

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

Richard Rose, et al.,

Plaintiffs,

vs.

Brad Raffensperger, in his
official capacity as Secretary of
State of the State of Georgia,

Defendant.

Case No. 1:20-cv-2921-SDG

**Plaintiffs' Reply in
Support of Motion for a
Conference Regarding
Remedial Proceedings**

A conference to discuss a schedule for remedial proceedings in this case is ripe and appropriate. The Court asked Plaintiffs to address the Court's jurisdiction to hold remedial proceedings given the Secretary's pending appeal. Plaintiffs have provided case law in support of the Court's jurisdiction, and the Secretary has conceded that case law supporting such jurisdiction exists. Dkt. No. 171 at 2-3. The Secretary implores this Court to take a "let's wait and see" approach, but Georgia voters have waited long enough. Now is the time to begin the remedial process to ensure that voters can participate in a lawful Public Service Commission election this year.

The only issue on appeal before the Eleventh Circuit is liability. The Secretary offers no case law to support the assertion that the Court lacks jurisdiction over the remedial stage here while that appeal is pending. Indeed, in *Georgia State Conference of the NAACP v. Fayette County Board of Commissioners*—which the Secretary cites in his response—the county used the remedial plan ordered by the trial court for an election held while the Eleventh Circuit decided the issue of liability. *See* 118 F. Supp. 3d 1338, 1340-41 (N.D. Ga. 2015). And even after the Eleventh Circuit reversed the trial court’s grant of summary judgment and ordered a trial on the merits, the trial court issued an injunction requiring the county to use the remedial plan for a special election set to occur before the trial concluded. *Id.*

The remaining cases the Secretary cites reach similar conclusions. *See Johnson v. Mortham*, 926 F. Supp. 1540, 1543 (N.D. Fla. 1996) (denying stay of remedial proceedings pending appeal); *Buskey v. Oliver*, 574 F. Supp. 41, 41 (M.D. Ala. 1983) (denying motion for stay and setting schedule for remedial proceeding pending appeal); *Wright v. Sumter Cty. Bd. of Elections & Registration*, 979 F.3d 1282, 1299 (11th

Cir. 2020) (referencing prior partial remand by the Eleventh Circuit for remedial proceedings pending appeal).

Contrary to the Secretary's assertion, beginning the remedial stage now is anything but "rush[ed]." This Court issued a thorough opinion in favor of Plaintiffs more than eight months ago, after more than two years of litigation and a week-long bench trial. And despite requesting expedited review from the Eleventh Circuit, four months have passed since oral argument without a decision.

There is no known timetable for when the Eleventh Circuit will issue a ruling. But even if that ruling were to come soon, that does not weigh against this Court holding a conference to discuss a schedule for remedial proceedings. If the Eleventh Circuit affirms this Court's liability ruling, there will need to be a schedule to move forward with the remedial process. Having that schedule set already would be a benefit, not a negative. The benefit of doing so would be even greater if the Secretary were to seek further appellate review of the Eleventh Circuit's ruling, either in en banc proceedings or in the U.S. Supreme Court. The latter is no mere possibility, as the Secretary has already told the Supreme Court he would "petition for review" if the Eleventh Circuit

ruled in Plaintiffs' favor. (Opp. to Emergency App. to Vacate Stay at 17 (Aug. 17, 2022).) Although the Secretary does not mention this in his response, any further appellate review he seeks would result in yet further delays to the remedial process under his "wait-and-see" approach.

If the Eleventh Circuit were to reverse, however, there would be no burden to the Court or the parties in simply disregarding the schedule. And if this Court were to craft a full remedial plan before the Eleventh Circuit rules, the Eleventh Circuit would then have the added benefit of being able to address the entire case at once rather than in a piecemeal fashion. The Secretary's proposed approach simply creates more delay regardless of how the Eleventh Circuit rules.

Further supporting action now on the remedial process is the undisputed fact that the legislature has already been given the first opportunity to fashion a remedy and yet chose not to do so. As the Supreme Court made clear, there is no stay of this Court's judgment in favor of Plaintiffs. Still, the Georgia General Assembly decided to adjourn on March 30, 2023, without taking any action to fashion or implement a remedial plan. The Secretary attempts to gloss over this

fact by relegating it to a footnote in his brief, *see* Dkt. No. 171 at 4 n.2, but the Court now rightfully owns the task of fashioning an appropriate interim remedy.

The delay that would be caused by inaction now cannot be undone. The Secretary acknowledges that a primary election, primary runoff election, general election, and general runoff election will likely be necessary if the Eleventh Circuit upholds this Court's judgment. Dkt No. 171 at 5. Per O.C.G.A. § 21-2-540(b), the earliest that each of these elections can be held is at least 29 days after being called. Thus, if the special primary election were to be called on Monday, April 24, 2023, and each subsequent election were called the day after the previous election was held, the general runoff election could not be held until August 21, 2023, at earliest.

Two Public Service Commission seats—including majority-Black District 3—are currently occupied by holdover members. Starting the remedial process now is necessary to give Georgia voters a reasonable chance to hold elections for these seats sometime this year.

Conclusion

This Court should schedule a conference call for the purpose of discussing an orderly schedule for remedial proceedings in this case.

Respectfully submitted this 21st day of April, 2023.

/s/ Bryan L. Sells

Georgia Bar No. 635562
The Law Office of Bryan L. Sells, LLC
PO Box 5493
Atlanta, Georgia 31107-0493
Telephone: (404) 480-4212
Email: bryan@bryansellslaw.com

Nicolas L. Martinez (*pro hac vice*)
Wesley A. Morrisette (*pro hac vice*)
Bartlit Beck LLP
Courthouse Place
54 West Hubbard Street, Suite 300
Chicago, IL 60654
Telephone: (312) 494-4400
Email: Nicolas.Martinez@bartlitbeck.com
Email: Wesley.Morrisette@bartlitbeck.com

Attorneys for the Plaintiffs

Certificate of Compliance

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing document has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

/s/ Bryan L. Sells

Bryan L. Sells

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