Fulton County Superior Court
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Cathelene Robinson, Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

DONNA CURLING, et al.	)	
	)	
Plaintiffs,	)	
	)	**CIVIL ACTION FILE**
v.	)	**NO. 2017CV290630**
	)	
BRIAN P. KEMP, in his official capacity as Secretary of State of Georgia, et al.	)	
	)	
Defendants.	)	

ORDER DENYING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND INTERLOCUTORY INJUNCTION AND FOR WRIT OF MANDAMUS

Plaintiffs' Emergency Motion for Temporary Restraining Order and Interlocutory Injunction ("Emergency Motion") filed on May 26, 2017 — on the eve of advance voting in the State of Georgia's Sixth Congressional District Run-Off Election — came before the Court for hearing and oral argument on June 7, 2017 following statutory notice to the State of Georgia. Attorneys Robert McGuire (*pro hac vice*) and Edward Krugman appeared on behalf of Plaintiffs; Attorneys Christina Correia and Josiah Heidt appeared on behalf of Defendant Brian Kemp, Georgia Secretary of State; Attorney Kaye Burrell appeared on behalf of Defendant Richard Barron, Director of the Fulton County Board of Elections; Attorney Bennett Bryan appeared on behalf of Defendant Maxine Daniels, Director of Voter Registrations and Elections for Dekalb County; and Attorney Daniel

White appeared on behalf of Defendant Janine Eveler, Director of the Cobb County Board of Elections and Registration. All of the defendants were sued in their respective official capacities.

In their Emergency Motion, Plaintiffs, a Colorado-based non-profit organization with members in Georgia's Sixth Congressional District, seek an Order from this Court to restrain and enjoin Defendants from using the Direct Recording Electronic ("DRE") voting equipment and its related DRE-based voting system to conduct the June 20, 2017 run-off election for the 2017 Sixth Congressional District Special Election in Cobb, Dekalb and Fulton counties. More particularly, Plaintiffs assert that Georgia's DRE voting system is uncertifiable, unsafe and inaccurate such that Defendants should be required to comply with O.C.G.A. §§ 21-2-334 and 21-2-281 and use paper ballots for hand counting in the manner proscribed under the laws of the State of Georgia. Having considered the issues presented in the parties' motions and supporting briefs, evidence, argument of counsel and applicable authority, Plaintiffs' Emergency Motion for Temporary Restraining Order and Interlocutory Injunction is hereby **DENIED** for the reasons explained below.

Plaintiffs assert their claim for injunctive relief applies only to the Defendant Counties. However, inasmuch as the Secretary of State is statutorily conferred with the authority to determine the voting equipment that will be used throughout

the State of Georgia, the claim for injunctive relief is necessarily asserted against Defendant Secretary of State as the relief Plaintiffs seek rests exclusively within his control. Even still, because the individually-named Defendants have been sued in their official capacities, the doctrine of sovereign immunity applies. Cameron v. Lang, 274 Ga. 122 (2001). Sovereign immunity also extends to the County Defendants. Butler v. Dawson Co., 238 Ga. App. 808, 809 (1999). As such, any state law claims against the Defendants are covered under the sovereign immunity doctrine unless there is some waiver of immunity. Plaintiffs have failed to identify any such waiver.

Plaintiffs asserted for the first time during the Emergency Hearing that their claims were based, in part, on the United States Constitution at 42 USC § 1983 authorizing their claims to be brought against state officers and employees in their official capacities where plaintiffs allege a violation of federal rights based on action taken under the color of law as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in

> such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 USC § 1983. Although such claims could be properly brought before this Court, in this instance Plaintiffs have failed to make such a pleading. As such there are no federal claims before this Court, and any state law causes of action would be subject to qualified immunity and must be **DISMISSED**. Moroever, because sovereign immunity applies, Plaintiffs are barred from injunctive relief at common law on any state law claims. Ga. Dept. of Nat'l. Resources, et. al v. Center for Sustainable Coast, 294 Ga. 593 (2014).

Even if Plaintiffs' claims were not barred by sovereign immunity, Plaintiffs request for an interlocutory injunction must fail because Plaintiffs cannot satisfy the elements for such a remedy. It is well settled that the issuance of an injunction is an extraordinary remedy that should be reserved for **"clear and urgent cases."** OC.G.A. § 9-5-8 (emphasis added). Courts have been cautioned to exercise this power "prudently and cautiously." Id. In considering whether to exercise the power to grant this extraordinary remedy, the Court must consider the following factors:

> (1) there is a substantial threat that the moving party will suffer irreparable injury if the injunction is not granted; (2) the threatened injury to the moving party outweighs the threatened harm that the injunction may do to the party being enjoined; (3) there is a substantial likelihood that the moving party will prevail on the merits of [their] claims at trial; and (4) granting the interlocutory injunction will not disserve the public interest.

Holton v. Physician Oncology Servs. LP, 292 Ga. 864, 866, (2013).

As to the first factor, while the Court is keenly aware and appreciates the heightened concern surrounding voting security in the State of Georgia and nationally taken together with troubling allegations of election interference, this Court is constrained by the law and the evidence presented in this case. Additionally, Plaintiffs' concern that the DRE voting system lacks a verification feature is legitimate. However, in the absence of evidence (*e.g.*, voter testimony, malfunction, unexplained deviations, skewed results, historical data, national research, etc.), this Court cannot adopt Plaintiffs' conclusion that Georgia's DRE voting equipment and its related voting system are unsafe, inaccurate and impracticable within the meaning of the statute. Plaintiffs have failed to demonstrate any concrete harm. Accordingly, the first factor militates against Plaintiffs.

