

The Honorable Robert S. Lasnik

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

SUSAN SOTO PALMER et al.,
Plaintiffs,

v.

STEVEN HOBBS, in his official capacity
as Secretary of State of Washington, et al.,
Defendants,

and

JOSE TREVINO et al.,
Intervenor-Defendants.

Case No.: 3:22-cv-5035-RSL

**INTERVENOR-DEFENDANTS’
MOTION TO SUSPEND REMEDIAL
PROCEEDINGS FOR WANT OF
JURISDICTION OR ORDER AN
EVIDENTIARY HEARING**

**NOTE ON MOTION CALENDAR:
February 9, 2024**

Intervenor-Defendants respectfully submit this motion because Plaintiffs raised a new jurisdictional issue affecting all parties in this case in their opposition to Senator Torres’s motion to intervene, and move this Court to suspend all action in these remedial proceedings for want of jurisdiction pending appeal. Alternatively, if this Court does not suspend further proceedings, Intervenor-Defendants move for an evidentiary hearing on the contested remedial issues.

INTRODUCTION

After this Court issued its memorandum and order, it entered a final judgment, finding for Plaintiffs on their Section 2 claim. (Dkts. ## 218, 219.) It then purported to “retain[] jurisdiction over the adoption of the new redistricting plan as set forth in the Memorandum of Decision.” (Dkt. # 219.) Plaintiffs argue in their Opposition (*see* Dkt. # 255) that this Court lacks jurisdiction over

1 the Motion to Intervene of Senator Nikki Torres (*see* Dkt. # 253) because Intervenor-Defendants’
 2 Notice of Appeal (*see* Dkt. # 222) of this Court’s Section 2 merits opinion and permanent
 3 injunction (*see* Dkt. # 218) divests this Court of jurisdiction over the ongoing remedial
 4 proceedings. (*See* Dkt. # 255 at 2–3.)

5 If this Court agrees with Plaintiffs’ jurisdictional argument,¹ as Intervenor-Defendants do,
 6 this Court should issue an order holding that it lacks jurisdiction to enter a remedial map. *See, e.g.,*
 7 *Wright v. Sumter Cty. Bd. of Elections & Registration*, No. 1:14-CV-42 (WLS), 2018 U.S. Dist.
 8 LEXIS 236668, at *6 (M.D. Ga. June 21, 2018) (“The Court issues this order to inform the parties
 9 that it does not intend to adopt any remedial district boundaries while the instant appeal remains
 10 pending. . . . [T]he Court finds that it lacks jurisdiction to enter any such order.”). At most, this
 11 Court is permitted to make modifications to its injunction under Federal Rule of Civil Procedure
 12 62(d) within the bounds of Federal Rule of Civil Procedure 62.1, which permits this Court to defer
 13 or deny Plaintiffs’ remedial plans or issue an indicative ruling that it would grant the motion were
 14 the Ninth Circuit to remand the case.

15 Alternatively, in the event this Court determines that it retains jurisdiction to conduct the
 16 remedial proceedings, Intervenor-Defendants move for an in-person, remedial-specific evidentiary
 17 hearing in connection with the adoption of any remedial maps. The failure to hold a remedy-
 18 specific evidentiary hearing where there are disputed facts (as is the case here) would be reversible
 19 error. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 49 (D.C. Cir.), cert. denied, 534
 20 U.S. 952 (2001).

21 ARGUMENT

22 **A. This Court Should Issue An Order Finding It Lacks Jurisdiction To Adopt A** 23 **Remedial Map.**

24 Although Plaintiffs do not explicitly acknowledge the import of their jurisdictional
 25 argument, the inescapable corollary of their argument is that if Intervenor-Defendants’ appeal
 26 divests this Court of jurisdiction over a motion to intervene in the remedial proceedings, then the

27 ¹ Under any other scenario short of this Court correctly finding it lacks jurisdiction over the remedy, Rep. Torres should be permitted to intervene. (Dkt. # 253.)

1 same appeal divests this Court of jurisdiction over the remedial proceedings themselves. To the
2 extent Plaintiffs make that argument (even if merely implicitly), Intervenor-Defendants adopt it
3 and accordingly seek for this Court to pause remedial proceedings as it lacks the jurisdiction to
4 continue them.

