket 199 and 200. So I think there's ample
6 opportunity to comment on those two proposals. I do
7 want to add one point in case this wasn't clear from
8 our written submissions on Monday afternoon. And that
9 is, to emphasize that what we're talking about for
10 November is an interim plan, that if the Court wants to
11 devise a plan of its own or give the county another
12 shot, the interim lines could be replaced with second
13 interim lines next year. Of course, if the legislature
14 acts, those will replace the interim plans. Really the
15 only thing before the Court today right now and in
16 response to the Eleventh Circuit's order is what to do
17 in November. Does it have time to implement -- to
18 order the implementation of a new plan. Again, we
19 think it does because the plans have already been
20 briefed and there remains time, although it might cause
21 some administrative headache, to implement them for the
22 November election.

23 **THE COURT:** All right. Thank you. Now, let
24 me ask you all this, and pose this also for you to give
25 some response. I think you've expressed yourselves as

1 to what might be the situation if the Court were to
2 move ahead with an interim plan. What if the Court
3 determined that it did not have sufficient time, what
4 would be the posture of matters then before this matter
5 goes back to the court of appeals? Would the Court
6 have to address the November election, ultimately the
7 injunction question that was pending just prior to the
8 remand from the court of appeals, would that be a
9 matter for this Court to address? Would I leave it
10 alone and let the court of appeals address it, or would
11 it be something that the Court would have to address
12 pending any further action by the court of appeals if
13 it determined that a plan could not be implemented
14 appropriately between now and November. From the
15 plaintiffs first?

16 **MR. SELLS:** Thank you, Your Honor. Yes, I
17 think that if the Court finds in response to the first
18 issue that, no, there is not enough time to implement
19 the new plan for the November election, then it needs
20 to move to the second part of the Eleventh Circuit's
21 mandate, which is to resolve the motions filed by the
22 parties regarding the November election, and there may
23 be other motions, but there's certainly one pending,
24 and that is our motion for a stay pending appeal. So,
25 the Court would have to address that motion before

1 returning the case to the Eleventh Circuit, and if
2 there are any other motions filed before it goes back
3 up, the Court has to address those as well.

4 **THE COURT:** All right. Ms. McKnight?

5 **MS. MCKNIGHT:** Yes, Your Honor. And it's --
6 two additional points on the new plan, Your Honor.
7 It's important that you hear these. Included in the
8 points that election administration will be burdened by
9 implementing a new plan this late is the concern about
10 ballots, Your Honor. It's very late in the game to --
11 even the ballot printing, and by that I mean, not just
12 including the election's rolls, but in determining
13 which district -- on which district should be on which
14 ballot. It's just it's very difficult. It takes a
15 long time to prepare these ballots, and it's late.
16 These points are points that plaintiff has already
17 conceded when plaintiff in the spring identified late
18 July as the latest time when a new map could be
19 implemented. One additional point on this is that
20 plaintiff is describing a 60 days in the spring,
21 80 days now. The point is the county is following the
22 rules that it is receiving from the Secretary of State.
23 There are plenty of reasons why an amount of time in
24 the spring with just a primary is different than the
25 amount of time in the fall related to a general

1 election. We can't go into all those on the phone. We
2 are prepared to offer Mr. Brady if you have any
3 questions about that, but we did go to say that it's
4 very late in the process. Now --

5 **MR. SELLS:** Your Honor, may I respond to that
6 please?

7 **THE COURT:** Yes.

8 **MR. SELLS:** Before Ms. McKnight goes on to
9 answer your question directly. Because I think that's,
10 frankly, not consistent with the evidence that's before
11 the Court. The deadline -- certainly the plaintiff has
12 not conceded one iota of what she's --

13 **THE COURT:** Well, I understood that to be --
14 Mr. Sells, I'm sorry. I recognize this is argument.
15 So the Court doesn't believe either side in this case,
16 I assure you, has conceded any matter of principle or
17 assertion. If that saves you a little bit.

18 **MR. SELLS:** I think one has to distinguish
19 between the regular process and what is possible. The
20 deadlines that we proposed that included the June 23rd
21 deadline for announcing a new plan, were based on, you
22 know, if everything goes right, here's what we want to
23 be able to do. But the declaration from Robert Brady,
24 which is at ECF 205-1, along with the declaration from
25 Michael Barnes that we submitted with our reply brief

1 last week, which is at ECF 228-2, I think they give a
2 peek under the hood of what the normal process is like.
3 The state, as you know, has 159 counties, and there's a
4 centralized processor of ballots, and so when setting
5 the normal deadline, they do that in a way that gives
6 them time to process ballots for 159 counties. But
7 what Mr. Brady did in the spring, which he could do as
8 well in the fall, is to talk to that central processor
9 at the Secretary of State and say, hey, look we've got
10 litigation brewing here, can you put us at the bottom
11 of the stack so that you get to our county later in the
12 process rather than earlier in the process. I mean, I
13 don't know if they do it alphabetically, or how they go
14 about deciding which ballots they process first. But
15 Mr. Brady was able to accomplish that in spring. We
16 think that he can accomplish it in the fall, and that
17 would buy the Court some time within which to implement
18 or order the implementation of a new plan for the fall.
19 But as we point out, the first step in doing that is to
20 order the county to get in touch with the centralized
21 processes at the Secretary of State's Office and ask
22 them to delay as long as possible.

