

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

KAREN FINN, DR. JILLIAN FORD,
HYLAH DALY, JENNE DULCIO,
GALEO LATINO COMMUNITY
DEVELOPMENT FUND, INC., NEW
GEORGIA PROJECT ACTION FUND,
LEAGUE OF WOMEN VOTERS OF
MARIETTA-COBB, and GEORGIA
COALITION FOR THE PEOPLE'S
AGENDA, INC.,

Plaintiffs,

v.

COBB COUNTY BOARD OF
ELECTIONS AND REGISTRATION
and TATE FALL, in her official capacity
as Director of the Cobb County Board of
Elections and Registration,

Defendants.

CIVIL ACTION

NO. 1:22-CV-2300-ELR

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF
CONTINUED JURISDICTION**

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
PROCEDURAL HISTORY	1
ARGUMENT	2
I. SENATE BILL 338 WAS PASSED AS A PROPOSED REMEDY FOR THIS COURT’S PRELIMINARY INJUNCTION	2
A. The Legislative Proceedings for SB 338 Focused on Responding to This Court’s Injunction	2
B. The Debate on SB 338 Demonstrates That the Central Dispute of This Litigation Remains Unresolved.....	4
II. REDISTRICTING CASES DO NOT CONCLUDE UNTIL A MAP THAT REMEDIES ALL VIOLATIONS IN PLACE FOR FUTURE ELECTIONS	6
A. Redistricting Cases Require Remedial Proceedings to Ensure Violations Are Fully Addressed.....	6
B. Redistricting Cases Would Enter an Infinity Loop if Passage of a Remedial Map Mooted the Litigation	8
C. The Court Should Now Conduct Proceedings to Test the Sufficiency of SB 338 as a Remedy for the Violations	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Coal. for Abolition of Marijuana Prohibition v. City of Atlanta</i> , 219 F.3d 1301 (11th Cir. 2000)	5
<i>In re Cobb Cnty. Sch. Dist.</i> , No. 23-14186 (11th Cir. Dec. 19, 2023).....	1, 2, 9
<i>Covington v. North Carolina</i> , 283 F. Supp. 3d 410 (M.D.N.C. 2018), <i>aff'd in part, rev'd in part on other grounds</i> , 585 U.S. 969 (2018)	5, 7, 8
<i>Moyle v. United States</i> , 144 S. Ct. 2015 (2024).....	10
<i>Naturist Soc’y, Inc. v. Fillyaw</i> , 958 F.2d 1515 (11th Cir. 1992)	5
<i>Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville</i> , 508 U.S. 656 (1993).....	5, 8, 9
<i>Singleton v. Allen</i> , 690 F. Supp. 3d 1226 (N.D. Ala. 2023).....	8
<i>Wilson v. Jones</i> , 130 F. Supp. 2d 1315 (S.D. Ala. 2000), <i>aff'd sub nom. Wilson v. Minor</i> , 220 F.3d 1297 (11th Cir. 2000)	7
<i>Wise v. Lipscomb</i> , 437 U.S. 535 (1978).....	7
 Constitutions	
U.S. CONST. amend. XIV	1, 6
 Statutes	
Voting Rights Act of 1965, (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1).....	5, 6

Legislation

SB 338, 2023-2024 Gen. Assemb., Reg. Sess. (Ga. 2024).....1, 2

Other Authorities

Georgia State Senate, *Legislative Day 8 | 2024 Session | 1/24/2024*,
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Lawmakers, YOUTUBE (Jan. 24, 2024),
<https://youtu.be/ufmvHUyNbig?si=4F6RIRKOrGIBnZ0U>3

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School Board Maps, MARIETTA DAILY J. (Jan. 8, 2024),
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but Democrats Say They Don’t End Racial Bias, ASSOCIATED
 PRESS (Jan. 24, 2024), <https://apnews.com/article/georgia-cobb-county-school-board-redistricting-34c107dee5523f261c37ef70be9b0070>4

