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

KAREN FINN, *et al.*,
Plaintiffs,

-v-

COBB COUNTY BOARD OF ELECTIONS AND REGISTRATION, *et al.*
Defendants.

Case No. 1:22-cv-2300-ELR

AMICUS BRIEF OF COBB COUNTY SCHOOL DISTRICT IN RESPONSE TO PLAINTIFFS' MEMORANDUM IN SUPPORT OF CONTINUING JURISDICTION

Cobb County School District (the "District") files this Amicus Brief in Response to Plaintiffs' Memorandum in Support of Continuing Jurisdiction.

For the reasons discussed below, Plaintiffs cannot demonstrate that there is an ongoing controversy to challenge a redistricting map that no longer exists as it was superseded by the legislature's enactment of a newly enacted map while this case was stayed and all pertinent deadlines with respect to the 2024 election cycle have now expired Moreover, Plaintiffs' effort to introduce evidence is insufficient to resuscitate their claims.

Accordingly, the case should be dismissed as moot. Alternatively, Plaintiffs would need to amend their pleadings to address the operative map and include the necessary parties.

BACKGROUND

On December 14, 2023, the Court enjoined the use of the then-applicable redistricting map ("the Challenged Map") for any future Cobb County Board of Education ("Board") elections, including the 2024 election cycle. (Doc. 212). On January 10, 2024, the Court imposed a January 22, 2024 deadline for the legislature to enact a remedial map based on representations by the Cobb County Board of Elections and Registration ("BOER") that it could implement a remedial map for the 2024 election cycle if it was submitted by February 9, 2024. (Doc. 220, ¶ 3; Doc. 221). However, on January 19, 2024, the Eleventh Circuit stayed the preliminary injunction (Doc. 227) and denied Plaintiffs' emergency motion to lift the stay on January 25, 2024. (Doc. 245-1, pp. 15-16).

In the meantime, the General Assembly repealed the Challenged Map and enacted a new redistricting map ("the Newly Enacted Map"), which Governor Kemp signed into law on January 30, 2024. (Doc. 233). The BOER implemented the Newly Enacted Map for use during the May 21, 2024 primary elections for seats on the Board, and the Newly Enacted Map will be used for the general election on November 5, 2024.

On August 13, 2024, the Eleventh Circuit dismissed the District's appeal on the ground that it lacked standing as a nonparty. (Doc. 241). In doing so, it noted a jurisdictional issue as to mootness given the legislature's adoption of the Newly

Enacted Map. (*Id*., p. 7 n.1). On August 20, 2024, the Court instructed the parties to file briefs on the mootness issue raised by the Eleventh Circuit.

II. ARGUMENT AND CITATION OF AUTHORITY

A. The Newly Enacted Map Is Not a Remedial Map

As set forth above, Governor Kemp signed the Newly Enacted Map into law on January 30, 2024 – 11 days *after* the Eleventh Circuit stayed the preliminary injunction. (Doc. 227, 230). Although Plaintiffs contend that the Newly Enacted Map was in response to the Court's preliminary injunction order (Doc. 246, pp. 2-4), the stay of the injunction meant that the General Assembly was not acting by judicial order. Indeed, the Newly Enacted Map would be in effect even if the preliminary injunction had been set aside. As one of the Eleventh Circuit judges indicated during oral argument, the Newly Enacted Map cannot be considered a remedial map for this reason.[1] Accordingly, the Newly Enacted Map falls under the general rule that a superseding statute enacted while litigation is pending renders the case moot. (*See* Doc. 245-1, pp. 3-5) (citing cases).

[1] *Finn v. Cobb County School District*, (11th Cir. No. 23-14186 May 14, 2024), https://www.ca11.uscourts.gov/oral-argument-recordings?title=23-14186&field_oar_case_name_value=&field_oral_argument_date_value%5Bmin%5D=&field_oral_argument_date_value%5Bmax%5D, at 12:24-47).