5 Plaintiffs rightly cite multiple cases for the proposition that a notice of appeal generally
6 divests district courts of jurisdiction. (*See* Dkt. # 255 at 2–3.) “An appeal, including an
7 interlocutory appeal, ‘divests the district court of its control over those aspects of the case involved
8 in the appeal.’” *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915, 1919 (2023) (quoting *Griggs v.*
9 *Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)).

10 The Supreme Court in *Coinbase* adopted Judge Easterbrook’s formulation in deciding if
11 an aspect of a case is essentially involved in an appeal: The dispositive question is whether that
12 aspect the appellate court is deciding determines whether the “the litigation may go forward in the
13 district court.” *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915, 1920 (2023) (quoting *Bradford-Scott*
14 *Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997)). In Section
15 2 cases, that means asking whether the district court’s remedial authority is bound up in the appeal
16 such that the appeal determines whether the litigation may continue at the district court level. A
17 district court’s remedial authority in ordering a remedial map is limited to ensuring plaintiffs are
18 relieved of the “injuries the plaintiffs established” from the challenged map. *North Carolina v.*
19 *Covington*, 138 S. Ct. 2548, 2554 (2018) (per curiam). Therefore, for Section 2, a district court’s
20 equitable authority in ordering a remedial map is premised on the equitable permanent injunction
21 order finding a Section 2 violation. *See North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017)
22 (“Relief in redistricting cases is fashioned in the light of well-known principles of equity.”)
23 (internal quotation marks omitted). If a federal appellate court vacates a district court’s permanent
24 injunction order, that would destroy the entire basis for the district court’s remedial authority,
25 which means the litigation as to the equitable relief (including the drawing of any maps) would no
26 longer go forward. It is axiomatic that, for Section 2, a “district court’s remedial proceedings bear
27 directly on and are inextricably bound up in its liability findings.” *Wright v. Sumter Cty. Bd. of*

1 *Elections & Registration*, 979 F.3d 1282, 1302–03 (11th Cir. 2020). Therefore, a district court’s
2 authority to order a remedial map is an aspect involved in the appeal, and the district court is
3 thereby divested of control as to the remedial map while the “merits” appeal is pending.

4 It is true, of course, that “[w]hile an appeal is pending from an interlocutory order or final
5 judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an
6 injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or
7 other terms that secure the opposing party’s rights.” Fed R. Civ. P. 62(d). Accordingly,
8 “[t]he general rule that an appeal deprives a district court of jurisdiction over the issues appealed
9 therefore is not absolute, and under certain circumstances, the district court retains jurisdiction to
10 modify an injunction pending appeal.” *Bd. of Educ. v. Missouri*, 936 F.2d 993, 995 (8th Cir. 1991).

11 The Ninth Circuit has described the surviving jurisdiction in this way:

12 [I]n the kinds of cases where the court supervises a continuing course of conduct
13 and where as new facts develop additional supervisory action by the court is
14 required, an appeal from the supervisory order does not divest the district court of
15 jurisdiction to continue its supervision, even though in the course of that
supervision the court acts upon or modifies the order from which the appeal is
taken.

16 *Hoffman ex rel NLRB v. Beer Drivers & Salesmen’s Local Union*, 536 F.2d 1268, 1276 (9th Cir.
17 1976).

18 But those two defined and narrow exceptions to the rule of divestment do not apply here,
19 for two reasons.

20 First, as *Coinbase* recently made clear, whatever the district court’s “supervisory”
21 jurisdiction to “modify” injunctions is, it cannot encroach on “aspects of the case involved in the
22 appeal.” *Coinbase* is an extremely limiting principle: Yes, the district court retains some
23 modification authority over its own injunction while an appeal is pending, but it cannot issue a
24 remedial map when its justification to do so is bound up in the appeal.

25 Second, the adoption of a remedial plan in Section 2 litigation is an extraordinary step in
26 our governmental system, because it involves a district court supplanting the ordinary role of the
27

1 State in redistricting. *See Chapman v. Meier*, 420 U.S. 1, 27 (1975) “(We say once again what has
2 been said on many occasions: reapportionment is primarily the duty and responsibility of the State
3 through its legislature or other body, rather than of a federal court.”). Therefore, the “supervision”
4 over a state’s remedial redistricting is qualitatively distinct from a federal court’s own remedial
5 process. In this case, this Court has asserted that it will order the map drawn. That is not supervision
6 over the implementation of its injunction against a state-adopted map. That is the districting itself.
7 What this Court is doing is no mere supervisory role contemplated by Rule 62(d). Instead, it is the
8 type of proceedings that could only be conducted when general jurisdiction over the case has not
9 been transferred to the appellate court.

