

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

4 DONNA CURLING, ET AL., :
5 :
6 PLAINTIFFS, :
7 vs. : DOCKET NUMBER
8 : 1:17-CV-2989-AT
9 BRAD RAFFENSPERGER, ET AL., :
10 :
11 DEFENDANTS. :

12 **TRANSCRIPT OF SCHEDULING CONFERENCE PROCEEDINGS**

13 **BEFORE THE HONORABLE AMY TOTENBERG**

14 **UNITED STATES DISTRICT JUDGE**

15 **MAY 31, 2019**

16 **11:21 A.M.**

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18
19
20
21 ***MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED***

22 ***TRANSCRIPT PRODUCED BY:***

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A P P E A R A N C E S O F C O U N S E L

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SCHOENBERG:**

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ICHTER DAVIS, LLC

JOHN POWERS
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

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P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; May 31, 2019.)

1 THE COURT: I can't guarantee what is going to happen
2 here on the HVAC system. Everyone is very -- the people down
3 there are very far away. But that is all right. Hello.
4 Hello.

5 Hello.
6 So, Ms. Burwell, we're going to just start back here
7 with the Fulton County group and maybe just go around this way.
8 Okay. If we can introduce -- if everyone can introduce
9 themselves.

10 And we're here for a conference in Curling, et al.
11 vs. Raffensperger, Case Number 17-CV-2989.

12 MS. BURWELL: Yes, Your Honor. Kaye Burwell for
13 Fulton County, as well as David Lowman.

14 THE COURT: Very good.

15 MR. ICHTER: Cary Ichter. I represent the Coalition
16 plaintiffs, Laura Digges, William Digges, Ricardo Davis, and
17 Megan Missett.

18 Your Honor, may I mention that I mentioned to
19 Mr. Martin earlier on that I have an appearance at 1:00 in
20 Fulton Superior Court and was told that it would be okay if I
21 snuck out at about 12:30. So with the Court's permission --

22 THE COURT: Oh, I had no idea that that was so. Are
23 you planning to come back?

24 MR. ICHTER: If it is still going on, absolutely.
25

1 Yes.

2 THE COURT: Because I'm not sure we will be through.

3 MR. ICHTER: All right.

4 THE COURT: I'm sorry. I don't know why we had a
5 communication break. But I have no idea when we're going to be
6 through. So I'm going to just treat that as a lunch break.

7 MR. ICHTER: Perfect.

8 MR. RUSSO: We actually -- Judge, we actually worked
9 out a lot next door. So we may not be here as long.

10 THE COURT: Good. That's marvelous. Well, that was
11 the hope that if we weren't in a courtroom that people would
12 actually sit and talk a little bit.

13 MR. MANOSO: That room is even hotter. So there was
14 reason to get along. I'm sure you didn't do that on purpose.

15 THE COURT: I probably did.

16 MR. KNAPP: We commend you on the accommodations.

17 THE COURT: Is Mr. Powers joining you, Mr. Ichter?

18 MR. ICHTER: Yes.

19 THE COURT: All right. Has he filed a notice of
20 appearance in the case?

21 MR. POWERS: Yes.

22 THE COURT: I didn't notice that. Very good.

23 Let's keep on moving this way.

24 MR. SPARKS: Yes, Your Honor. Adams Sparks with
25 Krevolin & Horst for the Curling plaintiffs.

1 MR. KNAPP: Halsey Knapp also with Krevolin & Horst
2 on behalf of the Curling plaintiffs.

3 MR. CROSS: David Cross of Morrison & Foerster for
4 the Curling plaintiffs.

5 MR. MANOSO: And Rob Manoso of behalf of the Curling
6 plaintiffs.

7 THE COURT: Obviously you know who I am, and you know
8 the court reporter. And you may or may not know Ms. Cole, who
9 is actually my permanent law clerk.

10 And I don't know -- this is Dr. Suman Malinpati, who
11 is actually working as an intern in the case. Had another life
12 as a doctor and somehow has decided to go into the law. And I
13 won't comment on the wisdom of that, other than referencing
14 that there is a question about wisdom. But maybe he will gain
15 it. All right.

16 MR. RUSSO: Vincent Russo with the Robbins Firm for
17 the state defendants.

18 MR. TYSON: Bryan Tyson from Taylor English for the
19 state defendants as well.

20 MR. MILLER: Carey Miller of the Robbins Firm for the
21 state defendants.

22 MS. ANDERSON: Kimberly Anderson from the Robbins
23 Firm also for the state defendants.

24 MR. JACOUTOT: Bryan Jacoutot from Taylor English for
25 the state defendants.

1 MR. DENTON: Alexander Denton with the Robbins Firm
2 for the state defendants.

3 THE COURT: Very good.

4 Are you expecting you are going to speak? Because I
5 hate to have y'all out there.

6 MR. JACOUTOT: I don't expect to have to speak.

7 THE COURT: Okay. Though you could from that point.
8 I know that our court reporter here, Shannon Welch, is able to
9 do anything. But she might bark at you. But those who are
10 further away, remember that you are a distance. We don't have
11 a microphone.

12 Why don't we start by your telling me what sorts of
13 things you've agreed about in the hot room so I don't go into
14 things I don't need to go into.

15 MR. RUSSO: Sure.

16 THE COURT: Because I was just trying to catch up
17 with what had been filed this morning. Because I had a hearing
18 first thing in the morning and didn't catch it. Then I was
19 sort of trying to catch up. All right.

20 MR. RUSSO: I mean, I can kind of start, and
21 everybody can jump in. Feel free. But we discussed the
22 discovery schedule and really the case schedule and timing for
23 having a 26(f) conference and submitting a discovery plan. And
24 we can walk through the dates with you now or we can --

25 THE COURT: Sure.

1 MS. ANDERSON: Do you want me to take it?

2 MR. RUSSO: I will pass it to her.

3 THE COURT: Do you need them to state their names?
4 Because it is a lot of people.

5 COURT REPORTER: No, ma'am. I've got it.

6 MS. ANDERSON: So as far as what I have down for our
7 schedule: So our answers are due June 4th. The 26(f)
8 conference will start the week of June 10th followed by a
9 seven-day -- within seven days, we need to submit a discovery
10 plan to the Court.

11 Fact -- well, do we want to -- sorry. Do we want to
12 address -- I'll do these general ones. Fact discovery will end
13 on November 15.

14 THE COURT: November 15?

15 MS. ANDERSON: Yes, ma'am. Initial expert reports
16 are due November 22nd.

17 **(There was a brief pause in the proceedings.)**

18 THE COURT: Is that a Wednesday, November 22nd? I
19 neglected to bring my phone.

20 MS. ANDERSON: I believe it is a Friday.

21 THE COURT: Okay. So that is -- I'm just trying to
22 think about Thanksgiving.

23 MS. ANDERSON: Yes, Your Honor. And generally
24 speaking surrounding experts, just so we have it on the record,
25 when I say initial expert report, whoever has the burden to

1 prove the particular issue, they will submit the expert report
2 at that time. So if they have -- so if plaintiffs have
3 particular topics for their complaint and then on the state
4 defendants to support any of their defenses we submit those on
5 November 22nd. The rebuttal expert reports are due December 4.
6 Any reply expert reports would be December 11. And then
7 generally speaking the case should be ready for trial
8 January -- the month of January 2020.

9 THE COURT: Okay.

10 MR. RUSSO: Then do you want to do the discovery
11 response deadlines?

12 MS. ANDERSON: Yes. So our discovery response
13 deadlines, we will have four actual responses and objections to
14 interrogatories or document productions. We have a 15-day
15 deadline.

16 MR. RUSSO: Just written discovery.

17 MS. ANDERSON: Yes. Well, I'm saying like the actual
18 written responses are due within 15 days. And then the actual
19 production of documents would be due within the 30-day
20 deadline.

21 THE COURT: 15 days from the time you receive the
22 interrogatory?

23 MS. ANDERSON: We must respond or object.

24 THE COURT: Does that include any requests for
25 admission or not?

1 MS. ANDERSON: Yes.

2 THE COURT: Then 30 days for the production of
3 documents?

4 MR. RUSSO: Yes, Your Honor.

5 MR. CROSS: Objections and written responses to
6 document requests would also be due in 15 days.

7 MS. ANDERSON: Correct. Yes.

8 MR. MANOSO: Objection and response.

9 MR. RUSSO: You are right. Just not the production.
10 You are right. We are shooting for 30 days. There may be some
11 rolling productions that we all recognize could occur on either
12 side.

13 THE COURT: Well, that is great. Agree on anything
14 else?

15 MS. ANDERSON: So I believe the -- sorry --

16 MR. MANOSO: Keep going. You're doing good.

17 MS. ANDERSON: I believe we agreed to have -- if the
18 Court will permit, since I know it varies from the Federal
19 Rules, to have 20 depositions per side. No more than 20
20 depositions per side.

21 MR. KNAPP: Fact depositions.

22 MS. ANDERSON: Fact depositions.

23 THE COURT: Does that include the plaintiffs'
24 third-party depositions?

25 MR. MANOSO: Yes, Your Honor.

1 MR. CROSS: It is third parties too for both sides.

2 MS. ANDERSON: Yes, Your Honor.

3 THE COURT: And the 20 is between both the Curling
4 and Coalition plaintiffs?

5 MR. CROSS: Per side.

6 THE COURT: You're dividing it per side. As a whole.
7 Fine.

8 MS. ANDERSON: Yes, Your Honor.

9 MR. KNAPP: Also 30(b)(6) depositions are considered
10 to be one deposition no matter how many designated witnesses
11 might be identified with response to the topics raised in the
12 30(b)(6) notice.

13 THE COURT: All right. That was helpful. Thank you.

14 MS. ANDERSON: As far as the other things that I have
15 remaining, which I don't know if you guys might want to handle
16 it, is the amending of the complaints. The Curling plaintiffs
17 it is my understanding are not amending their complaint.

18 MR. CROSS: There is no present intention to do that.

19 THE COURT: You mean there might be a future
20 intention but there is not a present intention?

21 MR. KNAPP: Things change.

22 MR. CROSS: What we had suggested was the issue of
23 the BMDs we still agree as we took the last hearing that that
24 is just parked. They are still kind of figuring out what they
25 are doing.

1 It may come to a point where the BMDs are
2 implemented, and we would either possibly amend the complaint,
3 possibly file a new action, or possibly argue that what they
4 have done is within the scope of this case. Just right now,
5 our case is focused on the claims that are before us.

6 THE COURT: All right.

7 MR. CROSS: We're not focusing on BMDs as part of
8 that present claim.

9 MR. TYSON: We're not going to be conducting
10 discovery on BMDs at this point either.

11 MR. RUSSO: And we disagree that they have alleged
12 anything about BMDs. But they are just -- they are parking
13 discovery for now. It is an issue for another day.

14 THE COURT: All right. What about the Coalition?

15 MR. ICHTER: Our position is that the complaint
16 currently embraces BMDs as well. But we also agree that it is
17 an issue that should be parked until such time as there's some
18 greater clarity as to exactly what is happening with BMDs.

19 THE COURT: All right. I just want to say to
20 everybody, on one hand, I don't think the plaintiffs'
21 complaints have been quite as narrow as the state has construed
22 them at least in your response to the discovery issues that you
23 filed, I guess, on the 30th, some unknown time.

24 But I want to be clear on the other side with the
25 plaintiffs that I do think that either you have to amend the

1 complaint if you're going to get into the BMDs -- I mean, it
2 might be peripheral while you are doing discovery, and there
3 may be something that you've got -- you can ask about it for
4 sure but -- or file a new complaint. I mean, it is up to you
5 then whether you consider it or the Clerk's Office whether they
6 consider it a related case or not.