B. Plaintiffs Cannot Establish Jurisdiction Based On Cases Addressing Remedies After a Final Ruling on the Merits

As the District set forth in its amicus brief on mootness (Doc. 245-1, pp. 5-7), Plaintiffs cannot establish continuing jurisdiction based on cases addressing remedial relief after a court has issued a ***final*** ruling on the merits of a statutory or constitutional challenge to a redistricting scheme. As also discussed in the District's amicus brief (*id*., p. 7), it is axiomatic that a ruling on a motion for preliminary injunction is *not* a final ruling on the merits. Thus, Plaintiffs' reliance on cases that addressed remedial relief after a final ruling on the merits are inapposite. (Doc. 246, pp. 5, 7-8) (citing *Covington v. North Carolina*, 283 F. Supp. 3d 410, 425 (M.D.N.C. 2018), *aff'd in part, rev'd in part on other grounds*, 585 U.S. 969 (2018), *Wise v. Lipscomb*, 437 U.S. 535, 542-43 (1978) and *Wilson v. Jones*, 130 F. Supp. 2d 1315, 1322) (S.D. Ala. 2000), *aff'd sub nom. Wilson v. Minor*, 220 F.3d 1297 (11th Cir. 2000).

C. Plaintiffs Cannot Establish Jurisdiction Based on Alleged Entitlement to Remedial Relief for Preliminary Injunction After Election Deadlines Have Passed

As the District also set forth in its amicus brief on mootness (Doc. 245-1, pp. 8-9), the only cases that have undertaken to review a superseding redistricting map in a remedial process in connection with a preliminary injunction have done so in the immediacy of a rapidly approaching election deadline. Here, all the relevant deadlines for the 2024 election cycle have long ago passed, and the Court thus is

powerless to order any remedial relief with respect to the 2024 election cycle. *Purcell v. Gonzalez*, 549 U.S. 1 (2006). The Challenged Map, in other words, is now a dead letter.

Yet, Plaintiffs cite concurring opinions in *Moyle v. United States*, 144 S. Ct. 2015, 2017, 2022 (2024) for the unremarkable proposition that a case typically continues on remand after an unsuccessful appeal of a preliminary injunction. (Doc. 246, p. 10). However, there was no superseding map enacted in *Moyle*, and mootness was not an issue in that case. Accordingly, *Moyle* is irrelevant to the mootness issue before the Court.

Plaintiffs also cite *Singleton v. Allen*, 690 F. Supp. 3d 1226, 1292-93 (N.D. Ala. 2023) for the proposition that redistricting cases would enter an "infinity loop" if remediation of a map mooted the litigation. (Doc. 246, p. 8). However, that verbiage was not part of a mootness analysis in *Singleton*, but rather was used when assessing the applicable scope of review – *i.e.*, whether Plaintiffs were required to re-prove liability for the remedial Congressional redistricting map under Section 2 of the Voting Rights Act, or only whether the challenged Congressional district gave black voters a reasonable opportunity to elect the candidate of their choice. *Id*. at 1288-1293. The court concluded that this issue was largely inconsequential as a practical matter because of numerous concessions made by the defendants, and, in any event, the court held that the new map violated the VRA. *Id*. at 1286, 1293-1320.

Indeed, no party raised mootness in S*ingleton*; instead, the court stated in a footnote that the new Congressional redistricting map did not render the case moot because of its duty to ensure that a remedial map cured the constitutional violation. *Singleton*, 690 F. Supp. 3d at 1290 n. 20. The court did not consider that a preliminary injunction is not a final ruling on the merits; moreover, the case was decided less than *one month* before an October 1, 2023 deadline to approve a Congressional redistricting map for the 2024 election cycle. *Id*. at 1237 n.4. That is not the case here. All applicable deadlines with respect to the 2024 election cycle expired months ago, and thus there is no further remedy available to Plaintiffs for the 2024 election cycle. Given this posture, the current case is moot, and dismissal is warranted.