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Final Hurdle at the Gold Dome, WABE (Feb. 1, 2024),
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Committee, AXIOS ATLANTA (Jan. 17, 2024),
<https://www.axios.com/local/atlanta/2024/01/17/cobb-schools-district-map>3

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 Cir. Aug. 13, 2024), Doc. 73-12

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Order of the Court, *In re Cobb Cnty. Sch. Dist.*, No. 23-14186 (11th Cir. Jan. 19, 2024), Doc. 29-2.....1

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INTRODUCTION

In express reaction to this Court preliminarily enjoining Georgia General Assembly’s 2022 Enacted Plan for the Cobb County School Board (the “PI”), the General Assembly enacted Senate Bill 338 (“SB 338”). Because of the Eleventh Circuit’s stay of the PI, however, this Court has not had the opportunity to assess whether SB 338 cures the likely constitutional violation. Therefore, there remains a case and controversy to resolve in this lawsuit, and the case is not moot. To hold otherwise would mean jurisdictions could avoid the effect of judicial findings of unconstitutional districting simply by enacting a new map, no matter how minimally the new map differs from the old. Now that the stay is lifted, this Court should resume the remedial proceedings and allow Plaintiffs the chance to submit objections to General Assembly’s Remedial Plan.

PROCEDURAL HISTORY

Plaintiffs sued the Cobb County Board of Elections (“Election Defendants”) challenging the School Board redistricting map as a racial gerrymander in violation of the Constitution’s Fourteenth Amendment. (ECF 1 at 37.) On December 14, 2023, the Court granted Plaintiffs’ PI Motion and enjoined that map. (PI, ECF 212.) On January 12, 2024, the Court of Appeals granted non-party CCSD’s motion to stay the PI pending resolution of CCSD’s appeal. (Order of the Court, *In re Cobb Cnty. Sch. Dist.*, No. 23-14186 (11th Cir. Jan. 19, 2024), Doc. 29-2). On January

30, 2024, before the PI was stayed, SB 338 was introduced.¹ The General Assembly passed it on January 30, 2024. *See* Ga. S.B. 338 § 1 (2024). Governor Brian Kemp signed the bill into law that same day, and the new School Board redistricting map contained therein—crafted for the stated purpose of addressing this Court’s PI—became effective immediately. *See id.* § 2. On August 13, 2024, the Court of Appeals dismissed CCSD’s appeal for lack of jurisdiction and returned the matter to this Court for further proceedings. (Opinion of the Court, *In re Cobb Cnty. Sch. Dist.*, No. 23-14186 (11th Cir. Aug. 13, 2024), Doc. 73-1).²

ARGUMENT

I. SENATE BILL 338 WAS PASSED AS A PROPOSED REMEDY FOR THIS COURT’S PRELIMINARY INJUNCTION

A. The Legislative Proceedings for SB 338 Focused on Responding to This Court’s Injunction

To begin, legislators expressly and repeatedly acknowledged that they were drawing a new map because of the PI. Sen. Ed Setzler, SB 338’s sponsor, repeatedly referenced both this litigation and this Court’s order in explaining why the General Assembly needed to pass a new map. As he said on the Senate floor, “[t]his legislature passed in 2022 a plan ... [which] was struck down by a federal district

¹ SB 338, 2023-2024 Gen. Assemb., Reg. Sess. (Ga. 2024), available at <https://www.legis.ga.gov/legislation/65953>.

² A more robust procedural history of this case is recounted in the 11th Circuit’s published opinion. (Opinion of the Court, *In re Cobb Cnty. Sch. Dist.*, No. 23-14186 (11th Cir. Aug. 13, 2024), Doc. 73-1).