10 The Eleventh Circuit has dealt well with this Section 2 procedural problem well, creating
11 a helpful roadmap in *Wright*. Admittedly—but sensibly—taking care of jurisdiction does result in
12 a bit of yo-yoing between courts:

13 The County Board appealed, challenging the district court’s order permanently
14 enjoining the May 2018 school board elections “and all orders forming the basis of
15 or relating to that injunction,” including the district court’s order finding liability
16 under section 2. With that appeal pending -- after the County Board had filed its
17 opening brief, and while we awaited Wright’s response -- the district court sua
18 sponte modified its injunction. Since the County Board’s notice of appeal had
19 deprived it of jurisdiction, the court concluded it was without power to draw a new
20 map. Therefore, school board elections would proceed under H.B. 836’s districting
21 regime. The court denied Wright’s motion for reconsideration.

22 A panel of this Court then sua sponte remanded the case to the district court on
23 a limited basis, for the second time. We construed its orders -- modifying the
24 injunction and denying Wright’s motion for reconsideration -- “as equivalent to
25 indicative rulings under Fed. R. Civ. P. 62.1(a)(3).” On remand, we directed the
26 district court to determine whether it was “still feasible to issue a new map with
27 interim boundaries for the November election in a timely manner.” “If so,” we said,
the court should draw a new district map “before returning the case and the record
to this Court.” If not, however, the district court should enter an order saying so
“and then return the case to this Court.”

Wright v. Sumter Cty. Bd. of Elections & Registration 979 F.3d at 1298–99. The Eleventh Circuit
thus endorsed (1) the district court’s power to modify the injunction but *not* to “draw a new map,”

1 and (2) the importance of having only one court at a time exercise jurisdiction over the entire
2 Section 2 case.

3 Moreover, this Court purported to issue a final judgment—not an interlocutory order—in
4 this Section 2 case. (*See* Dkt. # No. 219.) Ordinarily, “[a] final judgment ‘end[s] the litigation on
5 the merits and leave[s] nothing for the court to do but execute the judgment.’” *Demartini v.*
6 *Demartini*, Nos. 19-16603, 19-16940, 2023 U.S. App. LEXIS 15034, at *2 (9th Cir. June 16, 2023)
7 (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). And “[t]he United States Supreme
8 Court has affirmed the general rule that “the whole case and every matter in controversy in it [must
9 be] decided in a single appeal.” *Galaza v. Wolf*, 954 F.3d 1267, 1270 (9th Cir. 2020) (quoting
10 *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017)).

11 This Court, in issuing its final judgment, nonetheless stated that it “retains jurisdiction over
12 the adoption of the new redistricting plan as set forth in the Memorandum of Decision.” (Dkt. #
13 No. 219.) But, again, it is an extraordinary thing for a district court to *both* (1) retain jurisdiction
14 over a case *after* final judgment; *and* (2) assert its authority to draw a state’s legislative districts.
15 Such exceptional exercises of federal judicial power is not present in any other area of law. The
16 federal courts should instead treat Section 2 cases as ordinary federal cases. A final judgment
17 divests a district court of jurisdiction. As such, all remedial processes must cease so that the
18 appellate process may run its course.

19 All that notwithstanding, this Court may act within the strictures of Fed. R. Civ. P. 62.1
20 while Intervenor-Defendants’ appeal is pending: “If a timely motion is made for relief that
21 the court lacks authority to grant because of an appeal that has been docketed and is pending,
22 the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it
23 would grant the motion if the court of appeals remands for that purpose or that the motion raises a
24 substantial issue.”

25 Plaintiffs timely filed their opening “Brief in Support of Remedial Proposals” on December
26 1, 2023. (Dkt. # 245.) That document requested “this Court to adopt one of Plaintiffs’ five proposed
27 remedial plans, which fully and effectively remedy the Section 2 violation in the region, with a

1 preference.” (*Id.* at 7.) The brief, then, is the functional equivalent of a Motion to Adopt a Remedial
 2 Map. This is especially true because, based on this Court’s current scheduling, that brief will be
 3 the only option for the Plaintiffs to so move. Indeed, this Court has explained that it will, in
 4 cooperation with the special master, adopt one of those maps (whether or not modified) and then
 5 inform the parties. (*See generally* Dkt. # 246.) As such, Plaintiffs’ filing of December 1, 2023 is
 6 best construed as moving this Court to adopt one of their proposals.

