**Docket No. 23-14186-B**

---

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

---

Karen Finn, *et al.*,

*Plaintiffs-Appellees*,

v.

Cobb County Board of Elections and Registration, *et al.*,

*Defendants-Appellees*,

and

Cobb County School District,

*Appellant*.

---

On appeal from the United States District Court for the Northern District of Georgia; Civil Action No. 1:22-CV-02300-ELR

---

# PLAINTIFFS-APPELLEES' EMERGENCY MOTION TO DISSOLVE THIS COURT'S JANUARY 19, 2024, STAY ORDER (ACTION REQUESTED BY JANUARY 24, 2024)

---

Bradley E. Heard (Ga. Bar No. 342209)
Pichaya Poy Winichakul (Ga. Bar No. 246858)
Michael Tafelski (Ga. Bar No. 507007)
Sabrina S. Khan*
**SOUTHERN POVERTY LAW CENTER**
150 E. Ponce de Leon Ave., Suite 340
Decatur, Georgia 30030
(404) 521-6700
bradley.heard@splcenter.org
poy.winichakul@splcenter.org
michael.tafelski@splcenter.org
sabrina.khan@splcenter.org

Jeff Loperfido
Christopher Shenton
**SOUTHERN COALITION FOR SOCIAL JUSTICE**
5517 Durham Chapel Hill Blvd Durham, NC 27707
(919) 323-3380
jeffloperfido@scsj.org
chrisshenton@scsj.org

Caitlin May (Ga. Bar No. 602081)
Cory Isaacson (Ga. Bar No. 983797)
**ACLU FOUNDATION OF GEORGIA, INC.**
P.O. Box 570738
Atlanta, Georgia 30357
(678) 310-3699
cmay@acluga.org
cisaacson@acluga.org

Jon Greenbaum
Ezra D. Rosenberg
Julie M. Houk
Sofia Fernandez Gold

Heather Szilagyi
Javon Davis
**LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW**
1500 K Street, Suite 900
Washington, DC 20005
(202) 662-8600
jgreenbaum@lawyerscommittee.org
erosenberg@lawyerscommittee.org
jhouk@lawyerscommittee.org
sfgold@lawyerscommittee.org
hszilagyi@lawyerscommittee.org
jdavis@lawyerscommittee.org

Douglas I. Koff**
Thomas L. Mott**
Jacqueline Maero Blaskowski**
Paul Schochet**
**SCHULTE ROTH & ZABEL LLP**
919 Third Avenue
New York, New York 10022
(212) 756-2000
Douglas.Koff@srz.com
Thomas.Mott@srz.com
Jacqueline.MaeroBlaskowski@srz.com
Paul.Schochet@srz.com

**Admitted Pro Hac Vice*
***Admissions to the 11th Circuit Pending*

*Counsel for Plaintiffs-Appellees 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.*

**CERTIFICATE OF INTERESTED PERSONS**
**AND CORPORATE DISCLOSURE STATEMENT**

Plaintiffs-Appellees certify that the following is a complete list of all interested persons as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1:

1. American Civil Liberties Union Foundation of Georgia, Inc. – *Counsel for Plaintiffs-Appellees*
2. Anderson, Scott Eric – *Counsel for Appellant*
3. Buechner, William H. – *Counsel for Appellant*
4. Cobb County Board of Elections and Registration – *Defendants*
5. Cobb County School District – *Appellant*
6. Crumley, Jonathan Dean – *Counsel for Appellant*
7. Daly, Hylah – *Plaintiff-Appellee*
8. Davis, Javon – *Counsel for Plaintiffs-Appellees*
9. Dulcio, Jenne – *Plaintiff-Appellee*
10. Eveler, Janine – *Defendant, in her official capacity as Director of the Cobb County Board of Elections and Registration, substituted November 2, 2023*
11. Finn, Karen – *Plaintiff-Appellee*