judge on the 14th of December of 2023.”³ Sen. Setzler also acknowledged the remedial timeline ordered by this Court as “an important message that we needed to act upon this promptly.”⁴ When Sen. Setzler spoke to the House Intragovernmental Coordination Committee, he argued SB 338 “addresses the issues raised in the federal court order,” and takes “the specifics of [the PI] and implements that in the plan that you see before you.”⁵ He told a news outlet that SB 338 “was very carefully crafted to comply with the order of the judge[.]”⁶ He explained that SB 338’s configuration responded to “that issue of ... what percentage of Black voters are moved from one district to another district, what percentage of Hispanic voters are moved from one district to another, white voters and so forth[.]”⁷ a dynamic the PI focused on. (PI at 18-21.) He also argued SB 338 took into account “the provisions of the judge’s order and the reinforcement principles of compactness, core retention, minimizing split precincts, thoughtful of things such as communities of interest and

³ Georgia State Senate, *Legislative Day 8 | 2024 Session | 1/24/2024*, at 46:26, VIMEO (Jan. 24, 2024), <https://vimeo.com/905639740>.

⁴ *Id.*

⁵ Georgia House of Representatives, *Intragovernmental Coordination 01.26.24*, at 23:52, VIMEO (Jan. 26, 2024), <https://vimeo.com/906381551>.

⁶ Kristal Dixon, *Redrawn Cobb School Board Map Passes Senate Committee*, AXIOS ATLANTA (Jan. 17, 2024), <https://www.axios.com/local/atlanta/2024/01/17/cobb-schools-district-map>.

⁷ Juma Sei, *A Controversial Cobb County School Board Map Clears Its Final Hurdle at the Gold Dome*, WABE (Feb. 1, 2024), <https://www.wabe.org/a-controversial-cobb-county-school-board-map-clears-its-final-hurdle-in-the-gold-dome/>.

census defined areas, and it's a map I think we can all be very proud of.”⁸

Other legislators confirmed this intention, such as Sen. John Albers, who noted legislators were “working together to create something that met the order by the court.”⁹ Even legislators who opposed the proposed map, did so in the context of PI compliance: Sen. Jason Esteves argued that “the proposal in [SB 338] violates the clear provisions of the federal court order[,]”¹⁰ and Rep. Teri Anulewicz noted her alternative map was more responsive to the issues raised in the Court’s PI because it ensured “communities of interest ... are represented fairly[,]” kept together cities split in the enjoined map, and kept school attendance zones intact.¹¹

B. The Debate on SB 338 Demonstrates That the Central Dispute of This Litigation Remains Unresolved

When a superseding statute modifies but does not fundamentally alter the

⁸ GPB, *Cobb School Redistricting Bill Introduced on Day 8, Lawmakers*, at 0:14, YOUTUBE (Jan. 24, 2024), <https://youtu.be/ufmvHUyNbig?si=4F6RIRKOrGIBnZ0U>.

⁹ *See supra* n.3 at 54:24.

¹⁰ Jeff Amy, *Georgia Senate Passes New Cobb School Board Districts, but Democrats Say They Don't End Racial Bias*, ASSOCIATED PRESS (Jan. 24, 2024), <https://apnews.com/article/georgia-cobb-county-school-board-redistricting-34c107dee5523f261c37ef70be9b0070>.

¹¹ Jake Busch, *Tensions Flare in First Cobb Delegation Meeting on School Board Maps*, MARIETTA DAILY J. (Jan. 8, 2024), https://www.mdjonline.com/news/local/tensions-flare-in-first-cobb-delegation-meeting-on-school-board-maps/article_e737d31e-ae55-11ee-89b4-3bfe0f0b711f.html; *see, e.g.*, Taylor Croft and Cassidy Alexander, *Cobb Lawmakers Talk School Board Map Ahead of Judge's Deadline*, ATLANTA J.-CONST. (Jan. 8, 2024), <https://www.ajc.com/education/cobb-lawmakers-talk-school-board-map-ahead-of-judges-deadline/UKTJ5OKDWFH5LA7VJJHWSR6L3Q/>.

nature of plaintiffs' injury or of the underlying dispute, the case is not moot:

“[W]hen an ordinance is repealed by the enactment of a superseding statute, then the ‘superseding statute or regulation moots a case only to the extent that it removes challenged features of the prior law. To the extent those features remain in place, and changes in the law have not so fundamentally altered the statutory framework as to render the original controversy a mere abstraction, the case is not moot.’”