In the alternative, Plaintiffs would need to amend the complaint if they wish to challenge the Newly Enacted Map. For example, in *Grace, Inc. v. City of Miami*, --- F. Supp. 3d ---, 2023 WL 7980153, at *5 (S.D. Fla. Nov. 17, 2023), a remedial map proposed by plaintiffs and approved by the district court was stayed by the Eleventh Circuit, after which the appeal was dismissed. After the Eleventh Circuit stayed the remedial order, the applicable deadlines for that election cycle expired, and the plaintiffs filed a supplemental complaint directed toward the remedial map enacted by the city, and the case proceeded based on that operative complaint. *Id*. Thus, there is no "infinity loop" present. Plaintiffs have the option with leave of this

Court to pursue any such challenge to the Newly Enacted Map in a timely manner so that it may be resolved in ample time for the 2026 election cycle.[2]

D. Plaintiffs May Not Keep This (Moot) Case Alive by Resorting to New Legal Theories to Argue That the Newly Enacted Map Has the Same Constitutional Problems as the Challenged Map

Plaintiffs contend that the Newly Enacted Map does not render the case moot because it supposedly involves the same dispute as to whether the VRA justified the map-drawing. (Doc. 246, pp. 5-6). In support, Plaintiffs rely on statements by a single senator, Senator Setzler, regarding the purported need to retain a majority-black district in District 3 to comply with the VRA. (*Id*.). As a threshold matter, Plaintiffs improperly conflate the merits of a potential challenge to the Newly Enacted Map with the current mootness inquiry. Indeed, the legislative comments and news articles relied upon by plaintiffs are irrelevant to the mootness issue, and arguably inadmissible hearsay. Moreover, it is axiomatic that a plaintiff may not attribute the alleged motives of a bill sponsor to the entire legislature. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021).

More importantly for purposes of the mootness analysis, Plaintiffs' argument reflects a dramatic shift in the theory of liability that underpinned their request for a

[2] Plaintiffs did not file their motion for preliminary injunction with respect to the Challenged Map until more than 16 months after they filed this lawsuit and less than four months before the asserted deadline to approve a redistricting map for the 2024 election cycle.

preliminary injunction. The preliminary injunction was premised on the preliminary conclusion, without a hearing, testimony or opportunity for cross-examination, that the *map-drawer* for the Challenged Map, Bryan Tyson, drew District 3 as a majority-black district to comply with the VRA without conducting the required functional analysis. (Doc. 212, pp. 16-17, 21-26). This was due in no small part to Plaintiffs' focus on the alleged racial motives of *Mr. Tyson* as the decisive factor as to whether they were likely to succeed on their claim that the Challenged Map was an unconstitutional gerrymander. (*See, e.g.*, Doc. 194-1, pp. 15-23, 37-46). In contrast, Plaintiffs' brief does not suggest that Mr. Tyson drew the Newly Enacted Map and does not include any reference identifying who actually drew the Newly Enacted Map, much less present any evidence as to the motives of that map-drawer.

Furthermore, the preliminary injunction order also was partially premised on the conclusion that there was an excessive number of voters who were moved into different districts under the Challenged Map and that the voters moved into other districts were disproportionately Black or Hispanic. (Doc. 212, pp. 18-21). Again, this was due to Plaintiffs' focus on this issue in their briefing on their motion for preliminary injunction. (*See, e.g.*, Doc. 194-1, pp. 19-23). As Plaintiffs acknowledge in their brief, the Newly Enacted Map addressed this concern by reducing the number and percentage of voters moved from the Benchmark (2012) Map districts

from more than 35% under the Challenged Map to approximately 23% under the Newly Enacted Map. (Doc. 246, p. 3; Exhibit 1, attached).

Furthermore, any analysis as to whether race was the predominant motive in adopting the Newly Enacted Map will also differ substantially in another material respect: whereas the Challenged Map was recommended by the District pursuant to a Board resolution, the Newly Enacted Map was adopted in the absence of any such recommendation from the District. Therefore, any alleged racial motives of the Board -- which was a significant area of focus not only in Plaintiffs' Amended Complaint (*see*, *e.g.*, Doc. 37, ¶¶ 58-93), but also in their preliminary injunction briefing (*see*, *e.g.*, Doc. 194-1, pp. 30, 32-35) – would be irrelevant in any challenge to the Newly Enacted Map.