12. Ford, Jillian – *Plaintiff-Appellee*

13. Freed, P. Michael – *Counsel for Appellant*

14. Freeman Mathis & Gary LLP – *Counsel for Appellant*

15. GALEO Latino Community Development Fund, Inc. – *Plaintiff-Appellee*

16. Georgia Coalition for the People's Agenda, Inc. – *Plaintiff-Appellee*

17. Gold, Sofia Fernandez – *Counsel for Plaintiffs-Appellees*

18. Greenbaum, Jon M. – *Counsel for Plaintiffs-Appellees*

19. Haynie, Litchfield & White, PC – *Counsel for Defendant*

20. Heard, Bradley E. – *Counsel for Plaintiffs-Appellees*

21. Houk, Julie Marie – *Counsel for Plaintiffs-Appellees*

22. Isaacson, Cory – *Counsel for Plaintiffs-Appellees*

23. Khan, Sabrina S. – *Counsel for Plaintiffs-Appellees*

24. Koff, Douglas I. – *Counsel for Plaintiffs-Appellees*

25. Lawyers' Committee for Civil Rights Under Law – *Counsel for Plaintiffs-Appellees*

26. League of Women Voters of Marietta-Cobb – *Plaintiff-Appellee*

27. Loperfido, Jeffrey – *Counsel for Plaintiffs-Appellees*

28. Maero Blaskowski, Jacqueline – *Counsel for Plaintiffs-Appellees*
29. May, Caitlin Felt – *Counsel for Plaintiffs-Appellees*
30. Miller, Gerry – *Defendant, in his official capacity as Interim Director of the Cobb County Board of Elections and Registration*
31. Mott, Thomas Livingstone – *Counsel for Plaintiffs-Appellees*
32. New Georgia Project Action Fund – *Plaintiff-Appellee*
33. O'Donnell, Courtney – *Counsel for Plaintiffs-Appellees*
34. Price, Savannah Rose – *Counsel for Plaintiffs-Appellees*
35. Rosenberg, Ezra D. – *Counsel for Plaintiffs-Appellees*
36. Ross, Honorable Eleanor L. – *United States District Judge*
37. Savrin, Philip Wade – *Counsel for Appellant*
38. Schulte Roth & Zabel, LLP – *Counsel for Plaintiffs-Appellees*
39. Shenton, Chris – *Counsel for Plaintiffs-Appellees*
40. Short, Caren – *Counsel for Plaintiffs-Appellees*
41. Southern Coalition for Social Justice – *Counsel for Plaintiffs-Appellees*
42. Southern Poverty Law Center – *Counsel for Plaintiffs-Appellees*
43. Szilagyi, Heather Jean – *Counsel for Plaintiffs-Appellees*

44. Tafelski, Michael Joseph – *Counsel for Plaintiffs-Appellees*

45. White, Daniel Walter – *Counsel for Defendants*

46. Winichakul, Pichaya Poy – *Counsel for Plaintiffs-Appellees*

I hereby certify that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

Dated: January 21, 2024

Respectfully submitted,

*/s/ Michael Tafelski*
Michael Tafelski

*Counsel for Plaintiffs-Appellees*

**TABLE OF CONTENTS**

INTRODUCTION .......... 1

SUMMARY OF ARGUMENT .......... 5

ARGUMENT .......... 6

I. Legal Standard .......... 6

II. The Court Should Grant Plaintiffs' Motion Because They Are Likely to Succeed on the Merits of the Appeal. .......... 7

A. An Intervening Decision of Law from a Separate Panel of This Court Makes the Stay Order Untenable. .......... 7

B. CCSD Does Not Satisfy the Exceptional Circumstances Necessary to Appeal as a Non-Party. .......... 10

III. Without Dissolving the Stay, Irreparable Harm to Plaintiffs Is Certain. .......... 17

IV. Dissolving the Stay Will Not Harm Any Party. .......... 18

V. The Public Interest Strongly Favors Dissolution of the Stay Order. .......... 19

VI. In the Alternative, the Court Should Stay the Candidate Filing Deadline in Order to Truly Maintain the Status Quo. .......... 19

CONCLUSION .......... 21

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

*CalMat Co. v. Oldcastle Precast, Inc.*,
771 F. App'x 866 (10th Cir. 2019) ....................11

*Democratic Exec. Comm. of Fla. v. Lee*,
915 F.3d 1312 (11th Cir. 2019) ....................7

*Dopp v. HTP Corp.*,
947 F.2d 506 (1st Cir. 1991)....................11, 13, 14, 15

*Ekokotu v. Boyle*,
294 F. App'x 523 (11th Cir. 2008) ....................6

*Fernandez-Roque v. Smith*,
671 F.2d 426 (11th Cir. 1982) ....................20

*Hispanic Soc'y of N.Y.C. Police Dep't v. N.Y.C. Police Dep't*,
806 F.2d 1147 (2d Cir. 1986) ....................15

*Jacksonville Branch of NAACP v. City of Jacksonville*,
No. 22-13544, 2022 WL 16754389 (11th Cir. Nov. 7, 2022)....................19

*Kimberly Regenesis, LLC v. Lee Cnty.*,
64 F.4th 1253 (11th Cir. 2023) ....................11, 12

*Marino v. Ortiz*,
484 U.S. 301 (1988)....................5, 15, 16

*Microsystems Software, Inc. v. Scandinavia Online AB*,
226 F.3d 35 (1st Cir. 2000)....................12, 16

*Nken v. Holder*,
556 U.S. 418 (2009)....................7, 17

*Norwest Bank Minn., Nat'l Ass'n v. Sween Corp.*,
118 F.3d 1255 (8th Cir. 1997) ....................11

*Shaw v. Reno*,
509 U.S. 630 (1993)....................18

*Sky Cable, LLC v. DIRECTV, Inc.*,
886 F.3d 375 (4th Cir. 2018) ....................12, 13

*State Farm Fla. Ins. Co. v. Carapella (In re Gaime)*,
17 F.4th 1349 (11th Cir. 2021) ....................14

*Taylor v. Appleton*,
30 F.3d 1365 (11th Cir. 1994) ....................17

*United States v. Michigan*,
940 F.2d 143 (6th Cir. 1991) ....................13

*United States v. Texas*,
699 U.S. 670 (2023)....................3, 19

*United States v. Valme*,
2024 U.S. App. LEXIS 773 (11th Cir. 2024) ....................10