Coal. for Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301, 1310 (11th Cir. 2000) (citation omitted); *see also Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 661-62 (1993) (holding that enactment of a replacement statute for a challenged law did not render plaintiffs' claims moot because the new statute injured them “in the same fundamental way”). Courts regularly apply this framework in redistricting cases. *See, e.g., 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) (finding that racial gerrymandering claim was not moot after legislature passed new maps in response to injunction (“[W]e emphasize that the General Assembly redrew the Subject Districts pursuant to the opportunity provided by this Court’s order.”)).

Here, the core disputes and injuries remain the same. The fact is evidenced by the legislative debates surrounding SB 338, which focused on whether the Voting Rights Act justified the map-drawing for the Cobb County Board of Education, or whether the Voting Rights Act was instead improperly invoked as a pretext for a

racial gerrymander that packed Black and Latinx voters. According to Sen. Setzler, the General Assembly “had an obligation under the Voting Rights Act to maintain a majority-Black district in the southwest of the county. That has been maintained[.]”¹² Sen. Setzler again said in a different hearing that “[a]s we’re required by the Voting Rights Act, [SB 338] maintains District 3 which is a minority Black school board district ... as a majority Black district of the Voting Rights Act.”¹³ Opponents of SB 338, like Sen. Esteves, argued SB 338 “does not remedy the identified violations of the Voting Rights Act or the federal Constitution. [SB 338] continues the packing of Black and brown voters in Cobb County[.]”¹⁴

Disputes over compliance with the Voting Rights Act and the Fourteenth Amendment, the heart of Plaintiffs’ injury, persist with the passage of SB 338 and findings from this Court are still needed to resolve this issue.

II. REDISTRICTING CASES DO NOT CONCLUDE UNTIL A MAP THAT REMEDIES ALL VIOLATIONS IN PLACE FOR FUTURE ELECTIONS

A. Redistricting Cases Require Remedial Proceedings to Ensure Violations Are Fully Addressed

Liability determinations are not the end of the case, but require remedial proceedings to ensure that the liability is resolved rather than perpetuated. When a

¹² See *supra* note 5, at 25:21.

¹³ See *supra* note 3, at 49:19.

¹⁴ See *supra* note 3, at 50:04.

violation is found by a federal court in a redistricting case, the legislature or political subdivision is typically provided the first chance to remedy that violation. *Wise v. Lipscomb*, 437 U.S. 535, 542-43 (1978). That here the General Assembly availed itself of the opportunity to do so while there was a temporary stay—not a permanent stay or a reversal—of the PI and its deadlines does not change the character or context of the legislative act nor render this case moot. This Court must still determine whether SB 338 remedies the constitutional violations identified in the PI. When “the districting plan is offered as a replacement for one invalidated by the court[,] ... the court has an independent duty to assess its constitutionality[.]” *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). “In the remedial posture, courts must ensure that a proposed remedial plan completely corrects—rather than perpetuates—the defects that rendered the original districts unconstitutional or unlawful.” *Covington v. North Carolina*, 283 F. Supp. 3d at 431.

Accordingly, in *North Carolina v. Covington*, the Supreme Court rejected the North Carolina legislature’s argument that plaintiffs’ racial gerrymandering claims had become moot by the passage of a remedial plan. Rebuffing this logic, the Court held that “in the remedial posture in which this case is presented, the plaintiffs’ claims that they were organized into legislative districts on the basis of their race did not become moot simply because the General Assembly drew new district lines

around them.” 585 U.S. at 969. “Because the plaintiffs asserted that they remained segregated on the basis of race, their claims remained the subject of a live dispute, and the District Court properly retained jurisdiction.” *Id.* So too here.