Moving to the second and fourth factors, the Court finds that these factors also militate against Plaintiffs. Advance voting in the Special Election Sixth

Congressional Run-Off commenced on May 26, 2017. Evidence presented during the hearing showed that requiring Defendants to halt the Special Election in order to substitute DRE machines with paper ballot in the middle this election would be costly and could potentially create voter confusion and possible voter disenfranchisement in an ongoing election. These outcomes would necessarily undermine voter trust and confidence in the electoral process and the integrity of Georgia's elections and disserve the public interest. Further evidence showed that visually-impaired and other disabled voters would not have equal access to the ballot. The testimony further showed that election officials, including many volunteer poll officers and workers, are only trained to conduct elections using the method certified by the Secretary of State and, as such, would need to be re-trained on both the administration and tabulation of paper ballots which could have the unintended consequence of creating both security and accuracy concerns. As such, the Court finds that both the second and fourth factors favor Defendants.

As to the third factor, *assuming arguendo* that the claims survive sovereign immunity, the Georgia Supreme Court found in Favorito v. Handel, that so long as the voting method used – DRE machines in that case – was reasonable and neutral, that method would be free from second-guessing. 285 Ga. 795, 798 (2009). Based on precedent and the dearth of non-speculative evidence presented by Plaintiffs at

the hearing on the Emergency Motion, the Court finds that there is little likelihood of success on the merits.

Finally, Defendants jointly assert a valid laches argument. Laches applies to a request for equitable relief when: (1) there was a delay in asserting the claim; (2) the delay was not excusable; and (3) the delay caused the non-moving party undue prejudice. United States v. Barfield, 396 F.3d 1144, 1150 (11th Cir. 2005). Here, evidence shows the Plaintiffs was aware of the factors giving rise to the Verified Complaint and Emergency Motion on April 18, 2017, if not sooner. Plaintiffs knew that Advance Voting for the June 20, 2017 Special Run-off Election commenced on May 30, 2017. Plaintiffs were aware of alleged system errors that occurred during the April 18, 2017 Special Election tabulation in Fulton County. Plaintiffs were aware of a March 15, 2017 inquiry being forwarded to the Georgia Secretary of State regarding concerns with DRE machines. Despite all of this knowledge, however, Plaintiffs filed suit one (1) business day before advance voting commenced. This delay taken together with an intervening holiday and the statutory notice to which the State of Georgia is entitled prevented this matter from being considered by the Court prior to the start of Advance Voting. Plaintiffs' delay in asserting the claim has prejudiced Defendants.

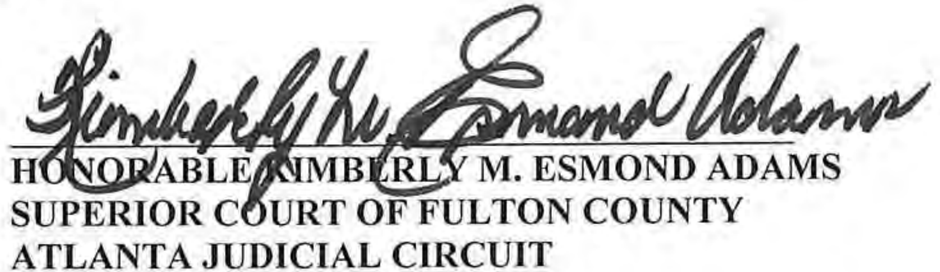
It cannot be argued in a democracy that the right to vote is fundamental. Concomitant with that right is the assurance that the ballot cast reflects the choices of the elector. As the Favorito Court pointed out:

> The unfortunate reality is that the possibility of electoral fraud can never be completely eliminated; no matter which type of ballot is used. [Citation omitted.] [Even assuming that] none of the advantages of touch-screen systems over traditional methods would be sacrificed if voter-verified paper ballots were added to touchscreen systems . . . , it is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems. [Citation omitted.] So long as their choice is reasonable and neutral, it is free from judicial second-guessing.

Favorito, 684 S.E.2d 257, 261.

Accordingly, for the reasons discussed above, the Court finds that Defendants are entitled to sovereign immunity from any claim for injunctive and declaratory relief. The Court further finds that the harm to the public would greatly outweigh the issuance of an injunction upon a consideration of the applicable factors and in conjunction with Defendants' laches arguments. For similar reasons, the Court still further finds that Plaintiffs' Request for a Writ of Mandamus must necessarily fail. Accordingly, Plaintiffs' Emergency Motion is hereby **DENIED** and the Complaint is hereby **DISMISSED**.

This 9th day of June 2017.



HONORABLE KIMBERLY M. ESMOND ADAMS
SUPERIOR COURT OF FULTON COUNTY
ATLANTA JUDICIAL CIRCUIT

Distribution List

EDWARD B. KRUGMAN
ROBERT L. ASHE, III
1201 WEST PEACHTREE STREET NW
SUITE 3900
ATLANTA, GA 30309
KRUGMAN@BMELAW.COM

CHRISTOPHER CARR
CHRISTINA CORREIA
GEORGIA ATTORNEY GENERAL
40 CAPITOL SQUARE, SW
ATLANTA, GA 30334
CCARR@LAW.GA.GOV

OVERTIS HICKS BRANTLEY
BENNETT. BRYAN
DEKALB COUNTY LAW DEPARTMENT
1300 COMMERCE DRIVE
FIFTH FLOOR
DECATUR, GA 30030
OVBRANTLEY@DEKALBCOUNTYGA.GOV

PATRISE M. PERKINS-HOOKER KAYE BURWELL
FULTON COUNTY ATTORNEY'S OFFICE
141 PRIOR STREET, SW
SUITE 4038
ATLANTA, GA 30303
PATRISE.HOOKER@FULTONCOUNTYGA.GOV