UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

PRESS ROBINSON, et al., *Plaintiffs,* v. KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana, *Defendant.*	Civil Action No. 3:22-cv-00211-SDD-SDJ Chief Judge Shelly D. Dick Magistrate Judge Scott D. Johnson
EDWARD GALMON, SR., et al., *Plaintiffs,* v. R. KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana, *Defendant.*	Consolidated with Civil Action No. 3:22-cv-00214-SDD-SDJ

LEGISLATIVE INTERVENORS BRIEF ON NATURE AND TIMELINE OF REMEDIAL PHASE

Legislative Intervenor-Defendants ("Legislative Intervenors"), in response to this Court's order of earlier today, respectfully submit this brief to submit their proposal concerning the "nature and timeline of the judicial redistricting process in the event that the Legislature is unable to enact a remedial map." ECF 196 at 2.:

RESERVATION OF RIGHTS

Legislative Intervenors respectfully note their disagreement with the Court's preliminary-injunction opinion on the law and the facts (ECF 173). For purposes of the remedial phase only—and without waiving any rights, including the right to challenge the liability ruling on appeal before and after final judgment, the right to continue to assert that this Court's actions should be stayed under the *Purcell* principle, and the right to challenge the propriety of ordering a "remedial phase"

as part of a preliminary-injunction decision rather than after the entry of judgment following a trial on the merits—Legislative Intervenors present this proposal for how the remedial phase should proceed. Nothing in this filing, or in any other of Legislative Intervenors' remedial filings, should be read as a waiver of any position, legal or factual, Legislative Intervenors are pressing on appeal, and any assertions consistent with or endorsing the Court's preliminary-injunction decision's legal and factual findings are made for the sake of argument, at the remedial phase, only.

The Legislative Intervenors respectfully submit that a remedial phase of this case should permit the parties to submit proposed remedial plans, followed by an adequate period for discovery into the proposed remedial phases (including a limited number of depositions), and culminating in an evidentiary hearing for the Court to receive evidence and arguments of counsel concerning the proposed remedial plans.

Legislative Intervenors would specifically propose the following schedule for a remedial phase in the event that the Louisiana Legislature is not able to enact a remedial plan by the Court's deadline of June 20, 2022:

- Deadline for Plaintiffs to propose a remedial plan and to submit evidence in support of said plan: June 30, 2022
- Deadline for Defendants to (a) respond to Plaintiffs' proposed remedial plan and (b) to themselves propose a remedial plan and (c) to submit evidence in support of both (a) and (b): July 15, 2022.
- Deadline for Plaintiffs to submit a response to Defendants' proposed remedial plan, including evidence: July 22, 2022.
- Discovery: Closes day prior to hearing, each side entitled to two depositions.
- Hearing: Week of July 25, 2022.

In support of this proposal, Legislative Intervenors respectfully represent as follows.

LEGAL STANDARD

Any discussion of the procedure for the Court's adoption of a remedial phase should begin with the standard governing the adoption of a remedial plan. As the Legislature has been afforded the first opportunity to devise a remedial plan, "the court's ensuing review and remedial powers are largely dictated by the legislative body's response." *McGhee v. Granville Cnty.*, 860 F.2d 110, 115 (4th Cir. 1988). If the Legislature adopts a remedial plan, "a court may not thereupon simply substitute its judgment of a more equitable remedy for that of the legislative body; it may only consider whether the proffered remedial plan is legally unacceptable because it violates anew, constitutional or statutory voting rights..." *United States v. Charleston Cnty.*, No. 2:01-cv-0155, 2003 WL 23525650, *1 (D.S.C. Aug. 14, 2003) (quoting *McGhee*, 860 F.2d at 115).

If, however, the Legislature does not adopt a remedial plan, "the responsibility falls on the District Court," *Chapman v. Meier,* 420 U.S. 1, 27 (1975), to create and adopt a remedial plan. If the Court must order a plan, "equitable considerations demand a close scrutiny and mandate the fashioning of a near-optimal apportionment plan." *Seastrunk v. Burns*, 772 F.2d 143, 151 (5th Cir. 1985). *See also McGhee*, 860 F.2d at 115 (same). While the remedial plan must, of course, remedy the Section 2 violation, the remedial plan should be "narrowly tailored" and "should not 'intrude on state policy any more than is necessary' to uphold the requirements of the Constitution." *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1023 (8th Cir. 2006) (quoting *Upham v. Seaman*, 456 U.S. 37, 41–42 (1982) (per curiam)). *See also, e.g., United States v. City of Euclid*, 523 F. Supp. 2d 641, 644 (N.D. Ohio 2007); *Carleston Cnty.*, 2003 WL 23525650, at *1.