7 And I can see arguments for that. But -- but I
8 don't -- as I said earlier, I think if there really is a new
9 system it doesn't necessarily vitiate everything here. But on
10 the other hand, because I don't know how much it will be ready
11 for implementation besides everything else so we could have a
12 very mixed situation -- I don't know what it will be.

13 And I think having read Judge Jones' order in the
14 Fair Fight case last night, I kind of agree with his just
15 realistic observation you don't really know a rollout until you
16 see it. And any of us who have gone through any type of
17 computer system rollout know that.

18 But anyway -- but I've heard the plaintiffs' argument
19 about why you think it embraces all future systems. But I just
20 don't want to lure you in that regard because -- thinking that
21 I find that really acceptable as a basis for ultimately relief
22 on the whole new system. You would need to do something.

23 MR. ICHTER: We appreciate that guidance.

24 MR. CROSS: Your Honor, I think we actually made good
25 progress on the scope of discovery at at least a high level.

1 THE COURT: That would be helpful because I --

2 MR. CROSS: I think at a high level it seems like,
3 you know, putting aside maybe some discrete issues it seemed
4 like that the only real divide at a high level since we parked
5 the issue of BMDs concerns vulnerabilities that we have alleged
6 with the voter registration system.

7 THE COURT: Right.

8 MR. CROSS: So it seems like -- y'all correct me if
9 I'm wrong -- we are agreed that the DREs, the GEMS, the memory
10 cards, everything that sort of funnels into and supports the
11 DREs system, which again is the GEMS, the servers, and all of
12 that behind it -- that is within the scope of discovery at a
13 general level. And then it is the issue of the voter
14 registration database and vulnerabilities that we have
15 identified with respect to -- with respect to Logan Lamb's work
16 and other issues. So I think that is probably the macro issue
17 of the day.

18 THE COURT: Yes.

19 MR. CROSS: I don't know if that's fair.

20 MR. TYSON: Before we get to that, we may want to
21 address the protective order.

22 MR. CROSS: Sure.

23 MR. TYSON: I think we looked at the Common Cause
24 protective order that we proposed. I think we're in broad
25 agreement that we can fashion something based on that

1 protective order to protect a lot of this information.

2 THE COURT: Great. Excellent.

3 MR. TYSON: Before we go --

4 MR. MANOSO: Our plan would be to come to the next
5 conference with a protective order agreed to. Our plan is to
6 submit to them any comments or revisions that we would have so
7 that we can get that taken care of sooner rather than later.

8 MR. RUSSO: The issues in that case were a little bit
9 different. So we'll have to define the scope within the
10 protective order. But I think that is going to be doable.

11 THE COURT: All right.

12 Ms. Burwell, can you hear when we're speaking down
13 here?

14 MS. BURWELL: Yes, Your Honor.

15 THE COURT: If at some point you can't, you are
16 entitled to say hey.

17 MR. TYSON: On the voter registration database, Your
18 Honor, given the claims in Common Cause, which I know you are
19 familiar with in terms of voter registration database, eNet
20 functions separately from the other components of the election
21 system. And as -- I know we have Common Cause stayed right
22 now. I think the agreement with the plaintiffs we're trying to
23 work through is that House Bill 316 and House Bill 392 mooted
24 the claims in Common Cause relating to the voter registration
25 database.

1 We don't see the connection between the voter
2 registration database and the system that operates the DREs,
3 the programs that operate them. So that's our difference of
4 opinion in terms of that on that issue.

5 THE COURT: Okay. Well, it was a very compressed
6 fall for me let me just say. So I may have missed something in
7 trying to recall everything that was in the Common Cause case.
8 But tell me what specifically in both of those acts you think
9 mooted out their claims so I can understand how that might
10 relate here or not.

11 MR. TYSON: Certainly. So in the Common Cause case,
12 the allegation was that someone could manipulate the voter
13 registration system causing someone when I show up to my
14 precinct I'm not in the voter registration database. So the
15 remedy for that is what you have ordered and then what House
16 Bill 316 put into place, which is the voter registrar when the
17 person votes a provisional ballot then has to check the paper
18 records, check the other records of where they may have
19 registered to vote to determine whether the ballot should be
20 counted or not.

21 House Bill 392 additionally put in place a security
22 protocol where the Secretary of State is about to issue a rule
23 related to ensuring that all the voter registration database
24 components meets the National Institute of Standards and other
25 kind of third-party security organizations and review the

1 security of the database on an ongoing basis.

2 The reality in terms of how the voter registration
3 database interacts with the DREs is there really isn't an
4 interaction. The voter registration database information is
5 put into the ExpressPoll machine, which are not connected to
6 and on a live basis. And any manipulation of the --

7 THE COURT: They get into the ExpressPoll machines,
8 and you are saying that is not connected to --

9 MR. TYSON: The DREs.

10 THE COURT: -- the DREs?

11 MR. TYSON: Because the programming on the -- from
12 the ExpressPoll is carried to the DRE is which ballot is the
13 voter eligible. Mr. Russo shows up. We say which ballot is he
14 entitled to. The information on the card is, DRE, call up this
15 particular ballot. And so there is not a connection between a
16 manipulation of the voter registration database and the
17 operations of the DREs and the vulnerabilities the plaintiffs
18 have alleged.

19 The other challenge is a manipulation of the voter
20 registration database, which we, of course, don't believe is
21 possible or has happened, also would affect voters regardless
22 of whether they voted on absentee ballots, DREs, or whatever
23 other method of election they use. So we don't see those as
24 being related to the DRE claims that are brought here by the
25 plaintiffs' complaints.

1 MR. ICHTER: Your Honor, can I say something about
2 that?

3 THE COURT: Yes.

4 MR. ICHTER: If all of that is true from what I'm
5 hearing -- and I could be wrong -- it sounds like the voter has
6 to be able to identify the fact that they have been handed a
7 wrong ballot or that the ballot that they are dealing with is
8 incorrect before they would be given a provisional. Right?

9 MR. TYSON: The challenge in Common Cause was
10 specifically that the person did not appear on the voter
11 registration database. And so if you showed up to vote, they
12 would say you are not a registered voter at this precinct, in
13 which case then your only remedy is a provisional ballot.

14 MR. ICHTER: But that is not the only problem that we
15 have with the information that flows from the database on to
16 the memory cards and then going into DREs. They can include
17 such things as somebody tinkering with what the race of the
18 person is who is listed on the rolls and/or where they are --
19 from my example more specifically, where they are located
20 geographically which would affect what ballot they will get,
21 who appears on that ballot.

22 And if they pull up that ballot and they are not
23 savvy enough to know that they have been given the wrong
24 ballot, it doesn't sound like being given the provisional
25 ballot -- or they wouldn't necessarily know they were given the

1 wrong ballot.

2 MR. POWERS: They would still vote a --

3 MR. ICHTER: They would have to identify the fact
4 that this is the wrong ballot, go to the poll worker, and say
5 you have given me the wrong ballot. They might not know that.

6 MR. SPARKS: Your Honor, if I might. Excuse me.
7 Cary, I'm sorry.

8 I might add two additional potential vulnerabilities
9 that come with at least the Curling plaintiffs' claim here. If
10 you will recall at the preliminary injunction hearing in
11 September, our expert, Mr. Halderman, demonstrated the
12 possibility of malware being entered into a DRE unit from the
13 memory card, the same memory card that is also programmed by
14 the ExpressPolls.

15 So you do have a link between the two systems at
16 least when it comes to the memory card and the possibility
17 of -- excuse me --

18 **(Unintelligible speaking.)**

19 **(There was a brief pause in the proceedings.)**

20 MR. SPARKS: So the memory card is one link between
21 those two systems. So they may be keep discretely. But they
22 are linked by the use of the common memory card. And certainly
23 we have shown that malware, as you have identified in your
24 order, Your Honor --

25 **(Unintelligible speaking.)**

1 COURT REPORTER: I didn't even understand that. Slow
2 down.

3 MR. SPARKS: The memory card can contain an advanced
4 persistent threat which can then conceal its own existence.
5 And so you do have a link between the two discrete systems, if
6 they are discrete.

7 The second point I would make is that our concerns
8 about the vulnerability of the database as housed by the state
9 defendants would apply with equal force, whether you are
10 discussing GEMS or whether you are discussing eNet. And
11 certainly that would seem to come within the auspices of the
12 second amended complaint.

13 MR. TYSON: I think for us I don't think there is any
14 disagreement that the ExpressPoll units and the GEMS server are
15 part of the operations of the DREs. Those are all connected.
16 The difference is there is no connection between the
17 ExpressPoll as a live connection to the voter registration
18 database.

19 The data is populated on to ExpressPoll units from
20 the voter registration database. But the vulnerabilities the
21 plaintiffs are alleging commence with the ExpressPoll, which is
22 part of the operation of the DRE, totally separate from what is
23 happening with the voter registration database.

24 THE COURT: So you agree the ExpressPoll and the
25 memory cards are part of the system and to the extent the

1 memory cards are bearing some imprint from the voter
2 registration database -- I mean, is it -- are they, in fact --
3 I can't remember. Do they come through the eNet system? I
4 know that they have the voter as identified with them.

5 MR. RUSSO: The memory card that Mr. Halderman used
6 in his demonstration is not the -- that was the flash drive
7 that goes into the machine. There was a yellow card also.

8 THE COURT: It is the yellow card. He also had the
9 yellow card.

10 MR. RUSSO: But I don't believe he had malware on
11 that yellow card in his demonstration. Correct?

12 THE COURT: I thought he did.

13 MR. RUSSO: The memory card -- well, my
14 understanding --

15 THE COURT: Then he also talked about basically
16 programming them in the beginning of the day as well and then
17 when they break down also reinserting the cards.

18 MR. RUSSO: The yellow cards aren't a memory card.
19 They are just taking, you know, someone's information from the
20 ExpressPoll.

21 THE COURT: Right. But that is what he spoke about
22 also.

23 **(Unintelligible crosstalk.)**

24 MR. RUSSO: I mean, the memory card doesn't touch the
25 voter registration system. So I'm -- that is what I'm

1 trying --

2 MR. MILLER: You are talking about the yellow --

3 MR. RUSSO: The yellow card -- the memory card is the
4 card that -- is the little flash drive that he put in.

5 MR. TYSON: I think the important thing to remember
6 is the ExpressPoll, the yellow card that is coming out of that,
7 the information on that card from the ExpressPoll is which
8 ballots do you get, not this is Bryan Tyson and this is the
9 ballot he is receiving.

10 And the information in the ExpressPoll -- it goes
11 through a process from the voter registration system to
12 basically a flat Excel database and then into the ExpressPoll
13 machines. So it is not like you are transmitting software
14 between those two systems.

15 You are moving an Excel sheet of data into an
16 ExpressPoll. The ExpressPoll then generates you are entitled
17 to this ballot. And that is what you receive. So there is not
18 again this connection between the voter registration system and
19 the ExpressPoll.

20 MR. KNAPP: You are saying that you use a hard copy
21 of an Excel spreadsheet or the digital copy of an Excel
22 spreadsheet?

23 MR. TYSON: No. There is an export from the voter
24 registration system to a flat database file that is then loaded
25 into --

1 MR. KNAPP: It is a digital file.

2 MR. TYSON: It is a digital file.

3 MR. KNAPP: That digital file is then loaded into the
4 system.

5 MR. TYSON: Correct.

6 MR. CROSS: And the ExpressPoll is what you are using
7 to generate each voter specific card that then activates the
8 machine and tells which ballots to pull up.