*Vanderstok v. Garland*,
2023 U.S. App. LEXIS 26499 (5th Cir. 2023) ....................17

*Wyatt ex rel. Rawlins v. Hanan*,
868 F. Supp. 1356 (M.D. Ala. 1994) ....................13

**Constitutions**

U.S. CONST. amend XIV ....................1, 18

**Rules**

11th Cir. R. 27-1(b)(2) ....................7

FED. R. APP. P. 27(d)(2)(A)....................26

FED. R. APP. P. 32(a)(5) ....................26

FED. R. APP. P. 32(a)(6) ....................26

FED. R. APP. P. 32(f)....................26

### Other Authorities

15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FED. PRAC. & PROC. JURIS. § 3902.3 (3d ed. 1998) ............................26

# INTRODUCTION

Plaintiffs-Appellees file this emergency motion for expedited relief ("Motion") concerning this Court's January 19, 2024, order ("Stay Order") granting Non-Party Appellant Cobb County School District's ("CCSD") motion to stay the preliminary injunction pending appeal ("Stay Motion")—an injunction entered at a time when CCSD's status in the case below was only as amicus. (Stay Order, Dkt. 29.)[1] The motions panel that entered the Stay Order did not have the benefit of the subsequent decision by the merits panel of two critically related appeals (23-13439 and 23-13774), which confirmed that CCSD was not a party to the action during the period covered by its three successive appeals. In light of the merits panel decision confirming CCSD's status as a non-party, and considering the harm to the parties and the public that will result from the stay, Plaintiffs respectfully request that this Court grant their Motion and dissolve the Stay Order by **January 24, 2024**.

This Motion is urgent, impacting the constitutional rights of hundreds of thousands of Cobb County residents. The district court found that the Cobb County School Board map was racially gerrymandered, in violation of the Fourteenth Amendment, and scheduled a remedial process that would allow for a new map to

[1] Citations to "Dkt." refer to the docket for this third appeal, 23-14186. Citations to "Doc." refer to the docket for CCSD's first appeal, 23-13439, which was consolidated with its second appeal, 23-13764. Citations to "ECF" refer to the district court's docket for the underlying action.

be in place in time for the 2024 election. The district court determined that a final map must be in place by February 9, 2024, to give the Board of Elections sufficient time for implementation before the 2024 election. Without immediate action from this Court, the district court will be unable to enter any remedy by February 9, and Cobb County residents will be forced to vote with a map that the district court enjoined as a likely racial gerrymander—all on the basis of an appeal from an entity who this Court has ruled was not a party.

On January 19, two different panels of this Court entered orders concerning CCSD's status in this litigation. First, in CCSD's third appeal, without expounding on the threshold issue of whether CCSD had the right to appeal and for the sole stated reason of preserving the status quo, a motions panel of this Court entered a stay of the preliminary injunction pending appeal at CCSD's request. Then, later that same day, after a careful review of the record below, a merits panel of this Court dismissed two related, earlier appeals by CCSD, finding that CCSD had ceased being a party to the proceedings below when it was dismissed from the case at its own request (months before the issuance of the preliminary injunction), and that the Court lacked jurisdiction to entertain the appeals. With the benefit of the merits panel's comprehensive consideration of the foundational issues, and its determination that CCSD has not been a party to the litigation below for the entirety of the appellate

proceedings, it follows that CCSD's appeal of the preliminary injunction cannot be sustained, and the Stay Order it requested should be dissolved.

"Traditionally, when a federal court finds a remedy merited, it provides party-specific relief . . . . If the court's remedial order affects nonparties, it does so only incidentally." *United States v. Texas*, 699 U.S. 670, 693 (2023) (Gorsuch, J., concurring). This "ensures that federal courts respect the limits of their Article III authority to decide cases and controversies . . . . After all, the judicial Power is the power to decide cases for parties, not questions for everyone." *Id.* This Motion seeks to ensure that Justice Gorsuch's warning does not go unheeded.

This extraordinary case stems from the conduct of an entity, CCSD, who intervened in the proceedings below and then was dismissed from the case on its own Rule 12 motion. Yet after receiving the relief it requested and ceasing to be party, CCSD attempted to continue to litigate, filing three different appeals of subsequent proceedings, all on functionally equivalent grounds and seeking functionally equivalent relief. In each of these appeals, CCSD asserted that, its successful motion notwithstanding, it retained its status as a party in the case. In each of these appeals, CCSD filed duplicative motions to stay the proceedings below. On January 19, a panel of this Court granted non-party CCSD's Revised 3rd Motion to Stay, bringing the remedial process in the district court—which was requested by both parties to the litigation—to a halt.

Time is of the utmost essence. Unless the Stay Order is immediately dissolved, the district court will not be able to conduct a remedial process and adopt a remedial map in time to be implemented by elections officials. At the time the Stay Order was entered, the Georgia General Assembly was actively working to meet the district court's schedule, which provided sufficient time for it to pass a new map that could be implemented in time for this year's elections. The district court ordered this schedule with the input and at the request of the Cobb County Board of Elections and Registration, the entity responsible for implementing those maps (and, with its Director, the only Defendants in this suit). That schedule calls for the implementation of a remedial map no later than February 9, 2024, the latest date by which the Board of Elections can implement the map for the 2024 election. The Stay Order should be dissolved as soon as possible, so that the district court has sufficient time to implement a remedial process pursuant to its preliminary injunction order.