23 **THE COURT:** All right. Mr. McKnight, you may
24 address the Court's question if you have remaining
25 comments.

1 **MS. MCKNIGHT:** Your Honor, your question was
2 about whether it could issue a new injunction for this
3 November's election.

4 **THE COURT:** Yeah.

5 **MS. MCKNIGHT:** And it's simply too late to do
6 anything to alter the November school board election
7 that this Court ordered back in the spring. Now, here
8 defendant is operating under the schedule identified by
9 plaintiff in the spring and adopted by the Court. The
10 new injunction from plaintiff is indeed a new
11 injunction. It would alter the status quo of the case
12 on appeal, therefore this Court does not have
13 jurisdiction to issue it. The injunction at issue in
14 the Eleventh Circuit is an injunction delaying the
15 election to November 6th. It not an injunction --
16 it's --

17 **THE COURT:** But don't you think -- yeah, Ms.
18 McKnight, but don't you think that with the court
19 saying what it said, secondarily by addressing those --
20 this and any other motion, if the Court determines that
21 it does not have time, that the court kind of
22 recognizes that would be necessarily an issue. Do you
23 think your argument is a fair reading of what the court
24 says in its decision?

25 **MS. MCKNIGHT:** I read what the Eleventh

1 Circuit said to mean, resolve any outstanding motions
2 so that when it comes up to us we don't have to deal
3 with, you know, back and forth motions between the
4 district court and the Eleventh Circuit. I understood
5 what the Eleventh Circuit was asking the Court to do
6 was button down the case so that it could begin its
7 review.

8 **THE COURT:** Well, the other question is, I
9 guess in order to avoid another remand, oh, I guess you
10 all could address those things to that court. So are
11 you suggesting then that any issue of any injunction
12 beyond the Court's determination that it should not try
13 to implement a new plan at this time would be left to
14 the court of appeals and not to this court because of
15 prior appeal about an earlier election which otherwise
16 is the same, except for when the date would be held --
17 what date the election would be held? In other
18 words --

19 **MR. SELLS:** Your Honor, may I speak on that
20 point?

21 **THE COURT:** No, just one moment, just one
22 moment. In other words, Ms. McKnight, is the amendment
23 of a date of an election, you know, so germane to the
24 status quo that it alters what is the central question
25 in the case which whether or not this is a properly

1 aligned districting for election purposes.

2 **MS. MCKNIGHT:** Right. On that point, Your
3 Honor, I -- we would rely on your order back in the
4 spring identifying some of the reasons why you enjoined
5 the May election to November. And I'll rely on some of
6 our briefing on this, Your Honor, but the point being
7 that in that order some of the things you said
8 included, look, you know, voters are expecting an
9 election in November, they're prepared to have an
10 election in November, they are not necessarily prepared
11 to have some sort of special election. Now, I'm adding
12 on that special election point here to say that your
13 sound -- your reasoning back in the spring to issue the
14 election as an issue on appeal, that rationale shows
15 why this Court should not issue an injunction at this
16 late time for the November election. So when you talk
17 about dates whether it's germane, it's at least germane
18 to this point of the type of harm that this can cause
19 and the type of confusion it can cause to the voters
20 and to candidates on the election.

21 **THE COURT:** Yeah, but the Court didn't change
22 the date. It's that an appeal took place that in the
23 Court's view deprived it of jurisdiction which prevents
24 possibly an election from going forward in November as
25 the court had indicated in its decision. In other

1 words, the Court picked November, not because it was a
2 lovely day, but because it was the next earliest
3 regular election that could take place after the time
4 the Court thought that a plan would be in place, but
5 all that stopped. So, how does the date become so much
6 -- so significant to the status quo that you don't have
7 essentially the same questions remaining before the
8 court of appeals as to whether the Court has made a
9 correct decision on liability, whether the Court either
10 does or does not implicate an appropriate plan, and
11 then, if so, when does that plan go into effect. I
12 don't see the significance of the date, other than
13 whether the Court had the opportunity to implement it,
14 giving respect to the jurisdiction with regard to the
15 appeal. That's what I'm trying to understand, what is
16 the -- in other words, wouldn't the status quo be
17 simply another date in the future while the court of
18 appeals considers the substance of the appeal that's
19 before it. Ms. McKnight?