9 MR. TYSON: Right. But it only populates a card with
10 which ballot you are entitled to.

11 MR. CROSS: Right. My understanding of what
12 Mr. Halderman or Dr. Halderman explained was that those
13 particular cards also are means of infecting the machines --

14 THE COURT: They are means of --

15 MR. CROSS: They are means of infecting the specific
16 DRE machine. And so --

17 THE COURT: That was -- I just want to say that was
18 my understanding as well.

19 MR. CROSS: So if you have access to the voter
20 registration database, not only can you manipulate registration
21 but it is another access point to the machines for the malware.
22 And if you can infect one machine, then you have the potential
23 to populate multiple machines because of the interconnected
24 nature of the machines. Right. You pull a memory card off.
25 You pull results off that machine. That is digital

1 information.

2 THE COURT: Let's just wait for a second.

3 **(There was a brief pause in the proceedings.)**

4 MR. CROSS: In any event --

5 THE COURT: Wait a second. I didn't realize he was
6 still there.

7 **(There was a brief pause in the proceedings.)**

8 MR. CROSS: So, anyway, the net of it your
9 understanding was what Dr. Halderman was explaining. That was
10 my understanding of it.

11 THE COURT: So I think the memory cards in that way
12 and what they are connected to on both sides are relevant. The
13 question I think still is are the plaintiffs saying that this
14 affects the integrity of the voter database. Because --
15 because what happened at Kennesaw and its open valve
16 information still was voter identification information. And,
17 you know, I see the very clear allegations about that. I
18 saw -- I obviously discussed them in the preliminary injunction
19 order.

20 But there is at some point there something that
21 you're not trying -- it seemed like you were not trying to get
22 into in the same weeds that the Common Cause people were. They
23 focused on basically approximately 45 percent of the
24 provisional ballots were for people or -- people who were
25 disqualified and that some of them weren't allowed to give

1 provisional ballots. But the use of a code where they just
2 didn't appear on the polls at all. And they had people who had
3 affirmative evidence of having actually registered and actually
4 voted. So -- and in the Fair Fight case, they are making
5 comparable allegations.

6 You had a different variation on this, which was more
7 about just simply the data becoming unreliable and also
8 infected because of the way it was handled as a whole --

9 MR. CROSS: I think that is generally fair.

10 THE COURT: -- rather than being in this exact same
11 prism that the others have. Is that a fair characterization of
12 your claim?

13 MR. MANOSO: Your Honor -- you were talking. Your
14 Honor, generally I would say that is right. And, you know, to
15 be clear, in our papers the first time around in our first
16 preliminary injunction, we did talk about the way in which the
17 actors -- and obviously it came out in the news in the Mueller
18 Report -- the use and the hacking of voter registration systems
19 as an access point to break into the system. But you are right
20 that it is separate from the exact prism of those other cases.

21 THE COURT: So I mean, to the extent it deals with
22 hacking into the system and being -- and the system being not
23 secure and it being a source of malware, you are saying it is
24 in. But you are not looking to go through all the codes and
25 challenge each -- the accuracy? You're not challenging the

1 accuracy in the sense of the focus of the Common Cause folks or
2 the Fair Fight; is that right?

3 MR. MANOSO: Yes, Your Honor.

4 THE COURT: Now, is that something different -- now
5 that I've summarized that, is that something different than
6 what the state sees? I know these are not exactly clean
7 borders. But --

8 MR. TYSON: I think so, Your Honor. I think the
9 issue is, you know, when we're talking about discovery of the
10 voter registration system --

11 THE COURT: I know.

12 MR. TYSON: -- is there a need for us to get into the
13 security protocol surrounding that system or do we just look at
14 what is in the ExpressPoll and then if you discover some
15 malware then we ask what is its origin. I don't see a reason
16 for us as an initial matter to get into all the security that
17 surrounds the voter registration system, especially because
18 like we talked about in Common Cause there is so much security
19 built around that and caused even by House Bill 316 and 392 now
20 amping up on a number of levels what the state has done for
21 eNet security even since last year.

22 So I don't see that there is a reason for us to dig
23 into those kinds of issues in discovery because we're not
24 getting into kind of the integrity of that system.

25 MR. CROSS: I think that remark may touch on a more

1 fundamental dispute that we actually didn't think to raise next
2 door, which is -- so what you just said was if we found malware
3 in the ExpressPoll maybe that would lead to some further
4 discovery. But that touches on a position in their filing from
5 last night that I read which said we have to show that the
6 system is compromised.

7 And we fundamentally disagree with that. We do not
8 think that is our burden. We actually thought Your Honor's
9 prior order had made clear that that was not our burden. That
10 it is enough to show that there is a vulnerability. Because
11 what it does -- if we have to show that it is actually
12 compromised, there are two issues with that as we have
13 addressed before.

14 One, it is very difficult to even detect malware, as
15 Dr. Halderman and others have explained. But the bigger issue
16 as a legal issue, as a constitutional issue is it should be
17 enough that the system is vulnerable and unreliable. Because,
18 otherwise, what happens is you only ever have retrospective
19 relief in a world in which you are now in a true democratic,
20 constitutional crisis. Because we suddenly go backwards and
21 realize the election results of some election were wrong.

22 What we're trying to do is prevent that, to say it is
23 enough for us to show that there are certain vulnerabilities
24 that are so severe that whether there has been a compromise
25 already voters cannot be subjected to that system because we

1 need to protect it on the front end.

2 And I thought Your Honor at least embraced that at a
3 high level. But we seem to be moving backwards, unless I
4 misunderstood the ruling, in saying no, no, our burden is to
5 show actual compromise. I don't think there is any court that
6 has ever held that. I don't know that --

7 THE COURT: Well, I think you were trying to show
8 actual compromise --

9 MR. CROSS: Oh, I think we can. But I don't --

10 THE COURT: I think that was part of the whole thing
11 about the Kennesaw situation.

12 MR. CROSS: Right.

13 THE COURT: And then -- but --

14 MR. CROSS: I just don't want there to be confusion
15 that for us to prevail, whether on a preliminary injunction or
16 a permanent injunction, that our burden is -- that the only way
17 we eliminate DREs, for example, just to focus on the machines
18 for a minute, is if we show that those machines are compromised
19 with existing malware. I do not think that is the law. And I
20 think it fundamentally prejudices voters to say that that is
21 the law because it only means -- the only relief voters ever
22 get is if you can actually show your vote was manipulated there
23 was compromise.

24 We're trying to avoid that happening. That is the
25 constitutional protection is to make sure voters never end up

1 in that place, assuming they haven't already.

2 THE COURT: Well, I think you-all know I'm very fact
3 based. So I hate to just be commenting as a theoretical
4 proposition on that. I -- I think what -- all I can say
5 about -- with respect to the order I did issue I found that
6 there was -- there was so many problems and such a disregard of
7 the problems that it became a very vulnerable situation where
8 people have no confidence their vote was being properly
9 counted.

10 But it is not just a negligence standard. That is
11 the thing. It is clearly -- you know, because it is a
12 constitutional violation. And so I thought there was in some
13 ways a shocking amount of evidence of what had happened. And
14 perhaps as we now also reflect with the increasing amount of
15 knowledge that all of us have that our understanding of these
16 issues changes over time about what makes the system
17 vulnerable.

18 So I don't know that I can exactly respond to you.
19 Because, you know, you don't know -- in terms of what your
20 responsibilities are in proof.

21 I would say I was trying a case myself a good number
22 of decades ago in front of Judge O'Kelley. And it was a case
23 against the state in an employment discrimination case. He
24 kept on saying, why do you have to put on so much evidence?
25 Why do you have to put on so much evidence? I said, because if

1 I didn't put so much evidence on, I wouldn't -- I would not
2 prevail. And I had prevailed. So it was -- he was very funny.
3 He was the usual judge pushing you onward. But, generally
4 speaking, my view is the more evidence the better evidence, not
5 just crappy evidence. That doesn't mean just cumulative for no
6 value.

7 So if you are trying to actually show something, you
8 have got to show real evidence of it. And that is -- and we
9 have kind of a set of rolling circumstances here. But just as
10 to the point you-all were trying to say about the voter
11 registration system, I think the discussion might be informed
12 some in your trying to reach what some parameters are by
13 talking to your experts about what they really need without
14 basically swamping you.

15 So that's my best suggestion about it. I don't have
16 a precise line. I can understand absolutely why you have to
17 have some information. But to the extent that you don't want
18 to be pressing on basically trying to be proving the accuracy
19 of the voter registration, then you have got to sort of modify
20 it so that it is actually based on what you need relative to
21 your particular claims.

22 And I don't know -- not being an expert in this and
23 now having been educated a lot by your experts, I don't know
24 where that exact line is. And I don't know how -- I don't know
25 what the state's -- how the state systems are exactly

1 configured, other than everything I have already shown that I
2 know and don't know in other prior orders.

3 MR. MANOSO: I think, Your Honor, we agree. It seems
4 like the meet-and-confer that we had this morning was
5 productive. And there has been some informal exchange of
6 information, which has also been productive. And it seems to
7 make sense for us to be able to consult with our experts. And
8 if we need some additional more informal information to make an
9 informed decision with our experts, then that would seem to
10 move the ball forward on this issue. While at the same time,
11 we continue with our discovery on the pieces of the system or
12 the tripod issue referred to earlier that we agreed to within
13 the scope of the case.

14 THE COURT: And the memory cards clearly -- I do
15 remember the memory cards. So they clearly are. Also another
16 way you could proceed is if you have an expert who is working
17 with you on this and you want to have an informal conference
18 with the state and somebody from the Secretary of State's
19 office or your elections folks where you are just basically
20 conversing so that you can try to make it simple and not -- and
21 actually get into the nuts and bolts, that would be useful.
22 Because a lot of these times these people can talk to each
23 other and help you sort it out.

24 MR. RUSSO: That is fine.

25 MR. CROSS: You guys should retain Professor Wenke

1 Lee. I don't know if you --

2 THE COURT: So does that -- I hope that -- I don't
3 think it clarified anything. But it --

4 MR. MANOSO: It makes homework, but it keeps the ball
5 moving.

6 MR. RUSSO: Yes.

7 MS. ANDERSON: Just so --

8 MR. RUSSO: We are on the same page with what we
9 agree is part of the complaint and where we think there is
10 going to be an issue at a certain point. You know, we'll work
11 it out.

12 MS. ANDERSON: It seems more of a wait-and-see kind
13 of approach for the voting registration --

14 THE COURT: Well, except to the extent that you are
15 really -- if you are infecting the system, I mean -- and that
16 was the thing about the memory cards at the very least. There
17 may -- I think you ought to -- basically I think the plaintiffs
18 ought to identify for you what they consider the points of --

19 MS. ANDERSON: Of infection?

20 THE COURT: -- of infection and also how -- how and
21 why they think it is relevant.

22 MR. CROSS: We can get more concrete, and I think
23 that will help.

24 THE COURT: Because I read your discovery
25 descriptions. And I also had some of the state's reaction.

1 But it may -- but it may get clarified by being concrete.

2 MR. MANOSO: And to your point, Your Honor, obviously
3 these were categories which we tried to be somewhat general,
4 but they aren't our actual discovery requests. So obviously
5 there was some reference to things being undefined or being
6 vague. Well, this was a general notice to the Court. Our
7 discovery responses -- or excuse me -- requests will obviously
8 have more detail to your point.