In light of this urgency, Plaintiffs respectfully request that the Court issue its order by January 24, 2024. This timeline would ensure that the district court is able to implement its ordered remedial process, and that an interim remedial map can be adopted in time for use in the 2024 election. Plaintiffs have worked diligently to file this Motion as quickly as possible after this Court's orders on the afternoon of January 19, 2024.

## SUMMARY OF ARGUMENT

With the benefit of the merits panel's reasoned decision as to CCSD's non-party status, the Stay Order should be dissolved. CCSD's Stay Motion was granted before Plaintiffs had the opportunity to oppose it, and in the midst of expedited briefing on CCSD's instant appeal ("Third Appeal") where the issue of this Court's jurisdiction was primed for consideration.[2] The Stay Motion was granted with no discussion of whether this Court actually has jurisdiction over CCSD's instant appeal.

CCSD had argued two bases for jurisdiction: (1) that the district court had improperly revoked its rights as an intervenor; and (2) that it qualified for the extraordinarily rare and narrow exception to the well-established rule that only parties may appeal adverse judgments. (*See* Dkt. 24 at 22-27.) Plaintiffs have demonstrated in various submissions to this Court that neither of these arguments apply, including in Plaintiffs' expedited merits brief. (*See* Dkt. 28 at 19-29; *e.g.*, Docs. 27, 30, 49, 53.) And, strikingly, a subsequent decision from a different panel of this Court, issued approximately one hour after the Stay Order, confirmed CCSD's status as a non-party and affirmatively and explicitly rejected CCSD's argument that

[2] Indeed, this Court's order expediting the Third Appeal and setting an expedited briefing schedule specifically ordered that CCSD's principal brief "address whether it has standing to appeal given that the district court previously entered judgment in its favor and terminated it as a party." (Dkt. 20-2 at 2-3 (citing *Marino v. Ortiz*, 484 U.S. 301, 304 (1988).)

the district court had improperly revoked its intervention rights, creating intervening law and making this matter the model case for dissolving an injunction. *See Ekokotu v. Boyle*, 294 F. App'x 523, 524 (11th Cir. 2008) (recognizing that "intervening case law" is proper grounds for reconsidering a prior order).

Alternatively, this Court should dissolve the Stay Order and issue a narrower order that does not derail the ongoing remedial process. Though the Stay Order purports to maintain the status quo, because of the tight timelines involved, it currently ensures that no matter the outcome of this appeal, a remedial map can ***never*** be implemented in time for the 2024 election. If the Court believes a stay is still appropriate despite CCSD not being a party and despite a stay entirely frustrating, rather than just pausing, the litigation below, it should enjoin the candidate filing deadline for the Board of Education to ensure that relief could still be implemented in time for the 2024 election cycle, should the preliminary injunction ultimately be affirmed.

## ARGUMENT

### I. Legal Standard

"A stay of a preliminary injunction requires the exercise of [] judicial discretion, and the party requesting the stay must demonstrate that the circumstances justify the exercise of that discretion." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317 (11th Cir. 2019). In deciding a stay motion, courts consider "(1)

whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). "[T]he party seeking the stay must show more than the mere possibility of success on the merits or of irreparable injury." *Lee*, 915 F.3d at 1317 (citing *Nken*, 556 U.S. at 434-35).

When deciding an emergency motion, this Court weighs: "(i) the likelihood the moving party will prevail on the merits; (ii) the prospect of irreparable injury to the moving party if relief is withheld; (iii) the possibility of harm to other parties if relief is granted; and (iv) the public interest." 11th Cir. R. 27-1(b)(2).

## II. The Court Should Grant Plaintiffs' Motion Because They Are Likely to Succeed on the Merits of the Appeal.

As the subsequent decision of this Court makes clear, the Stay Order cannot be sustained because it was entered at the request of a non-party who did not have standing to appeal, much less standing to request a stay pending that illusory appeal.

### A. An Intervening Decision of Law from a Separate Panel of This Court Makes the Stay Order Untenable.

The Motion is in connection with CCSD's Third Appeal. Here, as in its first two appeals, CCSD argued that the district court had improperly revoked its intervention rights and therefore all subsequently decided orders should be

dissolved. (Docket Nos. 23-13439; 23-13764-B.) This revocation, CCSD argued, supplied this Court "provisional jurisdiction" under the "anomalous rule," allowing this Court "to determine whether the district court properly" revoked CCSD's interventions rights. (Doc. 74 ("MTD Order") at 7 (collecting cases).)