In all events, the Court must engage in a "close scrutiny" of any proposed remedial plans, *Seastrunk*, 772 F.2d at 151, to assure the remedial plan complies with a host of redistricting factors, does not do undue violence to the State's redistricting policy, and that the plan remedies the voting rights concerns the Court identified in its preliminary-injunction order. This will undoubtedly

require lay and expert testimony (by multiple experts) for the parties to create the relevant record to allow the Court to scrutinize the proposed plans and order a suitable plan.

As part of the Court's scrutiny, the Court must also ensure that any remedial plan it adopts was not itself constructed using inappropriate racial considerations. Under *Clark v. Calhoun Cnty., Miss.*, 88 F.3d 1393 (5th Cir. 1996),[1] "race-based redistricting, even that done for remedial purposes, is subject to strict scrutiny." *Id.* at 1405. *Clark* found that compliance with Section 2 of the Voting Rights Act was a compelling state interest (a proposition the Supreme Court has only assumed), and then went on to conclude that "a tailored response to a found violation [of Section 2] must use race at the expense of traditional political concerns no more than is reasonably necessary to remedy the wrong." *Id.* at 1406. This Court, in its preliminary-injunction order, held that while "illustrative maps drawn by demographers for litigation are not state action and thus the Equal Protection Clause is not triggered," "a Court-imposed or legislatively-enacted map would be squarely subject to Equal Protection Review." ECF 173 at 114. In order for the Court to undertake *that* analysis, additional factfinding will be required, including the examination of the mapdrawer(s) at issue, and any additional lay or expert analysis required to determine whether the proposed remedial plan would violate the Equal Protection Clause through the inappropriate use of racial considerations.

THE COURT MUST GROUND ITS ADOPTION OF A REMEDIAL PLAN ON AN ADEQUATE REMEDIAL RECORD, TO INCLUDE A HEARING AND DISCOVERY

The Court's remedial phase must provide for sufficient development of the evidentiary record of the parties' proposed remedial plans before the Court adopts or rejecting any plan. The Fifth Circuit has recognized that even in expedited proceedings, a district court must conduct an

[1] Legislative Intervenors continue to adhere to their view that a proposed illustrative plan drawn with predominant racial intent cannot satisfy the first *Gingles* precondition, and nothing in this brief, including the citation to *Clark*, is intended to waive that issue.

"evidentiary hearing" and have "either specific fact findings, or at least, a record sufficient to allow review" when considering remedial plans. *Jones v. City of Lubbock*, 727 F.2d 364, 387 (5th Cir. 1984) (noting "shortcomings" in the district court's remedial phase, which lasted less than a month and a half, that would have required vacatur).

Legislative Intervenors request for the opportunity to conduct discovery on the proposed remedial plans, through depositions of Plaintiffs' mapdrawers and expert witnesses offered with Plaintiffs' proposed remedial plans, is vital to developing this record that must be presented to the Court. It is also not out of the ordinary. Courts frequently permit the filing of briefing, expert reports, and other evidence, and conduct remedial hearings (sometimes multiple) on proposed remedies in Section 2 or other complex redistricting cases. *See, e.g., United States v. Brown*, 561 F.3d 420, 436 (5th Cir. 2009) ("The district court held two evidentiary hearings before determining the appropriate remedy."); *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 301 F. Supp. 3d 1297, 1326 (M.D. Ga. 2018), *aff'd*, 979 F.3d 1282 (11th Cir. 2020) ("[T]he Court expects a much more expansive body of evidence to determine the effectiveness of proposed remedial plans following post-trial discovery."); *see also* March 1, 2018 Order, *Wright v. Sumter Cnty. Bd. of Elections & Registration*, Case No. 1:14-cv-00042, Doc. 189 (finding further discovery during remedial proceedings was needed regarding the plaintiffs' proposed remedial plans and the defendant's critiques and allowing depositions of the parties' experts); *Abrams v. Johnson*, 521 U.S. 74, 94–95 (1997) (noting that the parties "had ample opportunity to present evidence" on the court's remedial plan "at the remedy hearing, in which they fully participated.").