9 MR. POWERS: To kind of broaden it out, I think the
10 general concern is if -- to take the example of folks who get
11 wrong ballots, you know, they cast regular ballots but, you
12 know, it has them in the other district, you know, is the
13 problem with the GEMS server -- I'm sorry -- the database, the
14 memory cards, something in the machines themselves, or was it a
15 registration problem upfront in the beginning? That is where
16 the registration piece has to fit in at some point.

17 But I think we can -- we can narrow and be specific
18 about our request so as to frame them in a way that we're not
19 asking for, you know, all of the state's registration
20 information.

21 THE COURT: There was some evidence of the voter
22 closeout sheets from Fulton County from the precincts where the
23 numbers didn't add up that was attached to -- I can't
24 remember -- one plaintiffs' submission from the other. But it
25 might have been the Coalition's.

1 MR. MANOSO: It was, Your Honor.

2 THE COURT: But -- and that had some bearing. I
3 mean, you spent time looking at those submissions. And I
4 don't -- you know, I don't know whether that was the data
5 system or whatever. But that was -- that was part of the
6 problems that it looked like that Fulton County was having.
7 But they indicated different numbers on these closeout sheets.

8 MR. RUSSO: I don't know the issue. That could --
9 there are scenarios where that could happen when you have a
10 federal election and voters who do not reside in the U.S. any
11 more would still get to vote and they get lumped into a
12 precinct for counting purposes.

13 THE COURT: They seemed to have signed in. But I
14 can't --

15 MR. RUSSO: I don't know --

16 THE COURT: I think if you want to look for it I
17 think I referenced it in the order at some point -- the exhibit
18 number, at least one of the exhibit numbers. But there were a
19 number of them. And I don't know how it bears on any of this.
20 But that seemed to be -- I didn't know if it was the voter
21 registration system. I didn't know whether it was the ballot
22 counting, what happened exactly. But you could see that they
23 noted it on the closeout --

24 MR. RUSSO: Okay.

25 THE COURT: -- of the precincts. So were there other

1 topics that you were not able to agree on?

2 MR. MILLER: If I may, Your Honor, related to the
3 other topics -- and I want to just address those because
4 Mr. Ichter is going to need to run down the street. Because,
5 frankly, we got so far along on most of our topics, we may not
6 be here when he gets back. I'm not sure. But nonetheless --

7 THE COURT: We have another 27 minutes at this time.

8 MR. MILLER: Okay. Perfect.

9 THE COURT: Then I'll find out whether Mr. Powers is
10 going to sub for him.

11 MR. POWERS: Tag me in.

12 MR. MILLER: Your Honor, there is an outstanding
13 issue of the third-party subpoenas, those Rule 45 subpoenas
14 that have been issued. As Your Honor is probably aware, there
15 was a subpoena issued to Morgan County prior to your ruling on
16 the motion to dismiss. That was then withdrawn, refiled the
17 next day.

18 And then your order on the motion to dismiss came.
19 At that point it was then again reissued, along with another
20 subpoena to Rockdale County. The issue that we are kind of
21 flagging -- and, you know, I think we couldn't quite come to
22 the total agreement. But I think we understand each other's
23 point of view. The question as far as the timing of compliance
24 and whether that is getting the cart ahead of the horse on the
25 scope issue that we're here to talk about generally because

1 there are some things as I recall related -- as I mentioned,
2 there were multiple versions of these -- but as I recall
3 related to documents concerning BMDs, other things that are
4 just outside the scope of discovery. And so what we would like
5 to propose is that that compliance date be pushed out until the
6 joint discovery plan is submitted. At that point we're not
7 putting multiple things in front of you.

8 Right now the compliance date is set for June 4, the
9 same day that our answers are due. And, again, this is to
10 Morgan County and Rockdale County. At that point, you know, we
11 would also ask that -- and I think whether the dates are
12 correct -- but I think in concept -- and please correct me. I
13 don't want to put words in your mouth. But I think a concept
14 of putting a hold on other third-party subpoenas to counties
15 until that discovery plan point is something that would just
16 provide ease, not get the cart ahead of the horse on scope, not
17 require us to continue to pester you, frankly, while we're
18 still trying to define the scope of discovery.

19 That is not related to things that are served on us.
20 If it is us, we can handle it. But we're getting calls from,
21 you know, the two counties at issue saying, well, I don't know
22 what to do with this. This is y'all's stuff really. What are
23 we supposed to do?

24 And then, of course, from the state's perspective,
25 there are protective order issues as it relates to the GEMS

1 database, even things that are relevant to the scope, that we
2 agree, I think, are relevant to the scope that also are out
3 there with the subpoenas.

4 And, finally, to the extent that some of the
5 information is probably more readily obtainable through the
6 state defendants, I think there is an opportunity to work that
7 route and fall within a potential protective order easier as
8 well.

9 My understanding of the issue -- and, again, I don't
10 want to put words into plaintiffs' mouth. But this is more of
11 a Curling plaintiffs' issue than -- I'm sorry -- Coalition
12 plaintiffs' issue than a Curling plaintiffs' issue.

13 THE COURT: So what is the date that you are
14 proposing that it be --

15 MR. RUSSO: Seven days after --

16 MR. MILLER: Seven days after the 26(f) conference.

17 THE COURT: June 17.

18 MS. ANDERSON: We just had the week of -- we had the
19 week of June 10th to accommodate schedules.

20 MR. MILLER: The goal with that, Your Honor, would be
21 that at least at that point we would have a joint plan
22 discussing where we see specifically the scope is and we have
23 sat down and hammered it out. I think after today we've come
24 to a lot of agreement in terms of scope.

25 You know, there are only a few discrete issues that

1 we think are outside of the scope. But, nonetheless, that is
2 kind of where we are.

3 THE COURT: Mr. Ichter?

4 MR. ICHTER: It seems like the state's in a big hurry
5 with respect to a lot of things, except when they
6 (unintelligible) --

7 COURT REPORTER: Speak up.

8 MR. ICHTER: And these are subpoenas that have been
9 out there for weeks already. The ability to pull together the
10 information necessary to respond to them seems to be -- they
11 should be capable of doing it. They already had notice of it.
12 The responses -- not responses but motions to quash have
13 already been filed with respect to one of the two subpoenas.

14 MR. MILLER: The first version -- the first out of
15 three versions of the Morgan County subpoena, yes.

16 MR. ICHTER: Right. In terms of scope --

17 THE COURT: But is that moot though in terms of --

18 LAW CLERK COLE: It has been withdrawn.

19 THE COURT: It was withdrawn.

20 MR. MILLER: We withdrew it after plaintiffs withdrew
21 their subpoena. Plaintiffs then subsequently then reissued the
22 subpoena less than 24 hours after we withdrew the motion, as I
23 recall the timing of that. At that point, our arguments as
24 to -- again, you know, our arguments as to the subpoena issue
25 relate to scope Rule 26 issues that are applicable and that a

1 party to the case can raise as to a third-party issue and as to
2 protective order issues to the extent there are state interests
3 with respect to the GEMS server and things of that nature. I
4 just think it gets the cart ahead of the horse before we have
5 the protective order and before we kind of try and get close to
6 the same page on scope.

7 MR. RUSSO: The new subpoenas have been expanded
8 also.

9 MR. POWERS: No.

10 MR. RUSSO: Even the Morgan County --

11 MR. POWERS: Morgan County was narrowed.

12 MR. MILLER: Well, I think the Rockdale County --
13 Rockdale County adds an additional --

14 COURT REPORTER: Please don't talk at the same time.

15 MR. RUSSO: Well, all I know is the Morgan County
16 subpoena originally had 17 requests. Now it has got about 20.
17 Right?

18 THE COURT: Well, I think you should try to sit down
19 and talk about them. I can't -- I don't know that you need to
20 wait until the 20 -- I don't know what -- this is not a firm
21 deadline obviously. You are talking about the week of the 10th
22 and sometime seven days after you got it. But I know that the
23 plaintiffs want to get going on it.

24 MR. CROSS: Just to clarify, Your Honor, these are
25 served only by the Coalition. We're not --

1 THE COURT: They are not yours.

2 MR. ICHTER: If I could --

3 THE COURT: Is there some reason why it can't wait
4 until you have figured everything else out I guess is my
5 question.

6 MR. ICHTER: Well, it sounds to me like the vast
7 majority of scope issues have been resolved, and it seems to me
8 that we have eliminated all the procedural obstacles with
9 respect to the subpoenas and with respect to service and that
10 sort of thing.

11 So I think that the scope issues will be mainly the
12 things that are left over. And it would be useful once we walk
13 away from this meeting to know what -- based upon those
14 subpoenas, what scope issues still exist so that we can
15 refine -- and get a decision on that so that we can refine
16 subpoenas that are going to additional third parties in the
17 future.

18 And this is just going to push that back by a couple
19 of weeks when all is said and done. They have already done one
20 motion to quash. The brief is written. Just eliminate the
21 things that have been mooted. And with respect to the
22 counties, they have had these for weeks.

23 MR. MILLER: Respectfully, Your Honor, the question
24 is really more of a practical concern of the Court and also of
25 the parties as we continue to respond to the discovery that has

1 been served on state defendants. File our answers. Respond to
2 the motion for preliminary injunction. And the question is
3 truly whether that is more appropriately handled in the 26(f)
4 conference and the joint discovery plan that we're kind of
5 working to hammer out or if Your Honor prefers that there be
6 multiple docket entries as to motions to quash and having
7 dueling 26(f) conference meet-and-confers pursuant to your
8 standing order and those kind of things.

9 Just from a practical perspective, it seems to me to
10 line those up would be helpful to both the parties and the
11 Court. And, Your Honor, respectfully we have been, you know, I
12 think as available as we can be on voluntarily providing some
13 additional information that may be ahead of, you know, time
14 here with respect to the municipalities, with respect to all
15 kinds of other things to the plaintiffs. And we're not trying
16 to play hard ball here. But, practically speaking, we think
17 that makes sense.

18 MR. ICHTER: It doesn't seem to me that the 26(f)
19 conference is going to occur -- well --

20 MR. MILLER: I believe we said the week of the 10th.
21 And truthfully that is just right after our answers are filed,
22 right after the --

23 THE COURT: I think you need to try to work it out on
24 when you are having your -- the conference on June 10. Because
25 I just -- I realize it holds you up in dealing with the

1 counties. But it doesn't make sense otherwise. Because
2 whatever the issue is that they are fussing about, that they
3 are moving to quash on potentially again, will be the same
4 issue that we're dealing with as a whole.

5 So I just can't -- and it may have some repercussions
6 also for the Curling plaintiffs' other discovery that they'll
7 end up doing. So I just think -- I think you need to resolve
8 it then. And it may be that you can come back to me about
9 whatever the issues before the seven -- the discovery plan
10 because you may have already basically at that point identified
11 here is where we come up with a collision.

12 MR. ICHTER: We're not trying to play hard ball
13 either. And what I was trying to say a moment ago is that if
14 we -- if they tee up their motion to quash, that their position
15 will be laid out. For the purposes of the 26(f) conference,
16 we'll have something to talk about.

17 THE COURT: But you're asking them -- you have
18 already seen one motion to quash. You are asking them to write
19 something when I'm trying to get people to actually talk.
20 Obviously you can't during the last weekend decide it was a bad
21 idea to have everyone be in camps rather than seeing each
22 other. So I don't think that makes sense.

23 You may end up having to do that and do an informal
24 discovery statement to me because you can't agree on something.
25 I'm sure that may be so. But I think you ought to try to talk

1 first and have identified what the issues are and also have
2 resolved the protective order because the protective order has
3 to be done anyway.