As Plaintiffs have repeatedly argued, and as the merits panel has now confirmed, the district court never revoked CCSD's intervention rights. (*See* Dkt. 28 at 19-21; *e.g.*, Docs. 27, 30, 49, 53.) Rather, CCSD lost its status as an intervenor and as a party as the natural consequence of CCSD's own litigation choices. (MTD Order at 8.) Specifically, after intervening as a defendant in the action, CCSD sought and obtained judgment on the pleadings—which, once granted, "naturally terminated the School District's status as a party in the case." (*Id.*) CCSD's later attempts to create an appealable order out of the district court's statements at a teleconference and in a later order reiterating the necessary result of CCSD winning its dispositive motion were also insufficient.[3] Accordingly, CCSD's appeals were taken when it was no longer a party to the case, and with no appealable order to challenge. (*Accord id.* at 8-9.)

In its Third Appeal, CCSD sought to overturn the district court's December 14, 2023, order granting Plaintiffs' motion for a preliminary injunction. (Dkt. 24.)

---

[3] CCSD's actions led Plaintiffs to take the rare step of moving to dismiss CCSD's first two appeals. (*See* 23-13439, Doc. 30; 23-13764, Doc. 28.)

CCSD also moved to stay the preliminary injunction pending appeal. (Dkt. 16.) CCSD does not dispute that it was not a party when the district court issued the preliminary injunction. Indeed, CCSD's non-party status was the entire basis of its two prior appeals. (*See* Doc. 17 at 1; Doc. 56 at 1.) Nor does CCSD dispute that well-established precedent bars non-parties from appealing. (Dkt. 9 at 3.)

Instead, CCSD grounds its jurisdictional basis for bringing the Third Appeal on its argument that the district court had improperly revoked its rights as an intervenor. Specifically, CCSD argues that "[i]f the Court determines in the Intervention Appeals that the district court erred in terminating [CCSD's] intervention rights, then [CCSD] would have the right to immediately appeal the preliminary injunction." (*Id.* at 4.) To that end, CCSD devoted the bulk of its jurisdictional arguments in its principal brief to its intervenor theory. (Dkt. 24 at 22-26.)

Plaintiffs raised the jurisdictional defects with CCSD's Third Appeal in their response brief. (Dkt. 28 at 19-29.) Before Plaintiffs could file their opposition to CCSD's latest Stay Motion, however, this Court issued its Stay Order on January 19, 2024. The Stay Order did not state the basis for this Court's jurisdiction over the Third Appeal.

Just minutes after the Stay Order was issued, the merits panel assigned to CCSD's first and second appeals issued an order dismissing CCSD's first two

appeals for lack of jurisdiction. (MTD Order at 8.) In the MTD Order, this Court rejected CCSD's argument that the district court had revoked its intervenor status. Instead, explained the Court, the order "grant[ing] the [CCSD's] motion for judgment on the pleadings[] [] naturally terminated the [CCSD's] status as a party in the case." (*Id.*) The Court continued: "At no point did the district court deny a motion by [CCSD] to intervene." (*Id.*)

This Court's merits decision in the consolidated cases is now the law of the case. *See United States v. Valme*, 2024 U.S. App. LEXIS 773, at *6 (11th Cir. 2024) ("Under the law-of-the-case doctrine, district and appellate courts are generally bound to follow a prior appellate decision in the same case and cannot revisit issues that were decided explicitly or by necessary implication.").

The rejection of CCSD's main standing theory by a panel of this Court is alone wholly sufficient grounds to grant Plaintiffs' Motion.

### B. CCSD Does Not Satisfy the Exceptional Circumstances Necessary to Appeal as a Non-Party.

With the benefit of the merits panel's MTD Order on its first two appeals, CCSD can no longer point to its intervention rights to invoke this Court's jurisdiction; that argument has been squarely rejected. CCSD is thus left with the narrow exception to the rule that only parties can appeal adverse judgments. This too fails.

To begin, Plaintiffs have found no cases (and CCSD has yet to cite one) where the Eleventh Circuit applied this exception to actually find a non-party had standing to appeal. And several other circuits have repeatedly held former parties—like CCSD—who were dismissed from an action lacked standing. *See, e.g.*, *Dopp v. HTP Corp.*, 947 F.2d 506, 512 (1st Cir. 1991) (non-party appellant "departed from the case, on its own motion, long before the [appealed] judgment" and thus its "attempt to reenter the fray on appeal has no visible means of support"); *CalMat Co. v. Oldcastle Precast, Inc.,* 771 F. App'x 866, 869 (10th Cir. 2019) (similar); *Norwest Bank Minn., Nat'l Ass'n v. Sween Corp.*, 118 F.3d 1255, 1257 n.1 (8th Cir. 1997) (similar).

Rather than adopting a specific test for assessing non-party appeals, this Court has looked to the various tests adopted by sister circuits. *Kimberly Regenesis, LLC v. Lee Cnty.*, 64 F.4th 1253, 1261 (11th Cir. 2023). These courts have allowed a non-party to appeal in exceedingly rare circumstances. To determine whether this "limited exception" applies, *Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375 (4th Cir. 2018), courts have considered whether (1) the non-parties participated in the proceedings below, (2) the non-parties have a personal stake in the outcome, and (3) the equities weigh in favor of hearing the appeal. *Kimberly*, 64 F.4th at 1261. These standards have been applied sparingly and never—as far as Plaintiffs have been able to find and as seen by the dearth of authority in its favor unearthed by CCSD in its

briefing on the issue (*see* Dkt. 24 at 26-27)—to allow a party that has successfully asked to be dismissed from a case to have standing to appeal a subsequent order or judgment.