7 For the reasons stated above, this Court “lacks authority to grant” that request because of
 8 Intervenor-Defendants’ appeal. That limits the Court to three options. It can simply defer
 9 considering Plaintiffs’ proposals, deny the motion entirely, or give an indicative ruling. *See* Fed.
 10 R. Civ. P. 62.1.

11 This Court, therefore, could give an indication of which map as modified is its chosen
 12 remedy, but it lacks the jurisdiction to actually adopt a remedial map and impose it on the State.

13 **B. Alternatively, Should This Court Find It Retains Remedial Jurisdiction During the**
 14 **Pending Appeal, This Court Must Hold An In-Person Remedy-Specific Evidentiary**
 15 **Hearing To Determine Disputed Factual Matters.**

16 If this Court determines that it indeed retains remedial jurisdiction notwithstanding the
 17 pending appeal, prior to adopting any remedial map, this Court must conduct an in-person remedy-
 18 specific evidentiary hearing because it cannot adopt a new map without first deciding disputed
 19 factual matters. Further, this Court cannot decide disputed factual matters without first conducting
 20 a hearing.

21 The right to an evidentiary hearing with live witnesses and the opportunity for cross-
 22 examination is deeply rooted in our judicial system. Reflecting this deeply rooted tradition, the
 23 law of the Ninth Circuit for more than two decades has been that “[g]enerally the entry or
 24 continuation of an injunction requires a hearing. Only when the facts are not in dispute, or when
 25 the adverse party has waived its right to a hearing, can that significant procedural step be
 26 eliminated.” *Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988). Nearly every other
 27 circuit is in accord. “It is a cardinal principle of our system of justice that factual disputes must be

1 heard in open court and resolved through trial-like evidentiary proceedings.” *Microsoft*, 253 F.3d
2 at 101; *see also Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1211
3 (11th Cir. 2003); *In re Rationis Enters., Inc. of Panama*, 261 F.3d 264, 269 (2d Cir. 2001); *Prof’l*
4 *Plan Examiners of N.J., Inc. v. Lefante*, 750 F.2d 282, 288 (3d Cir. 1984); *United States v. McGee*,
5 714 F.2d 607, 613 (6th Cir. 1983).

6 The leading modern case on this issue is *United States v. Microsoft*. In *Microsoft*, the D.C.
7 Circuit, sitting *en banc*, unanimously reversed a district court’s imposition of an injunction without
8 an evidentiary hearing. 253 F.3d at 101. The court grounded its analysis on the “cardinal principle
9 of our system of justice that factual disputes must be heard in open court and resolved through
10 trial-like evidentiary proceedings,” and its recognition that “[a]ny other course would be contrary
11 ‘to the spirit which imbues our judicial tribunals prohibiting decision without hearing.’” *Id.*
12 (quoting *Sims v. Greene*, 161 F.2d 87, 88 (3d Cir. 1947)).

13 In *Microsoft*, the district court below, following a finding for the plaintiff on the merits
14 regarding liability in an antitrust case, moved forward with the remedial stage and restructured
15 Microsoft without holding an in-person remedy-specific hearing to determine disputed factual
16 matters. *Id.* at 49. In reversing the district court, the D.C. Circuit held that “[a] hearing on the
17 merits—i.e., a trial on liability—does not substitute for a relief-specific evidentiary hearing unless
18 the matter of relief was part of the trial on liability, or unless there are no disputed factual issues
19 regarding the matter of relief.” *Id.* at 101.

20 The present matter is analogous to *Microsoft*. Here, the Court issued a finding for Plaintiffs
21 at the “trial on liability.” (Dkts. ## 218, 219.) Now, the Court is engaging in the remedy phase,
22 and apparently intends to restructure the duly enacted legislative district map for Washington state
23 without any further evidentiary hearings. (*See* Dkt. # 253 at 32 (“Clerk of Court is directed to enter
24 judgment in plaintiffs’ favor on their Section 2 claim.”); *see also* Dkt. # 246 at 3 (stating that the
25 Court will schedule a hearing in the beginning of March “to discuss the Court’s preferred remedial
26 option” but saying nothing regarding any remedy-specific evidentiary hearing where experts and
27 witnesses can be cross examined.))