4 MR. ICHTER: I understand that.

5 THE COURT: Then if you see yourself -- you identify
6 what you can't agree on and it is not -- it doesn't need to be
7 part of the discovery plan because these are things you can't
8 just agree on, then you can go ahead and proceed on the
9 informal discovery process and dispute resolution process
10 without a full motion to quash. And we'll give you a number of
11 pages needed under the circumstances for you to do that without
12 making it incredibly exhausting for you or for us in terms of
13 the amount of time.

14 And I will say there was some reference in one of the
15 other -- the discussion most -- when we last spoke on the
16 preceding Friday about, well, maybe I could expedite discovery
17 by appointing a magistrate judge to preside over it. But that
18 won't work because, you know, you use the magistrate judge.
19 The magistrate judge has to issue an R&R, which takes time, and
20 they always feel like they want to understandably put things as
21 fully as possible so I understand how they are thinking. Then
22 you get to object to the R&R, which you have 14 days to do so
23 unless you agree on something else. And then I have to read
24 it.

25 So you basically already built in a month at that

1 juncture. It is not that I want to deal with all of the
2 discovery issues. But I think if you're actually trying to
3 move things on a reasonable time frame, I'm just -- we're going
4 to have to have phone conversations, or you are just going to
5 have to come in and see each other a lot with me. Because,
6 otherwise, we'll just never be able to move this.

7 I mean, because you've worked together today, I'm
8 going to assume that there are other things that you'll be able
9 to work out too if you actually see each other and try to talk
10 to each other.

11 MR. MILLER: I believe as far as the subpoenas are
12 covered, I think we can handle it in one fell swoop with the
13 26(f) and then not have to be as concerned moving forward.

14 THE COURT: All right. So is there anything else
15 regarding discovery? Because I wanted to talk about the
16 Curling plaintiffs' motion for preliminary injunction too. And
17 I'm just watching myself on Mr. Ichter's schedule.

18 MR. ICHTER: Sorry about that.

19 MR. TYSON: I think the only other issue, Your Honor
20 -- we talked generally and I know we didn't reach an agreement
21 on this point. But we discussed did we want to have a deadline
22 for complaint amendments or not since we parked the ballot
23 marking device issue. I think that is something out there. I
24 don't know if we have a good answer on that. But it is kind of
25 setting a hard point of when do we know what this case is.

1 THE COURT: Well, you -- the state is selecting its
2 vendor sometime in July. I wasn't clear when that was from --
3 I went back and looked at the RFP. Is there any clearer idea
4 of what that date is at this point?

5 MR. MILLER: Your Honor, they have got kind of a cone
6 of silence around the procurement. So it is still as far as we
7 know the same range that was provided in those documents.

8 THE COURT: And then you select them, and then
9 there's some other two-week or three-week period for doing some
10 other things. I can't remember what that was. But probably
11 shaking out a contract actually.

12 MR. MILLER: That is right. It is a NOIA and then a
13 contractual negotiation period.

14 THE COURT: So is everything confidential in that
15 period as well, or do you announce who won the bid?

16 MR. RUSSO: That is right. The NOIA announces who
17 got the bid.

18 MR. MILLER: Who won the bid. I cannot recall if the
19 details are released at the NOIA point or at the point of the
20 actual award.

21 MR. RUSSO: It is the award.

22 MR. MILLER: They announce the name at that point.
23 That's true.

24 THE COURT: I see. Well, I don't see how they can
25 write an intelligent new complaint or an amendment without

1 knowing more about the system. That is the only thing. So I
2 think you will be in a better position to firm that up. But
3 they can, of course, file a new complaint at any time and not
4 in the same posture.

5 And I don't know -- I'm not quite sure how you -- and
6 this is for plaintiffs to think about -- how you are going to
7 proceed on that without knowing more about the system. So that
8 is your problem and obviously easier if you do it as -- I know
9 you want to do it as an amended complaint probably rather than
10 anything else and would really prefer just not to have to do
11 anything. But that is something else.

12 But anything else as to discovery?

13 MR. CROSS: The only other thing --

14 THE COURT: When you get a clearer date though, you
15 might share that with them so they have that in mind.

16 MR. RUSSO: We told them that we would keep them up
17 to date on it.

18 MS. ANDERSON: We discussed that. We will.

19 MR. CROSS: I think the only thing we had on the
20 schedule, Your Honor, was there was a disagreement about
21 dispositive motions. As long as we're agreed on the rest of
22 the schedule and we're agreed that trial is in January,
23 candidly, I'm indifferent as to whether they want to file a
24 dispositive motion.

25 I can't imagine there is any efficiency in Your Honor

1 deciding that in advance of a trial that you're going to be the
2 ultimate fact finder in. But if they want to file, that is
3 fine. I just don't want anything to hold up --

4 THE COURT: Well, the problem is if they file it what
5 is the -- I can't prevent them from doing it. But we could
6 have -- but we could have a conference beforehand.

7 You wanted to have the dispositive motions due when?
8 You are having the end of discovery in -- the end of discovery
9 is December 11.

10 MR. MILLER: So it would be -- it would be slightly
11 altered from what we proposed in our schedule in the filing to
12 the Court. You know, the intention, I guess, would be to do it
13 towards the end of discovery, Your Honor. But I don't think we
14 discussed specifically a date for that. But certainly we'll be
15 amenable to it.

16 THE COURT: Well, if you're actually relying on any
17 expert testimony and the reply experts are due to be completed
18 by December 11, we would have a hard time having a trial in
19 January. That is the pragmatic problem.

20 MR. CROSS: From my perspective, we all have agreed
21 to trial in January. So that obviates dispositive motions in
22 my mind. But if they want to file something, again, I don't
23 care what they file as long as we don't have to brief it at the
24 same time we're preparing for trial.

25 You know, what many judges -- even in jury trials, I

1 have had judges just take summary judgment -- like in EDVA
2 where they are wanting things to move quickly, they just turn
3 it into a Rule 50 motion at trial. There is no obligation for
4 Your Honor to brief that or to decide it before trial,
5 particularly when you are the fact finder.

6 So I really don't understand why they want to do
7 this. It is a lot of work for them as well. We should just go
8 to trial. And whatever presentation they would make under
9 Rule 56, they will make to you on the merits. It is the same
10 thing on the same evidence.

11 MR. RUSSO: Well, I mean, I think what I'm hearing is
12 we don't have any disagreement on submitting dispositive
13 motions. However you treat it, we will just follow your lead.

14 THE COURT: I mean, I could have a trial still and
15 hear you and construe it as a motion for directed verdict --

16 MR. RUSSO: That's right.

17 THE COURT: -- which makes probably more sense at
18 that point. Otherwise, we will never get to it.

19 MR. RUSSO: We're not going to tell you what to do.
20 We are in agreement that dispositive motions can be filed.

21 THE COURT: All right. So what is the story with the
22 motion for preliminary injunction in June where the plaintiffs
23 don't agree on the timing of that? How am I going to hear from
24 the Curling plaintiffs, which I just barely have scratched the
25 surface on reading it, versus the Coalition plaintiffs not

1 being ready until the end of July? I'm not sure how I would
2 deal with that.

3 Also I wanted to talk about the scope of relief here
4 you are actually seeking. Let's just deal with the easy or the
5 not easy issue of the difference in timing.

6 MR. MANOSO: Sure, Your Honor. Our concern and our
7 reason in filing when we did was to specifically avoid the
8 situation that we found ourselves in last year. And we heard
9 you loud and clear in your order that time was the factor, if
10 not a factor. And that was the purpose in our moving when we
11 did in order to have briefing be finished during the summer so
12 that we can have a hearing during the summer.

13 I believe the bulk of elections that will occur are
14 in November, maybe a few -- one or a few in September.

15 THE COURT: Fulton County is in September.

16 MR. MANOSO: Fulton County in September and the
17 remaining in November. So, again, our intent was to keep
18 moving forward and to prevent ourselves from being in the exact
19 same situation we were in a year ago when we filed in August.

20 And, respectfully, the Coalition plaintiffs puts us
21 somewhere in the middle, and we just didn't want to take that
22 risk or impose a burden on ourselves or Your Honor over the
23 summer.

24 MR. CROSS: One thing if I could just add, Your
25 Honor. As Your Honor might recall, we wanted to file the

1 preliminary injunction motions last year much earlier, and we
2 got bogged down in a lot of procedural stuff with the amended
3 complaint that we did not want to happen.

4 One of the messages that came from Your Honor -- and
5 I can't remember which order it was -- Your Honor pointed out
6 that we as Curling plaintiffs could have filed earlier. And in
7 retrospect, it is probably one of the biggest regrets of my
8 career is that we tried to stay aligned and wait on their
9 timetable.

10 And we lost relief that even I think the prior
11 defense counsel acknowledged we probably would have gotten if
12 we had filed in the spring when we wanted to. That is not a
13 mistake that we're prepared to make again. So while we would
14 much prefer to be aligned -- Mr. Ichter can speak to their
15 timing. I thought we were aligned until a couple of days ago.

16 But we cannot find ourselves in a situation again
17 where we waited for reasons we didn't think were appropriate
18 and suddenly we're out of time. So that is why we are where we
19 are.

20 MR. ICHTER: Judge, based upon the Court's schedule
21 as we learned about it, we calculated that the earliest date
22 that we could have the hearing was going to be the July date
23 identified in our papers. And we worked back from that to come
24 up with a date for filing the motion for preliminary
25 injunction.

1 Rather than filing it at the same time that the
2 Curling plaintiffs filed, we thought it made more sense to wait
3 until the 21st, have a little more breathing room to get the
4 thing filed. And we have people off on vacation now who are
5 involved in the process of drafting the documents that are
6 going to have to be filed with the Court and not being in a
7 situation where we file a motion yesterday or next week that is
8 going to sit around and have nothing happen with it until three
9 more weeks when we could have that additional time to perfect
10 our filing, if you will. So that is the reason why we proposed
11 to file a little bit later.

12 THE COURT: Well, I guess what I'm -- tell me the
13 relief in either case -- I mean, I don't -- that you are
14 seeking.

15 MR. MANOSO: Yes, Your Honor. I don't know -- I have
16 an extra copy if Your Honor would like. Or you have got one
17 there.

18 Your Honor, our past hearings and the past order
19 focused on the tripod and this notion of a system that is
20 replete with vulnerabilities, and our position is that that
21 system should be replaced by a system that cures those
22 vulnerabilities.

23 So that is why we asked for stopping the use of the
24 DREs once and for all, using in-person hand marked paper
25 ballots, and as well as provide the minimum necessary for the

1 HAVA/ADA requirements, as well as providing a ballot scanner at
2 each polling place for casting, tabulation, and storing the
3 paper ballots. So, again, our relief seeks to end the use of
4 the DREs and replace that system with a system that is far more
5 recognized as secure and is something that, as we talked about
6 in our previous papers, is a system that is already sprinkled
7 throughout the current system, Your Honor. People know paper.

8 MR. CROSS: I think if you turn to Page 23, Your
9 Honor --

10 MR. MANOSO: Sorry.

11 THE COURT: All right. So it is three minutes before
12 Mr. Ichter says he has to leave. Are you -- do you need -- if
13 you need to be here, then we're going to break. And I'll read
14 the whole thing rather than just my select parts. But I don't
15 know whether Mr. Powers -- I know he hasn't been a constant
16 presence here. So I hate to --

17 MR. ICHTER: Mr. Powers can handle it. But, Your
18 Honor, we have prepared a summary. Now it says draft, not
19 final at the top because this issue from our perspective just
20 arose last night with the filing of the motion for preliminary
21 injunction. But this is a summary of the relief that we have
22 been asking for from the get-go in connection --

23 THE COURT: Well, when are you going to be through do
24 you think with the hearing down in Fulton County?

25 MR. ICHTER: I think it will be a 45- to 60-minute

1 hearing.