Therefore, Plaintiffs have failed to make the requisite showing that the Newly Enacted Map is essentially the same as the Challenged Map and merely perpetuates the same likely constitutional violation. Simply put, "[a]ny challenge to the new system will present a different case, demanding its own similarly sensitive analysis." *Holloway v. City of Virginia Beach*, 42 F.4th 266, 276 (4th Cir. 2022).[3]

[3] Contrary to Plaintiffs' assertions (Doc. 246, p. 14 n.15), the District argued in the Eleventh Circuit that the *appeal* was not moot and that it was "an open question" whether the district court would have jurisdiction to entertain objections to the new map on remand if the injunction was affirmed. *Finn v. Cobb County School District*, (11th Cir. No. 23-14186 May 14, 2024), https://www.ca11.uscourts.gov/oral-argument-recordings?title=23-14186&field_oar_case_name_value=&field_oral_argument_date_value%5Bmin%

CONCLUSION

For all the reasons set forth herein, Plaintiffs' § 1983 racial gerrymandering claim against the Challenged Map is now moot because of the General Assembly's enactment of the Newly Enacted Map and the expiration of the applicable deadlines in connection with the 2024 election cycle.

/s/ Philip W. Savrin
Philip W. Savrin
Georgia Bar No. 627836
psavrin@fmglaw.com
Jonathan D. Crumly
Georgia Bar No. 199466
jonathan.crumly@fmglaw.com
William H. Buechner, Jr.
Georgia Bar No. 086392
bbuechner@fmglaw.com
Scott Eric Anderson
Georgia Bar No. 105077
scott.anderson@fmglaw.com
P. Michael Freed
Georgia Bar No. 061128
michael.freed@fmglaw.com

5D=&field_oral_argument_date_value%5Bmax%5D, at 10:54-12:22, 47-56). Similarly, the District's Notice of Supplemental Authority filed with the Eleventh Circuit on February 27, 2024 asserted that the *appeal* was not moot. *Finn, et al. v. Cobb County Board of Elections & Registration, et al.*, (11th Cir. No. 23-14186) (Doc. 51 therein). That notice added, "The District questions whether the trial court would have jurisdiction to consider objections to the new map that has been passed by the General Assembly … because entirely new allegations would need to be made addressed to the General Assembly's actions." (*Id.*).

In any event, since mootness is jurisdictional, the Court must determine for itself whether the case is moot, regardless of the District's position.

Attorneys for
Cobb County School District

FREEMAN MATHIS & GARY, LLP
100 Galleria Parkway, Suite 1600
Atlanta, Georgia 30339-5948
(770) 818-0000 (telephone)
(833)330-3669 (facsimile)

LOCAL RULE 7.1 CERTIFICATION

The undersigned does hereby certify that the foregoing has been prepared with New Times Roman 14-point font in compliance with Local Rule 5.1.

/s/ Philip W. Savrin
Philip W. Savrin
Georgia Bar No. 627836
psavrin@fmglaw.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically submitted the foregoing to the Clerk of Court using the Court's E-file system, which will automatically send electronic mail notification of such filing to all parties who have appeared in the action.

This 13th day of September, 2024.

FREEMAN MATHIS & GARY, LLP

/s/ Philip W. Savrin
Philip W. Savrin
Georgia Bar No. 627836
psavrin@fmglaw.com

EXHIBIT 1
to Amicus Brief of Cobb County School District in Response to Plaintiffs' Memorandum in Support of Continuing Jurisdiction

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

CIVIL ACTION FILE NO. 1:22-CV-2300-ELR

KAREN FINN, et al,

Plaintiffs,

v.

COBB COUNTY SCHOOL DISTRICT,

Defendant.

----------/

Senate Committee On State And Local Governmental Operations

January 10, 2024

Excerpt 0:00:00 to 0:38:48

The only difference is the City of Kennesaw has an almost noncontiguous area to the east I-75 here that's not contiguous, but it's a real strange connection to the city. So it's -- this is essentially, substantially the same as the previous map.

Last few things, Mr. Chairman. The preservation of the core. One of the reapportionment principles is preserving the core of the districts. The 2022 map that's in the courts moved 36 percent of the citizenry of Cobb County into different districts.

That was one of the thing the judge raised was that that was a large number that was of concern. In drawing this plan, even though we have population shifts across our county, we lowered the 36 percent relocation of folks from district to district down to 23. So there's a significant drop in that, again, consistent with reapportionment principles.

And then lastly, the compactness standard. If you look at these black jagged lines, this is what the compactness looked like of districts before. You can see District 5 before was this. Now District 5 is