B. Redistricting Cases Would Enter an Infinity Loop if Passage of a Remedial Map Mooted the Litigation

There are also powerful practical reasons for the rule requiring courts to assure themselves of the lawfulness of remedial redistricting plans. Otherwise, legislatures could respond to adverse rulings by “put[ting] redistricting litigation in an infinity loop[,]” enacting superficially different remedial plans that did nothing to undo the actual legal harms proven by plaintiffs, who would then have no recourse except to prove their case anew—at which point even a doubly successful plaintiff could see another ruling undone by yet another insufficient remedial plan and the mooting of yet another case. *Singleton v. Allen*, 690 F. Supp. 3d 1226, 1292-93 (N.D. Ala. 2023). A requirement that Plaintiffs relitigate liability every time a legislature passed a new map “would make it exceedingly difficult, if not impossible, for a district court to ever effectuate relief” in a redistricting case. *Id.* at 1292; *see also Ne. Fla. Chapter*, 508 U.S. at 662 (“Nor does it matter that the new ordinance differs in certain respects from the old one. [Precedent] does not stand for the proposition that it is only the possibility that the *selfsame* statute will be enacted that prevents a case from being moot; if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some

insignificant respect.”) (emphasis in original). This scenario epitomizes the settled exception to mootness: an action that is capable of repetition but incapable of review. *Ne. Fla. Chapter*, 508 U.S. at 662.

Under the circumstances of this case—where the new map is enacted after a judicial finding that the old map was likely unconstitutional—whether SB 338 was enacted before, during, or after the temporary stay of this Court’s PI has no bearing on the mootness analysis. A holding of mootness in the context of this case would thrust the parties and this Court into that disfavored infinity loop.¹⁵

C. The Court Should Now Conduct Proceedings to Test the Sufficiency of SB 338 as a Remedy for the Violations

Given that the stay has been lifted and the appeal has had no impact on this Court’s preliminary injunction, the Court should now conduct proceedings to test the sufficiency of SB 338 as a remedy for the violations found in the Court’s December order. Courts have a strong interest in vindicating the extremely strong public interest in conducting elections using maps that are constitutional and do not

¹⁵ Plaintiffs note that while the Eleventh Circuit did not reach the issue of mootness, counsel for the School District expressly agreed that the passage of SB 338 did not moot the case. Oral Argument at 10:54-13:08, *Finn v. Cobb Cnty. Sch. Dist.*, No. 23-14186 (11th Cir. May 5, 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= (See also Supplemental Authority filed by Appellant Cobb County School District, *In re Cobb Cnty. Sch. Dist.*, No. 23-14186 (11th Cir. Feb. 27, 2024), Doc. 51.).

dilute the voices of any voters. While, absent the appeals, this process would have normally taken place soon after the injunction was entered, there is no doctrinal limitation on a court from conducting a remedial hearing on a longer timeline.

Here, where the injunction was on appeal but survives undisturbed, the injunction is in effect and the litigation continues. *See, e.g., Moyle v. United States*, 144 S. Ct. 2015, 2017 (2024) (Kagan, J., concurring) (“[W]ith [the appellate court’s] stay dissolved, the District Court’s preliminary injunction will again take effect” and “the lower courts can proceed with this litigation in the regular course.”); *see also id.* at 2022 (Barrett, J., concurring) (concurring in the judgment dissolving the stay of that preliminary injunction to “permit proceedings to run their course in the courts below.”). Plaintiffs contend that SB 338 does not remedy the constitutional violation found by this Court and intend to object to SB 338 as an insufficient remedy based on the Court’s findings. (ECF 233.) The Court must conduct remedial proceedings to ensure that the remedial map is compliant with Constitutional requirements.

CONCLUSION

Because SB 338 does not moot the controversy in this matter, Plaintiffs respectfully submit that the Court set a briefing schedule concerning the sufficiency of SB 338 as a remedy for the constitutional violations.

DATED this 6th day of September, 2024.

Respectfully Submitted,

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CERTIFICATION OF COMPLIANCE

Pursuant to Local Rule 7.1, the undersigned counsel hereby certifies that this document has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1.

Respectfully submitted this 6th day of September, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to all counsel of record in this case.

Respectfully submitted this 6th day of September, 2024.

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