2 THE COURT: All right. That is too long. It starts
3 at 1:00?

4 MR. ICHTER: Yes, Your Honor.

5 **(There was a brief pause in the proceedings.)**

6 THE COURT: Mr. Powers is just going to have to cover
7 for you. I will say before you leave without -- I will be
8 happy to look at this, and I think we would be efficient to
9 take a 15-minute break so I can finish looking at this as well.
10 And if you want anyone to look -- we could copy what you are
11 saying if you want.

12 MR. ICHTER: I have multiple copies, Your Honor.

13 THE COURT: But before you leave, I want to just say
14 this. The plaintiffs seem to assume that we're in the exact
15 same posture as we were last summer in September. And I don't
16 know that that is exactly so.

17 That is my -- and I want to just flag that for you.
18 There are -- I'm sure that the state's counsel can make their
19 own arguments about this but there are -- and have done so.
20 And you have probably thought of them.

21 First of all, I don't know -- for all of the
22 deficiencies in the DRE system, I don't know what they have
23 done in the last -- since I last saw them in the last
24 elections. I don't know -- and there may be extreme limits as
25 to what they can do under -- given the age of the software.

1 And that, I assume, is likely so.

2 But -- but I just want to point out it is not like --
3 because whatever I said in the September 17 order I said. But
4 it was still based on the information and evidence in front of
5 me then. Not on whatever you are going to do.

6 Secondly, to the extent we're dealing in this coming
7 election with lots of small counties, there are some other
8 circumstances. Also, I don't know really what is going to --
9 what their capacity is. I don't know whether you are going to
10 address this at all.

11 You know, on one hand, Fulton County has one set of
12 capacity issues as a major county and whatever its issues are.
13 A small county is -- I'm not even talking about money. It may
14 be personnel, have other sorts of issues. I don't know to the
15 extent somebody needs a scanner in order to have the -- that we
16 need a lot more scanners. And you have to think about problems
17 with the scanning. Those are issues that would have to be
18 addressed.

19 So there seemed at points to be this sort of
20 proposition that this is a slam dunk. And I'm just saying it
21 is not a slam dunk. I have to look at the record each time and
22 where we are. And it is -- the grant of an injunction is an
23 equitable set of considerations. You still have public
24 interest issues, which I think the state has been arguing, hey,
25 we're going to be moving into a whole other election system.

1 How much are you going to burden people, confuse them, et
2 cetera? And you also have the reality that you don't have that
3 many voters.

4 Now, I understand what you are all arguing
5 potentially is that the election system may not be ready for
6 the primaries. And that may be so. And that is something
7 we'll talk about. And that is a lot more voters. But there is
8 a lot of change here. There is a lot of things that may not be
9 changed at all.

10 But I just -- before Mr. Ichter left, I wanted to --
11 so that he would hear it from me as well, I want to express my
12 concerns. Because your clients, with all of the enthusiasm of
13 dedicated voters and citizen activists, may not necessarily see
14 any of those distinctions sometimes. It is something that
15 everyone has to be aware of.

16 MR. CROSS: Your Honor, we fully appreciate that. To
17 be candid, we have advised our clients that an injunction is
18 never a slam dunk and circumstances have changed. We think as
19 we have laid out in our papers and we'll lay out if we can
20 fully brief this and get to a hearing that those circumstances
21 move in our favor. Because, for example, you were talking
22 smaller elections with a much smaller turnout where, for
23 example, you don't need a scanner because you have a few
24 hundred people vote by paper. You can count those by hand.

25 THE COURT: All right. Well, we'll talk about that

1 in a moment. I am going to let Mr. Ichter go. I'm going to
2 read what you have. We'll get -- then you'll distribute
3 whatever -- you want to distribute that, and we'll -- I'll
4 just -- so realistically how many pages do I have here? I can
5 be able to be back with you in 15 or 20 minutes.

6 MR. RUSSO: What about those ten exhibits?

7 THE COURT: The ten exhibits.

8 MR. TYSON: Exactly.

9 THE COURT: Well, they are not like your 120 pages of
10 fascinating procurement information.

11 All right. Okay.

12 MR. ICHTER: Thank you, Your Honor.

13 THE COURT: All right. It is still pretty warm in
14 here. So I don't know whether it is any better in the hallway.

15 All right. Just come back in about 15 minutes and
16 we'll round you up.

17 **(A brief break was taken at 12:35 P.M. Mr.**
18 **Ichter and Mr. Lowman exited the scheduling**
19 **conference.)**

20 THE COURT: So do the Curling plaintiffs seek an
21 injunction at this point that would extend and resolve issues
22 all the way through the primaries, or is this really just
23 focused on the 2019 elections?

24 MR. MANOSO: I think our intent is to cover up
25 through the primaries and whenever the replacement system is

1 rolled out and as we were discussing earlier to then evaluate
2 to the extent that resolves the concerns that we believe have
3 already been shown and will continue to prove during discovery
4 that exists in the current system.

5 THE COURT: Because it is a little confusing when I
6 read the brief. And this is what I was sort of -- on one hand,
7 you say that this is an ideal circumstance for the introduction
8 of hand ballots -- paper ballots because it is a smaller
9 election. And that is one of the factors you point to is that
10 it is a smaller election. But obviously the primaries are not
11 that smaller election.

12 So is this -- I know ideally you would like to get
13 everything done at once. But in terms of the preliminary
14 injunction, isn't that sort of a tension in terms of the relief
15 that you potentially will be looking at or what is the focus of
16 any hearing and what we need for that in order to be
17 considering that?

18 MR. MANOSO: I think I understand your question. And
19 you can reel me back in if I'm going off course. So our
20 position is that the 2019 elections provide the framework for a
21 system to be rolled out -- for the new system that we requested
22 as we state in our relief to be rolled out, to be applied in
23 those elections where the state has a role as discussed in the
24 Coalition plaintiffs' brief. And so that that system is in
25 place or at least largely in place by the time of the March

1 primaries.

2 So as opposed to the BMDs, the current solution that
3 is being -- going to be implemented, which at best will be
4 coming in right before the primaries, our proposal allows for a
5 system to be put in place this year for these elections so that
6 by the time there is a more general or more widespread election
7 in March that system has already been put in place.

8 One of the concerns as we set forth in our brief is
9 that the timeline that is set forth for the replacement system
10 is aggressive to quite aggressive. And our solution allows for
11 an implementation in these smaller elections that will be ready
12 in time for the primaries that occur in March.

13 THE COURT: All right. I heard that before. I'm
14 just -- the scope of the evidence at the hearing that you are
15 seeking on the preliminary injunction relates to that I would
16 be basically seeing what is the burden, what is the -- what are
17 the issues involved would be the entire state or would be the
18 entities that are having elections in 2019?

19 MR. MANOSO: So I think the -- our approach was to
20 roll out the system --

21 THE COURT: I know what you're rolling out. I'm
22 asking --

23 MR. CROSS: It is both, Your Honor. It is both. It
24 is both.

25 THE COURT: It is both.

1 MR. CROSS: You're going to have interim elections
2 that are coming up that are smaller. So there will be
3 feasibility issues raised as to those. We think that is
4 readily resolved. But by the time we get to the primaries, if
5 the DRE system is still in place, then yeah, it will encompass
6 that as well.

7 And so they have told us today that they fully expect
8 the BMDs to be in place before the primaries. And so I assume
9 they are going to tell the Court there is no feasibility issue
10 with respect to our relief as to the primaries because the
11 primaries are never going to happen on DREs, which is what they
12 told us today. If that -- they can correct me if I got that
13 wrong.

14 If that continues to be their position, then the
15 feasibility scope for Your Honor will only be on these much
16 smaller elections. But, of course, our concern is that they
17 are never -- that that may actually not play out as they
18 anticipate. So we want that relief in place before we get to
19 the primaries before it is too late to do something about that.

20 Does that answer Your Honor's question?

21 THE COURT: Better.

22 MR. CROSS: Still incomplete?

23 THE COURT: No. I mean, I think that one of the
24 things that bothers me is really what is happening at this --
25 at this hearing. I mean, what you -- when I read your motion,

1 I mean, a substantial part of it is information and argument I
2 have obviously considered in the past. And then there's -- in
3 terms of addition, there's the affidavits and obviously the
4 findings in the Mueller Report. And they are briefly
5 referenced, the attempted intrusion that was in Georgia and the
6 peculiarity of the vote count in the lieutenant governor's
7 race. That's the most I get that is extra.

8 So I'm just trying to determine what is involved in
9 the preliminary injunction hearing, whether it be one just that
10 your clients are asking to be held in the end of June or it is
11 one in July. And then I would rather, of course, hear directly
12 from the defendants if they actually think given the rollout of
13 the BMD system that's identified in the RFP -- do you actually
14 think that you're going to actually be functional before
15 March 3rd?

16 MR. RUSSO: Yes, ma'am, we do. I mean, there is a
17 pilot project, of course, this year that will roll out and then
18 roll into the full implementation next year. I think the RFP
19 indicates that by the end of the first quarter will be the
20 deadline. The primary -- presidential preference primary has
21 not been set for next year yet. The Secretary of State sets
22 that and has a statutory requirement to do that by December 1.

23 For practical purposes, I suspect it is done earlier
24 because of the two political parties that are involved in that
25 process. But, you know, right now I suspect it would be -- I

1 suspect it will be in late March at the earliest. But, again,
2 the Secretary of State hasn't decided. It won't be before
3 March 1st. We do know that. And we have no reason to think
4 that the BMDs will not be in place.

5 THE COURT: Is there going to be a Super Tuesday
6 again where all of the other --

7 MR. RUSSO: We don't -- we really don't know. You
8 start getting into issues around really the RNC and the DNC and
9 how they apportion delegates to those candidates. And so,
10 again, we'll have an idea and maybe -- we're happy to try to
11 get some additional clarity sooner rather than later from the
12 Secretary of State about when he is going to set that date.

13 But we have no reason to think that the -- the end of
14 the first quarter deadline in the RFP for full implementation
15 wouldn't -- we will be satisfying that.

16 THE COURT: All right. So just let's assume that is
17 so. It is still a question mark to me because of the
18 challenges of the aggressive schedule.

19 What do the plaintiffs as a whole envision being put
20 up at a preliminary injunction hearing versus a trial on the
21 merits? And I know you don't have the evidence that you
22 have -- necessarily that you're trying to obtain in connection
23 with the trial on the merits. But what are we doing with the
24 trial on the merits on the issue that we have before us of the
25 DRE -- why are we doing that in January or February I guess is

1 my question. Especially -- and what are we doing with a
2 preliminary injunction hearing? Are you just basically asking
3 me in the end just to hear a short update of Dr. Halderman's
4 affidavit and one or two other things and say now, Judge, do
5 this and that is -- we think we're entitled now because there
6 is enough time? That was the whole reason why I raised my
7 concerns before we broke.

8 MR. MANOSO: Sure, Your Honor. I think one thing
9 that kind of first comes to mind is the notion of whether there
10 was, in fact, a compromise. And the forensic analysis that we
11 expect our experts to do after discovery -- that is obviously
12 something that we wouldn't have at the preliminary stage
13 because we have only been talking about vulnerabilities, and we
14 haven't really had the opportunity to look and see whether
15 there was a compromise.

16 What is the extent of the vulnerabilities beyond what
17 Dr. Halderman is able to access from the public facing, the
18 public information about these systems? So that is one of the
19 first categories that comes to mind.