First, Plaintiffs do not dispute that CCSD participated in the district court proceedings and that CCSD has an interest in the outcome of this case. But "mere participation in the proceedings below [does] not suffice to confer standing upon a nonparty," and "[a] mere interest in the outcome of litigation will not suffice to confer standing upon a nonparty" either. *Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35, 39, 42 (1st Cir. 2000) (holding that a non-party lacked standing to appeal a permanent injunction, despite that party, with the lower court's permission, previously submitting briefing in opposition and participating in oral arguments about the appealed injunction).

The first point is obvious: courts cannot allow any and every third party to appeal based solely on participation in the district court. Doing so would invite chaos to judicial proceedings. For that reason, "many levels of active participation will fall below the level required to establish de facto party status." 15A Fed. Prac. & Proc. Juris. § 3902.3 (3d ed.). To that end, courts across the country have held the "limited exception" to the general rule that non-parties lack standing to appeal adverse judgments only arises if a non-party "actively participated in ***the particular stage of district court proceedings that is challenged on appeal***." *Sky Cable*, 886

F.3d 384 (emphasis added). CCSD does not contend that it participated as either a party or intervenor in the court proceedings leading up to the preliminary injunction.

Nor does CCSD's participation as an amicus before the preliminary injunction change the analysis. Although clear lines have yet to be drawn about the exact contours of this "limited exception," it is well-established that an amicus has no right to appeal a judgment. *See* 15A Fed. Prac. & Proc. Juris. § 3902.3 (3d ed.) ("An amicus curiae . . . lacks standing to appeal in that role. . . ."); *see also Wyatt ex rel. Rawlins v. Hanan*, 868 F. Supp. 1356, 1358–59 (M.D. Ala. 1994) ("[A]n amicus has no right to appeal or dismiss issues." (citing *United States v. Michigan*, 940 F.2d 143, 165–66 (6th Cir. 1991))). As to CCSD's interest in the outcome, "the fact that an order has an indirect or incidental effect on a non-party does not confer standing to appeal." *Dopp v. HTP Corp.*, 947 F.2d 506, 512 (1st Cir. 1991). That is fatal to CCSD's standing argument. Courts have held that non-parties may only invoke the "exception to th[e] black-letter rule" that standing is restricted to parties when the "lower court specifically direct[ed] an order at a [non-party] or enjoin[ed] it from a course of conduct." *Id.* at 512. CCSD cannot show either applies here.

This narrow application of a non-party's ability to appeal is logical and necessary. Under a broader reading, "Pandora's jar would be open," and anyone with an "interest" in a case—including students, parents, teachers, and voters of Cobb County—could "pop in and out of the proceedings virtually at will." *Id.; see*

*also State Farm Fla. Ins. Co. v. Carapella (In re Gaime)*, 17 F.4th 1349, 1355 (11th Cir. 2021) (affirming district court's decision to stay motion to intervene from a party that chose to withdraw from the litigation but "now wants 'a second bite at the apple' to relitigate that judgment").

Finally, here the equities weigh strongly against favoring an appeal for two reasons. First, a party who was dismissed from a case but then seeks to appeal subsequent orders simply does not qualify for the non-party appeals exception. CCSD has not cited to a single case that remotely approaches the circumstances here and supports a grant of standing to a non-party such as CCSD. Indeed, the existing authority is decidedly to the contrary.

*Dopp* is particularly instructive on this point. 947 F.2d at 506. There, the judgment at issue extinguished the litigant's rights against plaintiff. But the would-be appellant had successfully moved to have the claims against it dismissed on grounds other than the merits of the claims. *Id.* at 509. In holding that the would-be appellant lacked standing to appeal, the court explained that the litigant had "departed from the case, on its own motion, long before the [appealed] judgment" and thus its "attempt to reenter the fray on appeal has no visible means of support." *Id.* at 512. That is precisely what happened here.

Second, and just as important, the non-party appeal exception should not apply when intervention was easily available in the lower court. *Marino* provides

authoritative guidance. There, the Second Circuit dismissed an appeal taken by non-parties, but suggested in dictum that there were several exceptions to the rule that only parties may appeal from an adverse judgment. *See Hispanic Soc'y of N.Y.C. Police Dep't v. N.Y.C. Police Dep't*, 806 F.2d 1147, 1152 (2d Cir. 1986) (discussing *Marino*, 806 F.2d at 1144). The *Marino* Court subsequently affirmed the judgment of the lower court, but added a critical caveat: "The Court of Appeals suggested that there may be exceptions to this general rule, primarily 'when the nonparty has an interest that is affected by the trial court's judgment.' We think the better practice is for such a nonparty to seek intervention for purposes of appeal." 484 U.S. at 304 (citing *Hispanic Soc'y*, 806 F.2d at 1152). In other words, "[w]hile there is an exception to the 'only a party may appeal' rule that allows a nonparty to appeal the denial of a motion to intervene . . . the situation differs when intervention is readily available." *Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35, 39–40 (1st Cir. 2000). In such cases, "courts are powerless to extend a right of appeal to a nonparty who abjures intervention." *Id.*