20 **MS. MCKNIGHT:** Yes, Your Honor. It sounds
21 like you are focused on this issue over us raising the
22 point of jurisdiction. Is that fair to say?

23 **THE COURT:** That's -- that's one issue, of
24 course, jurisdiction has been around all the while
25 because the Court didn't think it had jurisdiction

1 until it got this case back to do anything. What I'm
2 asking you is, does moving the date to another date in
3 the future, otherwise this case remaining the same, is
4 that a real change in the status quo? In other words,
5 when the status quo is an enjoined election pending a
6 certain date, and if the case is on appeal, then it
7 would be in that state unless and until the court of
8 appeals made its decision of either accepting or
9 modifying or reversing the Court's decision or
10 remanding it back for something different. In other
11 words, I don't see that the Court -- it's any different
12 now from the Court deciding -- assuming that there's a
13 basis for it, moving an election from November than it
14 was for the Court to move it from May. That's what I'm
15 trying to understand, how is that significant for the
16 status quo.

17 **MS. MCKNIGHT:** I see, Your Honor. And part
18 of me, because some of your questions relate to the
19 harm, the balancing of the harm and the question about
20 the injunction itself. When it gets to, you know --
21 and I -- when you get to the balancing of the harm, we
22 have candidates already who are ready to run and have
23 qualified, you now, a second time around. They've
24 already qualified a first time. Enjoining the November
25 election would be moving the election -- scheduling the

1 election for a third time. This election was scheduled
2 for May, now it's scheduled for November, and it'll be
3 scheduled for another date at some point in the future.
4 When you're asking about what importance does the date
5 have, I guess that all of the -- frankly, I think every
6 single one of the equities we've identified in our
7 briefing as weighing against an injunction, it gets at
8 board member terms and minority representation, it gets
9 at the likelihood of voter confusion, it gets at the
10 burdens on candidates, and importantly the cumulative
11 effect of uncertainty, which this will now be the third
12 time that this -- if the injunction, new injunction
13 issues, it will be the third time this election is set
14 off. It goes --

15 **THE COURT:** I'm sorry, again. What would be
16 the effect, in any, to the voters who allegedly, as the
17 Court has found, who are harmed by an improperly
18 aligned -- improperly aligned districts. How would
19 their views and their consideration of harm be taken
20 into account if the Court just said hands off, since
21 we've done it twice, let's forget it and let it go back
22 to where it was.

23 **MS. MCKNIGHT:** Right. And that's a fair
24 question, Your Honor, and we think it is squarely
25 answered by the Supreme Court in *Covington*. The

1 Supreme Court in *Covington* said, look, if you're using
2 the type of rationale frankly that plaintiff has put
3 forward in this case for this injunction, trying to
4 enjoin an election this late in the date, and it's
5 simply insufficient. The Court there said: It would
6 appear to justify a special election in every single
7 racial gerrymandering case, a result clearly at odds
8 with our demand for careful case-specific analysis.
9 So, now, of course, the county disagrees respectfully,
10 Your Honor, with your decision in this case. We
11 believe these districts were drawn lawfully and they
12 abide with the Constitution, and that is what is the
13 subject of our appeal. But when it comes down to
14 whether this Court is required to enjoin the election
15 based on these districts, based on the showing that
16 plaintiff has put forth, it's not enough, Your Honor.
17 Plaintiff has not put forward enough even because it
18 would -- it would, as the Supreme Court said, appear to
19 justify a special election in every racial
20 gerrymandering case, and the Supreme Court said, Your
21 Honor, that it did not justify it in this case.

22 **THE COURT:** All right. Thank you.
23 Mr. Sells, anything further?

24 **MR. SELLS:** Yes, Your Honor. I wanted to
25 address the status quo point because I think that is a

1 complete red herring at this point. The Eleventh
2 Circuit has remanded the entire appeal back to your
3 court. That means you have jurisdiction over the case
4 at this point, at least to accomplish the purposes set
5 forth in the remand order, and the court of appeals
6 does not. So the question of whether to enjoin the
7 November election is squarely on your shoulders and not
8 on some other court's shoulders. I don't think there
9 is any question at all of jurisdiction remaining in
10 light of the remand order. That's what remand means.
11 And if there were any questions, Rule 52.1, Subsection
12 (c) says: The district court may decide the motion if
13 the court of appeal remands for that purpose. The
14 court of appeals was pretty clear in its remand order.
15 So I do think that if the Court decides that there's
16 not time to implement a remedial plan, then as the
17 Eleventh Circuit says, it must enter an order to that
18 effect explaining why, I would think.

19 **THE COURT:** I don't get chance to just say
20 no, right?

21 **MR. SELLS:** Well, you know, in all honesty,
22 Your Honor, things move quickly in election cases and
23 it's not unheard of for a court to enter short orders
24 that are then followed down the road with explanation,
25 and we --

1 **THE COURT:** I understand. I was just kidding
2 around, but I understand.