20 THE COURT: You're talking about that at trial or --
21 on the trial on the merits or preliminary injunction?

22 MR. MANOSO: That would be at the trial.

23 THE COURT: Let's just talk about the preliminary
24 injunction though. Because that points out what is -- what is
25 it that is additional, supplemental, or anything else that you

1 are trying to do with this preliminary injunction hearing that
2 is -- that provides me any further information. I mean, I can
3 almost anticipate more what the defendants are going to say
4 than what you are going to say at this juncture that would make
5 this anything other than your making the same arguments you
6 have made before.

7 MR. MANOSO: Well, in some ways, that is kind of the
8 point, Your Honor, because the goal of this is to put the
9 defendants to their proof. Because as Your Honor pointed out
10 earlier, we don't know if there have been changes that have
11 been made. We don't know if any of the vulnerabilities that
12 were identified before have changed.

13 Our position, as we set forth in our papers, is that
14 there is no indication that there has been a change. Now, if
15 they come forward at the preliminary injunction hearing and
16 say, well, we've done this, this, and this and if they -- I'm
17 sure they will set that out in their papers -- we'll have an
18 opportunity to say, well, that doesn't fix this. That doesn't
19 fix that.

20 So it is not so much what we can add to the table.
21 because I agree with Your Honor I think some of what the
22 findings that you have made before, at least as it stands now,
23 we have no indication that the facts have changed. But the
24 burden should be on the defendants to come forward and say,
25 well, Your Honor, your concern was this. We have addressed

1 this with this. Your Honor, your concern was this.

2 THE COURT: So we're just going to be flying by the
3 seat of our pants, if I have a hearing the last week of June,
4 which is when you would like to do this, or the last week --
5 the second to the last week of July, we're going to be
6 basically flying by the seat of our pants by finding out what
7 the state has to say?

8 MR. CROSS: No, Your Honor. What I would think is it
9 will play out like it did before. There is briefing. They'll
10 come forward with their evidence, declarants, what have you.
11 And so Your Honor will have a full, robust record in the
12 papers. And then if there are live witnesses, it will play out
13 as it did before.

14 I mean, I guess the one thing, Your Honor, to be
15 candid I'm trying to understand is when Your Honor says we
16 haven't come forward with something new, there are new facts
17 that I think further support our position. For example,
18 problems that arose in the last election that show why DREs
19 themselves are unreliable and pose issues you don't have with
20 hand ballots.

21 THE COURT: I just didn't see them really
22 discussed --

23 MR. CROSS: Fair enough.

24 THE COURT: -- in this brief.

25 MR. CROSS: So I guess from my state of mind --

1 THE COURT: Tracingly so. But I'm not saying that
2 they weren't --

3 MR. CROSS: Understood.

4 THE COURT: They weren't referenced on some high
5 level generality.

6 MR. CROSS: Right. I mean, so our thinking going
7 into this is there are vulnerabilities that we believe the
8 evidence established last time. Those vulnerabilities,
9 irrespective of any developments, warrant a preliminary
10 injunction. They warrant relief from voters having to use this
11 system at any point going forward.

12 We didn't get that relief because it was just too
13 late in the day for something as massive as the midterms. So I
14 would respectfully submit, Your Honor, on the record we have
15 already submitted I think as a matter of law we are entitled to
16 that relief.

17 We do have additional evidence. We have additional
18 facts that we will develop. But I think it shifts to them to
19 be able to come in and say whether they have resolved those
20 vulnerabilities so they no longer warrant relief or they can
21 address the feasibility issue which seemed to be a pivotal
22 turning point in their direction last time. It wasn't really
23 the vulnerabilities. It was the feasibility. And feasibility
24 has swapped to the other direction. So --

25 THE COURT: But why then -- let's say that is exactly

1 as you say. Why would I reach the question of a statewide
2 injunction in a preliminary injunction hearing that is -- at
3 this point in time?

4 MR. CROSS: Because there are upcoming elections. I
5 guess candidly, Your Honor, that, I think, concern holds in any
6 preliminary injunction with a permanent injunction. The point
7 is you found we're likely to succeed on the merits. We think
8 that still holds. There is an irreparable harm for voters to
9 go forward --

10 THE COURT: Let me just be clear with you.

11 MR. CROSS: Okay. Sorry.

12 THE COURT: You are asking -- there is one set of
13 problems with small counties and cities. And we have got a few
14 larger ones as well. But I don't know how many people turn out
15 for some of these elections. Even like in Fulton County, it is
16 still one commission seat. So it is not -- unless it is a -- I
17 think it is just a particular district. It is not countywide
18 voting. So it is still not a huge number of people who vote.
19 That is one thing to factor in when the Court is determining
20 the equities and the harms and just the whole posture of the
21 case.

22 It is potentially something else to say I am entering
23 an injunction that is statewide so that come whatever the month
24 the primary is that if, in fact, they are not ready to roll
25 that my injunction has that impact. And I may not have

1 considered at that point what the impact of having -- of that
2 rollout would be. That is a whole other body of evidence, even
3 though you think it is a cinch. And it may be a necessity. I
4 agree. But it may not be. But the point is that it is --
5 there is additional evidence.

6 MR. CROSS: Well, I think Your Honor is going to get
7 up in that situation regardless because we have all agreed on a
8 trial in January. So if Your Honor takes no steps on the
9 relief we're seeking until a trial in January, then the state
10 is in a worse position because -- right? At least our thinking
11 was if we get it --

12 THE COURT: Well, I guess -- all right. So are you
13 prepared to present evidence -- statewide evidence about cost,
14 et cetera? Because let me just say that some of your argument
15 has been, hey, this is really a lot simpler for you to do on
16 a -- and for the state to do when you have these small amount
17 of elections. And it sort of is a -- gives us a little
18 laboratory of how this is going to be run. But you're not --
19 and all right. Let's say that is what -- that is so.

20 You've asked me and I'll have granted according to
21 your scenario an injunction though that goes further than that.
22 So I'll have to consider anything else as well -- everything
23 else relating to the state, even though it has been made out as
24 if this isn't so much, Judge. All you're doing is having to
25 deal with the -- what the impact and challenges are in

1 implementing it in these small election frameworks.

2 MR. CROSS: Right now we're taking them at face
3 value. Again, I think it is a question mark, and we have
4 serious doubts about this. But we take them at face value that
5 they will have a new system. It will not be this system come
6 time for the primaries.

7 So that is why we've briefed it to say this really is
8 focused on small elections because those are the only elections
9 the state has represented will be on the current system.

10 I mean, I guess what I would say, Your Honor, is Your
11 Honor has discretion to figure out what the right result and
12 the equities are. So at the very least, you could issue an
13 order that says for the 2019 elections, no DREs, here is the
14 scope of relief. And we can determine whether there's broader
15 relief as we get closer to the primaries. There is January.
16 We'll all be in trial.

17 That certainly is not what we want. But Your Honor
18 has the latitude. So you are not in a box where it is an all
19 or nothing --

20 THE COURT: So what is then the 2000 -- the March --
21 what is the January trial on the merits though at that point,
22 if, in fact, they have selected another -- this other system,
23 which you may be challenging through one route or another? But
24 what -- what is the focus if not on the DREs which are -- is it
25 irrelevant if they have at that point moved on to the ballot --

1 I'm sorry.

2 MR. RUSSO: BMDs. Ballot marking --

3 THE COURT: Right. Thank you -- ballot marking
4 machines?

5 MR. RUSSO: Device.

6 THE COURT: Device.

7 MR. CROSS: We're getting there. Just call them
8 BMDs.

9 MR. RUSSO: We know what you're talking about.

10 THE COURT: The BMDs. Is it irrelevant? I mean --

11 MR. CROSS: I think it is irrelevant only at the
12 point at which it is implemented. Here is what you can
13 envision happening. They roll them out to some degree with
14 pilot programs over the next nine months or whatever it is. We
15 could get to January, and they may come in and say, here is our
16 system. We expect this to be fully in place for the primaries
17 by X date.

18 The problem is that may or may not happen. Right?
19 So to the mootness point, what the case law makes clear is your
20 case is not moot until the state has literally -- it has done
21 it. It has adopted it. And what we don't want to have happen
22 is they come in in January and say we're far enough along that
23 that is moot. But then suddenly it doesn't happen, and
24 everyone is voting on DREs in the primaries.

25 So, bottom line, our claims are relevant. The system

1 is unsecure until the point they have actually implemented
2 something and the public is voting on something different.

3 Does that answer --

4 THE COURT: Yes. So relative to the difference
5 between the Curling and the Coalition plaintiffs, are you
6 actually going to be prepared for a trial the last week in
7 June? Is that what you are --

8 MR. CROSS: I imagine it will be like before.
9 Probably a one-day. We can do it in a day like we did before
10 because it is just preliminary.

11 THE COURT: So what is your -- did you get an
12 opportunity to talk with Mr. Ichter or Mr. Brown? I know
13 Mr. Powers is here, but he has not been on the case as long --
14 about this difference between your respective positions and how
15 you think the Court should resolve that? I can't split the
16 baby here because I'm just not going to be here to be able to
17 do it.

18 MR. CROSS: So Bruce -- and there was a lot -- in
19 fairnesses to the Coalition plaintiffs, there was a lot that
20 went back and forth over the last probably six weeks -- Bruce
21 and I in particular getting aligned -- and there was a point in
22 which we were, like I say, pretty much aligned on the relief.
23 I think we're still aligned on the basic propositions of the
24 relief, hand marked ballots, no DREs.

25 It wasn't until, I think, yesterday or Wednesday

1 where they announced to us for the first time that they wanted
2 to push this to June 21st.

3 THE COURT: To July?

4 MR. CROSS: Well, their filing would be June
5 something, late June, and then the hearing later. And as you
6 saw in the prior schedule, we had all agreed on the schedule we
7 originally submitted weeks ago that it would be filed this
8 week. So a lot of compromise and effort went into that. Cary
9 reached out since Bruce is traveling to say they wanted to push
10 it to late June. And as I said before --

11 THE COURT: To July? They wanted to push it to July?

12 MR. CROSS: The hearing to be in July. I'm talking
13 about their filing of their actual motion.

14 THE COURT: I see.

15 MR. CROSS: I very much remember Your Honor's
16 admonition that we could have filed separately. And I'm not
17 making that mistake again.

18 MR. POWERS: I think our position is that, you know,
19 while we based on our understanding of the Court's schedule
20 think that a July hearing allows for the opportunity for Your
21 Honor to digest the briefing, hold the hearing, issue an order,
22 and have the local jurisdictions implement that order in time
23 for the upcoming elections --

24 THE COURT: Who other than Fulton had a September
25 election?

1 MR. POWERS: That is correct.

2 THE COURT: I mean, were any of the other
3 jurisdictions having an election other than Fulton?

4 MR. RUSSO: I believe they did.

5 MR. CROSS: Your Honor, if it helps, while they look
6 at this, just to be clear, we don't have an objection to a July
7 hearing as long as we're not going to hear an argument from
8 anyone and it is not going to put Your Honor in a position to
9 say it is too late.

10 THE COURT: Well, I'm just --

11 MR. CROSS: That is my --

12 THE COURT: I understand that. That is why I'm
13 asking you about -- they are not trying to get that September
14 election, but you are. So that is why --

15 MR. CROSS: Right.

16 MR. RUSSO: So the statute -- those would be SPLOST
17 elections. So we wouldn't have necessarily notice of all of
18 those yet. I think right now there is one.

19 MR. MILLER: I'm aware of -- I think we've known
20 anecdotally of maybe a couple. There is one for -- yes, that
21 is the Fulton commissioner.