CCSD's last-minute, back-door attempt to establish standing through the non-party exception is exactly what the Supreme Court cautioned against in *Marino*. Unsurprisingly, CCSD invokes this exception as part of its long effort to portray the procedural history of this case as one in which it is the victim of an unfair process, rather than the master of its own litigation strategy. But in actuality, CCSD became

a non-party by its own request, following the grant of its motion for judgment on the pleadings on July 18, 2023. (ECF 136.) CCSD then continued to appear at depositions and propound discovery requests as a self-described "Adverse Intervenor." (ECF 136, 149, 155.) It then proceeded to file successive motions suggesting it was entitled to perpetual intervenor status that it never asked for. (ECF 149, 155.) Even after the district court made plain that CCSD had been removed as a party, CCSD still did not file a renewed motion for intervention. Instead, it asked to participate as amicus curiae, a request the district court quickly granted. (ECF 201.) If CCSD wanted to become a proper party to this case, it had ample time to do so. But it did not file a renewed motion for intervention until January 9, 2024, more than 175 days after the grant of its motion for judgment on the pleadings, 26 days after the grant of the preliminary injunction, and 22 days into the remedial process. (ECF 219.) This cannot qualify CCSD for the narrow non-party exception.

This complete lack of precedential support for CCSD's standing theory raises serious questions as to its viability on the merits, but its novelty is particular cause for concern in light of the *Nken* stay factors, which require a "strong" showing of likelihood of success on the merits. 556 U.S. at 434. It is difficult to imagine the ability of CCSD to make such a showing by relying entirely on a legal theory that has never been successfully applied. This is particularly true when the relief sought raises core issues about the proper Article III role of federal courts. "Injunctions that

afford relief to non-parties are potentially problematic." *Vanderstok v. Garland*, 2023 U.S. App. LEXIS 26499, at *4 (5th Cir. 2023).

This Motion and the merits panel decision it is informed by go to the heart of whether this Court has jurisdiction to hear CCSD's motion and appeal. *See Taylor v. Appleton*, 30 F.3d 1365, 1366 (11th Cir. 1994) (explaining that courts must "first determine whether it has proper subject matter jurisdiction before addressing the substantive issues"). The MTD Order, decided with the benefit of the panel's "careful review of the record," (MTD Order 7), adds ample support for the conclusion that the Stay Order should not stand, and that this Court lacks jurisdiction to decide the appeal.

## III. Without Dissolving the Stay, Irreparable Harm to Plaintiffs Is Certain.

If the Stay Order remains in place, Plaintiffs will be *certain* to suffer irreparable harm. Leaving the Stay Order in place would ensure that the enjoined map would be used in the 2024 elections, despite the district court's finding that it is a likely racial gerrymander in violation of the Fourteenth Amendment. This would subject Plaintiffs to "[r]acial classifications with respect to voting," which "bears an uncomfortable resemblance to political apartheid." *Shaw v. Reno*, 509 U.S. 630, 648 657 (1993). Should the Stay Order remain in place, this harm would be unavoidable.

Time is short. As of the date of this Motion, there are just 20 days remaining until February 9, 2024, the date elections officials have said a final map must be

implemented in time for the 2024 election. This timeline—proposed by Election Defendants and Plaintiffs and accepted by the district court—provides the Election Defendants with just three-and-a-half weeks to implement a remedial map before the first day of the candidate qualifying period and the first day to request absentee ballots on March 4, 2024. As Plaintiffs presented to the district court in August of 2023, "Election Defendants have implemented county-wide maps within a period of four to six weeks prior to the relevant candidate qualifying deadline." (ECF 156-2 at 7.)

In other words, the remedial schedule approved by the district court already provides the Election Defendants with less time than they normally have to implement a map. Unless the Stay Order is immediately dissolved and the remedial process is permitted to proceed, there will not be time to implement a remedial map for the 2024 elections.

## IV. Dissolving the Stay Will Not Harm Any Party.

Nor would dissolving the Stay Order harm any party to the litigation. As this Court made clear in the MTD Order, CCSD is not a party. (MTD Order at 8.) And the only other party below, the Election Defendants, have no challenge to the preliminary injunction, and stipulated that they stand willing and able to implement any remedial map ordered by February 9, 2024. (ECF 220.)

## V. The Public Interest Strongly Favors Dissolution of the Stay Order.

The public interest strongly favors dissolution of the Stay Order, for two reasons. First, the public's interest in safeguarding equal opportunity to access the political process favors denying the stay. *Jacksonville Branch of the NAACP v. City of Jacksonville*, No. 22-13544, 2022 WL 16754389, at *5 (11th Cir. Nov. 7, 2022) ("[T]he public has no interest in enforcing unconstitutional redistricting plans."). And second, dissolving the Stay Order ensures that the public interest in federal courts "decide cases for parties, not questions for everyone" is vindicated. *United States v. Texas*, 143 S. Ct. at 1980 (Gorsuch, J., concurring).

## VI. In the Alternative, the Court Should Stay the Candidate Filing Deadline in Order to Truly Maintain the Status Quo.