3 **MR. SELLS:** But, so I just want to say,
4 again, there's no question of jurisdiction anymore.
5 You don't need to -- you don't really need to focus on
6 what is the status quo or not the status quo at least
7 from the perspective of jurisdiction.

8 **THE COURT:** Okay. Well, I'm under the
9 impression pretty much that what you all have already
10 submitted and the tremendous record that's already in
11 this case that I have what I need to review, I have
12 take a little time to think about this. But let me do
13 this, if anyone has anything else you think you would
14 like to submit to the Court, you may do so by Friday at
15 5:00 of any of the matters presently pending, just a
16 memoranda or affidavits that you may think is pertinent
17 to the matters pending, I'll allow you that opportunity
18 to add those things to the record. If it's something
19 that the Court does not already have or something you
20 think needs to be further refined for the Court. I'm
21 not inviting you or suggesting that you don't have what
22 you need in the record, but just to give you, since we
23 are on a very short timeline, I thought to just give
24 you all at least that opportunity after having heard
25 from you today. You've been helpful in giving me your

1 views and assisting the Court in focusing on what your
2 points are and what it needs to do to make a decision
3 in the matter. But we intend to do so straightaway, so
4 that we can get it either on board for November or
5 leave it as it is or recast it for the court of
6 appeal's further consideration. But we won't hesitate
7 to get one or the other done. All right. Anything
8 else that either party has today? Mr. Sells, for the
9 plaintiff?

10 **MR. SELLS:** Well, Your Honor, I would again
11 direct your attention to our suggestion that the Court
12 enter an order directing the Court to communicate the
13 current situation to the Secretary of State's office
14 and ask them to press pause on doing anything with
15 Sumter County's ballots for as long as possible to give
16 the Court the maximum time to do whatever it determines
17 is appropriate.

18 **THE COURT:** Are you suggesting that the Court
19 just direct Sumter County through, by way of counsel to
20 do so?

21 **MR. SELLS:** Well, it could by way of
22 Mr. Brady. I suspect that would be the most
23 appropriate channel. But I think that is a first step
24 that needs to happen so that the Secretary of State's
25 Office, you know, who may not be aware of this

1 litigation, certainly has the opportunity to conserve
2 its resources and press pause on the printing of
3 ballots for Sumter County, that work is not wasted.

4 **THE COURT:** Okay. Let hope they go in
5 alphabetical order since Sumter County -- well, Ms.
6 McKnight, is there any problem with the Court just
7 saying to counsel that the election officials should
8 communicate that fact to the state election officials
9 for their information in terms of --

10 **MS. MCKNIGHT:** Your Honor, I think we would
11 not object to that. We only ask, you know, that it's
12 just clear what we need to do, what we need to
13 communicate to the Secretary of State. It's one thing
14 for Mr. Brady to contact them on his own, which he's
15 already done for the latest date. It's another thing
16 for the court to -- from the court that's clear and
17 what he needs to do, what he needs to ask for.

18 **THE COURT:** Let me do it this then. Why not
19 do it this way then, just have Mr. Brady inquire, that
20 advising the state of the pending matter before the
21 Court that might affect the balloting for Sumter
22 County, what is the latest time that the state would be
23 able to address that -- would have to have before they
24 could -- before the ballot would be printed. As I
25 understood from Mr. Sells was that they're able to kind

1 of sometime reorder. In other words, just for him to
2 just find out and let the Court know to what degree the
3 actual issuance of the -- I guess if Sumter County's
4 ballot could be delayed by the state in view of this
5 short pending period of the Court's consideration of
6 this matter.

7 **MS. MCKNIGHT:** Okay. Your Honor, that's
8 fair. We'll have him do that. And again, we
9 appreciate you offering that. As I said, he's already
10 reached out and asked for a delay, and all he got was
11 the 17th, so this was helpful.

12 **THE COURT:** Yeah, I didn't realize the 17th
13 was the delay that he had requested. That was the --
14 as I understood it, that was like the last day -- as I
15 understood it. I just forgot the detail that's what it
16 was, but, yeah, just have him verify whether that
17 remains the case or not. Okay.

18 **MS. MCKNIGHT:** I understand, Your Honor.
19 Thank you.

20 **THE COURT:** All right. Anything else? All
21 right. Then thank y'all.

22 **MS. MCKNIGHT:** Thank you, Your Honor.

23 **THE COURT:** Thank y'all very much. You've
24 been most helpful to the Court. I think it was
25 important to have this conference and well spent for

1 the Court to provide it. All right. Thank y'all so
2 much, and I'll be communicating with you as soon as I
3 can.

4 **MR. SELLS:** Thank you, Your Honor.

5 **THE COURT:** Goodbye.

6

7

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