22 MR. RUSSO: One for sure.

23 MR. MILLER: At this point, we wouldn't have been
24 noticed of a SPLOST election. So, you know, a county -- if I
25 was actively involved in Hall County politics or wherever, I

1 would know that my SPLOST election is coming up. But they
2 wouldn't have noticed the Secretary of State.

3 MR. POWERS: Aren't there more than 100 county SPLOST
4 elections currently scheduled for November?

5 THE COURT: No. It was a very shorter list. I mean,
6 the state did a good job of identifying what the last
7 comparable elections were in the last comparable off year. And
8 there were a lot more elections than are currently in their
9 Exhibit A or 1.

10 MR. RUSSO: And -- yeah.

11 THE COURT: Maybe that will expand, and maybe it
12 won't. I mean, there can be any -- to the extent that there
13 were a lot of SPLOST elections before, I mean --

14 MR. RUSSO: There are SPLOST elections.

15 THE COURT: That could fluctuate with what is
16 happening, frankly, with public education and funding.

17 MR. RUSSO: Yeah. I mean, we don't know how many
18 more there will be, of course. We do know that there is an
19 intervening effect though with moving into discovery in the
20 case right now and then trying to do a preliminary injunction
21 hearing.

22 I mean, there are affidavits by a number of experts
23 who I think we would probably try to depose before that
24 hearing. Either way, though, there's some impact on how we try
25 to move forward quickly with discovery while also trying to

1 prepare for essentially a mini trial on the preliminary
2 injunction now. So I think there is that issue.

3 There is also -- the point that you've I think hit on
4 a number of times already with municipalities -- and if you
5 enjoin us, I don't know if you can reach the municipality or
6 whether you could. They have their own authority under the law
7 to run their own elections the way they would like to.

8 Some municipalities -- we have reached out to GMA,
9 the Georgia Municipal Association, to have them pull their
10 municipalities. We're aware of seven or eight municipalities
11 that actually own their own DRE machines and run their own
12 elections. So, you know, those --

13 MR. MILLER: To clarify, we're aware of 141 that run
14 their own elections. Now, the information they provided us as
15 to how they run those elections has just been a voluntary
16 survey, frankly, within the last week after we got -- before we
17 knew the preliminary injunction was being filed after we got
18 the notice of the Coalition plaintiffs filing as to state
19 defendants' role in municipal elections.

20 Since then, we have kind of learned about a broad
21 group of folks that either own their own DREs, contract with
22 the counties to run their elections, lease a DRE from the
23 county but still conduct their own election, or operate any
24 number of other voting systems.

25 We have identified at least two municipalities at

1 this point -- this is only out of maybe a dozen that we've
2 gotten responses from -- that run lever machines. So these
3 are -- it is a Shoup lever machine.

4 MR. TYSON: We had to look that one up.

5 MR. MILLER: It is not as -- not nearly as uniform as
6 the elections conducted. So if they contract with the county,
7 they have to run it by DRE by law. In fact, by law they have
8 to run it by DRE with the county. But if they are doing their
9 own, it is truly kind of all over the place.

10 We have attempted to provide as much information to
11 the plaintiffs at each point that they have asked with respect
12 to kind of what we know. But as we have expressed before, this
13 isn't something that the Secretary or the state defendants
14 actually run themselves.

15 THE COURT: Well, except that you do -- you prepare
16 the ballot; right?

17 MR. RUSSO: It depends on the election.

18 THE COURT: If it is one where the county is using
19 the --

20 MR. MILLER: Respectfully, it is not always correct
21 that the Secretary prepares the ballot if it is a local
22 election. In that case, actually the statutory authority is on
23 the municipal superintendent to create and provide the ballot.
24 To the extent there is help or if it intervenes with a state
25 election at that point or otherwise a county conducted one,

1 then we would be involved. Yes.

2 THE COURT: If it is a county conducted one -- I
3 mean, I'm just trying to figure out maybe should we be just
4 focused on the county managed elections if that is really --
5 just to basically cut to the quick about this. Because it
6 would seem like it would be simpler.

7 MR. MANOSO: Your Honor, I think that is right. And
8 we would never -- we don't intend to bring the Court within the
9 purview of small municipalities that have small elections. We
10 understand that we might not reach those. But, again, our
11 point is that it seems like at least for the majority of the
12 elections -- I don't have the exact number -- that it is the
13 state through the counties that would have the role that would
14 be enjoined. And so in our view it is better to have some
15 relief to a large number of voters than have no relief at all.

16 And the fact that some small municipalities might not
17 be reached doesn't mean that no voter should get any added
18 protection in this elections cycle.

19 MR. POWERS: If I may, from the Coalition plaintiffs'
20 perspective, I think there is obviously a dispute here about
21 the relative role of the state in conducting some of these
22 municipal elections. And from our perspective, that is
23 something we intend to use the next couple of weeks -- well, if
24 we had a couple of more weeks before filing the PI motion to
25 develop some evidence and present that as part of our briefing.

1 Because obviously the burden on the -- the burden on the
2 counties and municipalities is going to be perhaps the main
3 issue here. And we want to provide as many facts on that to
4 Your Honor as possible.

5 THE COURT: Well, I think you would have to -- if we
6 have a preliminary injunction hearing in July, I think that the
7 plaintiffs would have to likely give up the thought of being
8 able to affect Fulton County in that time frame.

9 MR. CROSS: That is our concern. And Fulton County
10 is arguably the biggest, most significant county.

11 THE COURT: I know. But it is just one district I
12 thought. Isn't -- it is one county -- just -- I mean -- not to
13 say that is not a significant seat.

14 How many commissioners are there?

15 MS. BURWELL: There are seven. This is district six.

16 THE COURT: It is September?

17 MS. BURWELL: 17.

18 MR. CROSS: Does that election have to happen in
19 September? Or is there a reason it can't be moved until later?

20 MS. BURWELL: Fulton County doesn't have any control
21 over that. The Board of Registrations and Elections determines
22 when they have the capability of handling an election.

23 THE COURT: Is this somebody who has vacated his or
24 her seat?

25 MS. BURWELL: Commissioner Darnell passed away.

1 THE COURT: Oh, that's right.

2 MR. RUSSO: Now, of course, we have people who are
3 not being represented on the commission now. So I think that
4 is the reason they would try to have this as early as possible.

5 MR. CROSS: I see.

6 THE COURT: Well, I'm going to think about it. But I
7 think that -- I think you have likely enough time but not for
8 Fulton County. I mean, I still have to have some weeks to look
9 at -- to write a coherent order. I might not. But --

10 MR. CROSS: The last time Your Honor wrote a very
11 coherent order in a few days.

12 THE COURT: Yeah. But I never left my chair.

13 MR. MANOSO: It is hot outside in July.

14 THE COURT: I never left my chair.

15 MR. RUSSO: Your Honor, we'll, of course, obviously
16 respond to this in detail. But there are steps that the state
17 has taken. You have raised this point before. New security
18 measures. And we'll lay that out in our response. But the
19 circumstances are different now than they were.

20 THE COURT: Okay. All right. Well, let me think
21 about it and get back to you on Monday afternoon about it. But
22 you would -- if you go to November -- to July, I still would
23 want to see a briefing schedule that wasn't too jammed up.

24 MR. MILLER: Is Your Honor referring to the Coalition
25 plaintiffs' schedule?

1 THE COURT: Yes.

2 MR. POWERS: Certainly we're willing to be flexible
3 on that, Your Honor.

4 MR. MILLER: I think as far as the state's concern on
5 that is obviously it is the plaintiffs' prerogative if they
6 want to file a preliminary injunction. But the practical
7 aspect into the intervening effect of us trying to get to a
8 trial on the merits within a reasonable time frame and then
9 also as far as the dates -- I think one of the proposed dates
10 had us responding on July 5.

11 THE COURT: I saw that.

12 MR. POWERS: We'll obviously be flexible on that.

13 THE COURT: File 6/21, 14 days falls on July 5th.
14 Someone will be unhappy, or their family will be.

15 MR. MILLER: My wife.

16 THE COURT: What is happening with the baby?

17 MR. RUSSO: She is ready to rock and roll in a few
18 days. The 5th is the date.

19 THE COURT: Well, that is great. Someone will be
20 very unhappy.

21 MR. RUSSO: Well, June 5th.

22 THE COURT: Do you have other children?

23 MR. RUSSO: Yes, ma'am, I do. One other. She's very
24 excited.

25 THE COURT: How old is she?

1 MR. RUSSO: Almost four.

2 THE COURT: Great. That's wonderful.

3 All right. Well, I will think about it. Is there
4 anything else we should address?

5 MR. POWERS: Not for us.

6 MR. CROSS: No, Your Honor.

7 THE COURT: The thing is if you're going to want to
8 take their depositions I will say of anyone -- if they are
9 going to testify, they are going to, of course, want to take --
10 find out about your security measures. And you should get
11 that -- get that protective order in place as soon as possible,
12 so --

13 MR. CROSS: We should be able to do the protective
14 order next week. They proposed one, the Common Cause one.
15 That is fine.

16 THE COURT: All right. Is there -- are there any
17 other topics we should address?

18 MR. TYSON: Not for us.

19 THE COURT: Very good. Well, thank you very much. I
20 think this was productive. And I will do it again. I know
21 that your clients like to attend, and I don't want to foreclose
22 public observation of the proceedings. But I really saw this
23 as a working meeting. And sometimes it is what you have to do
24 in order to get people to actually move a case forward.

25 MR. CROSS: Your Honor, I do think it is worth noting

1 in fairness to the defendants the meeting next door was quite
2 productive. So I think getting folks together definitely helps
3 even when Your Honor is not here.

4 THE COURT: Right. Well, obviously you got more done
5 without me. But that -- I just was looming up there.

6 MR. MANOSO: We saved the fun stuff for you.

7 THE COURT: But, you know, you are welcome, of
8 course, to use the court any time if it is helpful to you.

9 MR. RUSSO: Thank you.

10 THE COURT: Then I can come down if it is helpful to
11 you at some point that you just have something you think you
12 would want to be able to confer about. You-all have law
13 offices. But if you think you're going to need me at some
14 point, even if you don't end up needing it, it can be
15 productive. And I'm happy to facilitate that.

16 MR. KNAPP: The prospect of your appearance is very
17 positive in resolving disputes.

18 MR. CROSS: Or for any purpose.

19 THE COURT: You know, I have a colleague who is in
20 the Northern District of California, and I think she is much
21 more -- she's extraordinarily effective on having meetings.
22 And she really actually -- she requires people to, like the way
23 Judge Owens used to do, get her permission essentially before
24 they file summary judgment motions. But when they come in and
25 tell her about the case, she will say, well, it might make

1 sense on this count and that count. It doesn't -- I'm telling
2 you that you are losing on this one. But she often makes food
3 available -- so that is a whole other concept -- and definitely
4 air-conditioning.

5 All right. Thank you. Have a good weekend.

6 **(The proceedings were thereby concluded at 1:51**
7 **P.M.)**

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C E R T I F I C A T E

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3 UNITED STATES OF AMERICA
4 NORTHERN DISTRICT OF GEORGIA
5

6 I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of
7 the United States District Court, for the Northern District of
8 Georgia, Atlanta Division, do hereby certify that the foregoing
9 81 pages constitute a true transcript of proceedings had before
10 the said Court, held in the City of Atlanta, Georgia, in the
11 matter therein stated.

12 In testimony whereof, I hereunto set my hand on this, the
13 4th day of June, 2019.
14
15
16

17 *Shannon R. Welch*

18 _____
19 SHANNON R. WELCH, RMR, CRR
20 OFFICIAL COURT REPORTER
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