1 In the present matter, there are disputed facts the Court must decide before it can enter a
2 final remedy, i.e., a new legislative map. For example, Plaintiffs’ remedial expert, Dr. Oskooii, an
3 expert who did not appear in the trial on liability, prepared five different proposed remedial maps.
4 (Dkt. # 245.) Dr. Oskooii claims that his maps (1) respect traditional criteria and the redistricting
5 criteria set forth in Washington law; and (2) that LD-14 (his proposed remedial district in the
6 Yakima Valley) unites population centers in the Yakima Valley. *Id.* Dr. Collingwood, another
7 remedial expert for Plaintiffs, provides his opinion for the first time before the Court that Dr.
8 Oskooii’s proposed remedial maps comply with Section 2 of the Voting Rights Act. *Id.* Both Dr.
9 Oskooii’s and Dr. Collingwood’s expert opinions are factual assertions which Intervenor-
10 Defendants dispute. (*see* Dkts. ## 251, 252.) It is essential that Dr. Oskooii and Dr. Collingwood
11 face cross examination regarding their disputed factual claims.²

12 **CONCLUSION**

13 For the foregoing reasons, Intervenor-Defendants respectfully request that this Court
14 recognize that it lacks jurisdiction to conduct remedial proceedings and issue an order placing all
15 remedial proceedings in this case in abeyance pending action by the Ninth Circuit. Alternatively,
16 in the event this Court determines that it retains jurisdiction for the remedial proceedings,
17 Intervenor-Defendants move this Court to hold an in-person remedial-specific evidentiary hearing
18 prior to adopting any remedial maps.

19
20
21
22
23

24 ² Additionally, Intervenor-Defendants would like to discuss with Drs. Oskooii and Collingwood why, despite the
25 Court ordering that the remedy map include “a majority-Latino” population in Yakima, they put forth a map that
26 contains a sub-majority Latino population? (*See* Dkts. ## 70 at 41, 218 at 32 (Plaintiffs ask that the Court order the
27 implementation of a map that “that includes a majority-Latino state legislative district in the Yakima Valley region”
and the Court “enter[s] judgment in plaintiffs’ favor on their Section 2 claim.”)) Other disputed issues include: location
of incumbents, adjusting partisan performance in non-Yakima Valley districts, what data was consulted by the experts
while creating and analyzing Plaintiffs’ proposed remedial maps, etc.

1 DATED this 19th day of January, 2024.

2 Respectfully submitted,

3 s/ Andrew R. Stokesbary

4 Andrew R. Stokesbary, WSBA No. 46097
5 CHALMERS, ADAMS, BACKER & KAUFMAN, LLC
6 701 Fifth Avenue, Suite 4200
7 Seattle, WA 98104
8 T: (206) 813-9322
9 dstokesbary@chalmersadams.com

10 Jason B. Torchinsky (admitted pro hac vice)
11 Phillip M. Gordon (admitted pro hac vice)
12 Andrew B. Pardue (admitted pro hac vice)
13 Caleb Acker (admitted pro hac vice)
14 HOLTZMAN VOGEL BARAN
15 TORCHINSKY & JOSEFIK PLLC
16 15405 John Marshall Hwy
17 Haymarket, VA 20169
18 T: (540) 341-8808
19 jtorchinsky@holtzmanvogel.com
20 pgordon@holtzmanvogel.com
21 apardue@holtzmanvogel.com
22 cacker@holtzmanvogel.com

23 Dallin B. Holt (admitted pro hac vice)
24 Brennan A.R. Bowen (admitted pro hac vice)
25 HOLTZMAN VOGEL BARAN
26 TORCHINSKY & JOSEFIK PLLC
27 Esplanade Tower IV
2575 East Camelback Rd
Suite 860
Phoenix, AZ 85016
T: (540) 341-8808
dholt@holtzmanvogel.com
bbowen@holtzmanvogel.com

Counsel for Intervenor-Defendants

I certify that this memorandum contains 3,192 words, in compliance with the Local Civil Rules.

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing document with the Clerk of the Court of the United States District Court for the Western District of Washington through the Court's CM/ECF System, which will serve a copy of this document upon all counsel of record.

DATED this 19th day of January, 2024.

Respectfully submitted,

s/ Andrew R. Stokesbary
Andrew R. Stokesbary, WSBA No. 46097

Counsel for Intervenor-Defendants

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27