If the Court disagrees with Plaintiffs and finds that the Stay Order is appropriate even in light of the MTD Order, the Court should at least modify its stay in a way that makes a remedy still possible.

The Stay Order purports to maintain the status quo, (Stay Order at 2), but instead causes irreparable harm to Plaintiffs and the public by ensuring that, even if Plaintiffs are ultimately successful, a remedy for the 2024 elections will be impossible.

The Stay Order goes far beyond maintaining the status quo. It thwarts the possibility of a timely remedy, enjoining the "deadlines for the General Assembly to adopt a remedial map by January 22, 2024, for objections to be submitted January

24 and 26, and for the remedial map to be finalized by February 9." (*Id.*) The remedial process is the mechanism that would allow an alternative, constitutional map to be implemented during the pendency of this appeal. By issuing this relief, the Stay Order issues a *de facto* injunction, to the exclusive benefit of an entity that is undisputedly not party to this litigation. *See Fernandez-Roque v. Smith*, 671 F.2d 426, 429 (11th Cir. 1982) (explaining that the functional effect of an order controls and that an order is an injunction if, rather than "merely preserving the status quo," it "grant[s] most or all of the substantive relief requested").

Halting the remedial process irreparably injures Plaintiffs and the public by essentially guaranteeing that the current enjoined map—which the district court found to be a likely unconstitutional racial gerrymander—will be the ***only*** map available for use in the 2024 election, regardless of the resolution of this appeal. Any further delay in the remedial process beyond a few days makes it impossible for any remedial map to be available in time for the 2024 election. Election administrators have indicated that February 9, 2024, is the last day by which such a map could be implemented. (ECF 220.) A stay effectively rewards CCSD—a non-party with no standing to challenge the preliminary injunction and who, regardless, is not likely to succeed on the merits of this appeal—at the expense of the parties and the public.

If this Court disagrees and finds a stay should remain in effect, that stay should be modified to include a limited injunction of the candidate filing deadline for Cobb

County School Board candidates. This relief would extend the window of time in which a new map could be implemented in time for the 2024 election, by delaying the date by which a map would need to be finalized for use in candidate filing and commensurate elections, and in so doing preserve both Plaintiffs' ability to obtain a remedy in addition to CCSD's ability, as a non-party, to continue challenging the preliminary injunction order. Leaving the Stay Order in place without at least enjoining the candidate filing deadline would ensure that no matter the final outcome of the appeal, the stay "pending" appeal will, in actuality, solely benefit a non-party.

## CONCLUSION

For these reasons, the Court should grant Plaintiffs' Motion.

Dated: January 21, 2024

Respectfully Submitted,

*/s/ Michael Tafelski*

Bradley E. Heard (Ga. Bar No. 342209)
Pichaya Poy Winichakul (Ga. Bar No. 246858)
Michael Tafelski (Ga. Bar No. 507007)
Sabrina S. Khan*
SOUTHERN POVERTY LAW CENTER
150 E. Ponce de Leon Ave., Suite 340
Decatur, Georgia 30030
(404) 521-6700
bradley.heard@splcenter.org
poy.winichakul@splcenter.org
michael.tafelski@splcenter.org
sabrina.khan@splcenter.org

Jeff Loperfido
Christopher Shenton
SOUTHERN COALITION FOR SOCIAL JUSTICE
5517 Durham Chapel Hill Blvd
Durham, NC 27707
(919) 323-3380
jeffloperfido@scsj.org
chrisshenton@scsj.org

Caitlin May (Ga. Bar No. 602081)
Cory Isaacson (Ga. Bar No. 983797)
ACLU FOUNDATION OF GEORGIA, INC.
P.O. Box 570738
Atlanta, Georgia 30357
(678) 310-3699
cmay@acluga.org
cisaacson@acluga.org

Jon Greenbaum
Ezra D. Rosenberg
Julie M. Houk
Sofia Fernandez Gold
Heather Szilagyi
Javon Davis
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street, Suite 900
Washington, DC 20005
(202) 662-8600
jgreenbaum@lawyerscommittee.org
erosenberg@lawyerscommittee.org
jhouk@lawyerscommittee.org
sfgold@lawyerscommittee.org
hszilagyi@lawyerscommittee.org
jdavis@lawyerscommittee.org

Douglas I. Koff*
Thomas L. Mott*
Jacqueline Maero Blaskowski*
Paul Schochet*
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, New York 10022 (212)
756-2000
Douglas.Koff@srz.com
Thomas.Mott@srz.com
Jacqueline.MaeroBlaskowski@srz.com
Paul.Schochet@srz.com

**Admitted Pro Hac Vice*
***Admissions to the 11th Circuit Pending*

*Counsel for Plaintiffs-Appellees 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.*

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 21, 2024

*/s/ Michael Tafelski*
Michael Tafelski

*Counsel for Plaintiffs-Appellees*

## CERTIFICATE OF COMPLIANCE

I certify this document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because this document contains 5,167/5,200 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) as it was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: January 21, 2024

*/s/ Michael Tafelski*
Michael Tafelski

*Counsel for Plaintiffs-Appellees*