

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' Motion to Begin
Remedial Proceedings**

The plaintiffs respectfully move the Court to begin remedial proceedings in this case. In light of Judge Jones' recent order setting a December 8 deadline for the State of Georgia to draw new maps for the state legislature and Congress, *see Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 1:21-cv-05337-SCJ, 2023 WL 7037537, at *143 (N.D. Ga. Oct. 26, 2023), the plaintiffs ask the Court to begin remedial proceedings and impose the same deadline here.

Background

This is a voting-rights challenge to the at-large method of electing members of Georgia's Public Service Commission. The plaintiffs—a

group of Black Georgians—sued Georgia Secretary of State Brad Raffensperger in July 2020, alleging that the at-large elections dilute Black voting strength in violation of Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301.

After more than two years of litigation and a week-long bench trial, this Court made detailed findings of fact and comprehensive conclusions of law to support its ultimate conclusion that the challenged election practice violates Section 2. The Court enjoined future elections using the unlawful practice and gave the Georgia General Assembly an opportunity to devise a remedy at its next regular session beginning in January 2023.

The Secretary then filed an interlocutory appeal and an emergency motion for a stay pending appeal. A divided motions panel of the Eleventh Circuit granted a stay, but the Supreme Court vacated it a week later. The Eleventh Circuit granted the plaintiffs' motion to expedite the Secretary's appeal, which was argued on December 15, 2022. It remains pending for decision nearly eleven months later.

Meanwhile, the Georgia General Assembly took no action to address the Court's injunction before it adjourned *sine die* on March 30,

2023. That same day, the plaintiffs requested a conference with the Court for the purpose of discussing a schedule for remedial proceedings. The Court denied that motion but granted leave for the plaintiffs to renew that motion in six months.

Six months have now passed, and the Eleventh Circuit has yet to decide the Secretary's appeal. In the meantime, the Supreme Court has forcefully reaffirmed the vitality of Section 2 and the Court's seminal decision interpreting it. *See Allen v. Milligan*, 599 U.S. 1 (2023); *see also Allen v. Milligan*, No. 23A231, 2023 WL 6218394 (Sept. 26, 2023) (denying Alabama's application to stay the district court's order enjoining the legislature's 2023 remedial plan because it violated Section 2). A three-judge panel of this Court, which included a member of the Eleventh Circuit panel deciding the Secretary's appeal, rejected his primary legal argument and held that "proof of the second and third [Gingles] prerequisites does not require showing the cause(s) of racial polarization." *Ga. State Conf. of the NAACP v. Georgia*, No. 1:21-CV-05338-ELB-SCJ-SDG, 2023 WL 7093025, at *19 (N.D. Ga. Oct. 26, 2023). And Judge Jones has struck down Georgia's redistricting plans

for the state House, Senate, and Congress as violations of Section 2. *See Alpha Phi Alpha*, 2023 WL 7037537, at *144.

Based on representations from the Secretary's counsel that remedial plans would need to be in place by late January or early February for the 2024 election, Judge Jones gave the State until December 8 to draw lawful remedial plans consistent with his order. And he noted that the Court would proceed to draw or adopt its own remedial plans "[i]n the event that the State is unable or unwilling to enact remedial plans by December 8." *Id.* at *143.

Shortly after Judge Jones issued his order, Governor Kemp called a special session for the General Assembly for the purpose of redistricting the state House, Senate, and Congress. The Governor's proclamation does not include drawing a map for the Public Service Commission. The Secretary has announced that the State plans to appeal Judge Jones' ruling but does not intend to seek a stay.

Discussion

As a general rule, the filing of a notice of appeal divests the district court of jurisdiction over the case pending disposition of the appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58

(1982) (per curiam). But a number of exceptions have emerged. The district court retains jurisdiction, for example, to issue orders staying, modifying, or granting injunctions, to direct the filing of supersedeas bonds, and to issue orders affecting the record on appeal, the granting of bail, and matters of a similar nature. *Mahone v. Ray*, 326 F.3d 1176, 1179 (11th Cir. 2003); *Doe v. Bush*, 261 F.3d 1037, 1064-65 (11th Cir. 2001); *Weaver v. Fla. Power and Light Co.*, 172 F.3d 771, 773 & n.4 (11th Cir. 1999); see also *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97 (3d Cir. 1988). See, e.g., *Johnson v. 3M Co.*, 55 F.4th 1304, 1309 (11th Cir. 2022) (holding that a district court had jurisdiction over an amended complaint that did not affect the issues in a pending appeal). See generally, Fed. R. Civ. P. 60, 62, 62.1; Fed. R. App. P. 8, 12.1.

The rule is a judge-made creation—rather than a statutory or constitutional limit—that is founded on prudential considerations. It is designed to prevent the confusion and inefficiency that would result if both the district court and the court of appeals were adjudicating the same issues simultaneously. As a prudential doctrine, the rule should not be applied when doing so would defeat its purpose of achieving judicial economy. See *Pensiero*, 847 F.2d at 97.

In voting-rights cases like this one, moreover, it is standard judicial practice for a district court to proceed with the remedial stage of the case, notwithstanding a party's appeal of a ruling on liability, unless and until a superior court stays those proceedings. That's precisely what's happening in *Alpha Phi Alpha*, where the Secretary has announced his intention to appeal while the remedial process unfolds. See Def.'s Not. of Decision Not to Seek Stay, *Common Cause v. Raffenberger*, 1:21-cv-5338-SCJ-SDG-ELB (N.D. Ga. Nov. 1, 2023) (ECF 203); see also *Milligan v. Allen*, 2:21-cv-11530 (N.D. Ala. Sept. 11, 2023) (denying a motion for a stay pending appeal from the district court's order striking down the legislature's 2023 remedial plan as a violation of Section 2); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 557-58 (E.D. Va. 2016) (remedy imposed while case was on appeal to the Supreme Court).

This case is in the same procedural posture as *Alpha Phi Alpha*, *Milligan*, and *Page*. A court has found a voting-rights violation and has ordered a remedy. No stay has been granted. And immediate action is necessary to ensure that a remedy can be in place for the next regularly scheduled election. Just as in those cases, the question of remedy here is

a collateral issue that does not affect the question of liability that is currently before the Eleventh Circuit. The prudential doctrine articulated in *Griggs* therefore does not prevent this Court from conducting remedial proceedings.

Although the State of Georgia has already had an opportunity to devise a remedy in this case and chose not to do so, the plaintiffs here do not oppose giving the State a second chance as long as a remedy can be in place for the 2024 election. Given the representations by the Secretary's counsel in *Alpha Phi Alpha*, the plaintiffs think it makes good sense to sync up the remedial proceedings here with proceedings in that case.

Conclusion

This Court should issue an order giving the General Assembly until December 8, 2023, to devise a remedial plan consistent with its order on liability (ECF 151). The Court should retain jurisdiction to determine whether any such remedial plan cures the Section 2 violation found by this Court. And it should make clear that the Court will proceed to draw or adopt its own remedial plan if the State fails to enact a lawful remedy by December 8.

Respectfully submitted this 13th day of November, 2023.

/s/ Bryan L. Sells

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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

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