The need for this discovery is even greater given the current procedural posture. There has not been a full trial on the merits or other opportunity to develop the record on any proposed remedial plans. *See Abrams*, 521 U.S. at 94–95. Further, as mentioned *supra*, the "close scrutiny"

the Court must apply to any proposed remedial plans necessarily entails factual development, and will almost certainly require both fact and expert testimony. The Court must ensure the plans satisfy one-person, one-vote, that they are reasonably compact, that they remedy the alleged Section 2 violation the Court found Plaintiffs had shown a likelihood of success of proving, and at the same time that they comply with the Equal Protection Clause by not unlawfully segregating voters on the basis of race. Those findings require record development, including through the filing of briefs, reports, discovery, and ultimately a contested evidentiary hearing. Redistricting is "never easy," especially when one considers the interaction of "complex and delicately balanced requirements regarding the consideration of race," *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018), between the Voting Rights Act and the Constitution. To ensure there is an adequate record for the Court to undertake that delicate balancing and other considerations, Legislative Intervenors respectfully suggest a hearing and briefing is required.

Finally, Legislative Intervenors' request for discovery is consistent with the "liberal spirit" of the Federal Rules of Civil Procedure. *See Miller v. Sam Houston State Univ.*, 986 F.3d 880, 891 (5th Cir. 2021); *see* Fed. R. Civ. P. 26(b) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case…"). "Blanket denials" of discovery requests that affect a party's "substantial rights" and prevent them from fairly presenting their claims fail to adhere to this "liberal spirt." *See Miller*, 986 F.3d at 892 (holding that the district court's discovery restrictions, including the refusal to allow a party to depose witnesses, "suffocated any chance" for the party to "fairly present" their claims). Legislative Intervenors should be permitted to conduct discovery, including through depositions of Plaintiffs' mapdrawers and expert witnesses offered with Plaintiffs' proposed

remedial plans, in order to build the record required before any plan is adopted or rejected. *See Jones*, 727 F.2d at 387.

A PROPOSED SCHEDULE

Legislative Intervenors' proposed schedule is intended to allow adequate time for record development while simultaneously respecting the Court's expressed intent for expedition of these proceedings. In the event that the Legislature is not successful in adopting a remedial plan by June 20 as this Court has directed, the Legislative Intervenors would propose the following schedule and allowance for discovery:

- Deadline for Plaintiffs to propose a remedial plan and to submit evidence and a brief in support of said plan: June 30, 2022
- Deadline for Defendants to (a) respond to Plaintiffs' proposed remedial plan and (b) to themselves propose a remedial plan and (c) to submit evidence and a brief in support of both (a) and (b): July 15, 2022.
- Deadline for Plaintiffs to submit a response to Defendants' proposed remedial plan, including evidence: July 22, 2022.
- Discovery: Closes day prior to hearing, each side entitled to two depositions.
- Hearing: Week of July 25, 2022.

Legislative Intervenors suggest that parties exchange, on the date they propose their plans, shapefiles and/or block-equivalency files for their proposed plans, expert reports, and expert "backup" data within the meaning of Federal Rule of Civil Procedure 26, and other evidentiary materials in support of their proposed plan. Legislative Intervenors further suggest that each side be permitted to take two depositions within the proposed schedule, which depositions can be taken via remote technology. Given the complexity involved in redistricting matters, Legislative Intervenors submit that the proposed schedule allows adequate time for the parties to construct

plans, obtain the necessary evidentiary support for proposed plans, and ensure an appropriate record is created for the Court to consider when adopting a plan.

CONCLUSION

For the foregoing reasons, Legislative Intervenors respectfully request that the Court adopt their proposed remedial procedure and schedule.

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CERTIFICATE OF SERVICE

I certify that on June 16, 2022, this document was filed electronically on the Court's electronic case filing system. Notice of the filing will be served on all counsel of record through the Court's system. Copies of the filing are available on the Court's system.

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