

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 TELEPHONE CONFERENCE PROCEEDINGS**

13 **BEFORE THE HONORABLE AMY TOTENBERG**

14 **UNITED STATES DISTRICT JUDGE**

15 **AUGUST 27, 2019**

16 **10:33 A.M.**

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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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(...cont'd...)

1 (...cont'd....)

2

3 **FOR THE OBJECTORS CARE IN ACTION, INC., ET AL:**

4

DARA LINDENBAUM
SANDLER REIFF LAMB ROSENSTEIN & BIRKENSTOCK, P.C.

5

6

KURT G. KASTORF
THE SUMMERVILLE FIRM, LLC

7

8

ALSO PRESENT:

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J. ALEX HALDERMAN, Ph.D.
MARILYN MARKS

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P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; August 27, 2019.)

COURTROOM DEPUTY CLERK: Good morning, everyone.
We're here for a teleconference in Curling vs. Raffensperger,
Civil Action Number 17-CV-2989.

Beginning with the Curling plaintiffs, would counsel
please make their appearance for the record.

MR. TYSON: Mr. Martin, this is Bryan Tyson for the
state defendants. I have seen a couple of emails from
Mr. Cross and Mr. McGuire that the access code was not working
correctly for them. So I'm not sure there is anybody from the
plaintiff that is on the phone.

COURTROOM DEPUTY CLERK: Okay. Thank you. Let me go
and check that out real quick.

(There was a brief pause in the proceedings.)

LAW CLERK COLE: Counsel, this is Ms. Cole. Is
everyone on the line now?

MR. CROSS: David Cross is on for Curling plaintiffs.
I think our expert, Dr. Halderman, may dial in any minute. I
just sent him the correct code.

(There was a brief pause in the proceedings.)

COURTROOM DEPUTY CLERK: Okay. Let's try this again.
We are here for the teleconference in Curling vs.
Raffensperger, Civil Action Number 17-CV-2989.

Beginning with the Curling plaintiffs, would counsel

1 make their appearance for the record.

2 MR. CROSS: Good morning. This is David Cross from
3 Morrison Foerster. And also on the line is Dr. Alex Halderman.

4 MR. BROWN: This is Bruce Brown for the Coalition
5 plaintiffs.

6 MR. McGUIRE: This is Robert McGuire for Coalition
7 plaintiffs, as well. I believe Marilyn Marks is on the line,
8 as well, for the Coalition as the executive director.

9 COURTROOM DEPUTY CLERK: Thank you.

10 State of Georgia?

11 MR. RUSSO: Vincent Russo with Robbins Ross Alloy
12 Belinfante Littlefield.

13 MR. TYSON: And Bryan Tyson with Taylor English,
14 along with Bryan Jacoutot.

15 MR. RUSSO: And I have here with me Kimberly
16 Anderson, Josh Belinfante, Carey Miller, and Brian Lake.

17 THE COURT: Thank you.

18 COURTROOM DEPUTY CLERK: Fulton County?

19 MS. RINGER: Good morning. Cheryl Ringer and David
20 Lowman.

21 COURTROOM DEPUTY CLERK: Thank you.

22 Did anyone else just join recently?

23 MR. SPARKS: Yes. This is Adam Sparks with Krevolin
24 & Horst for the Curling plaintiffs.

25 MR. KASTORF: This is Kurt Kastorf with the

1 Summerville Firm. I represent some nonparty subpoena targets
2 who are also plaintiffs in the Fair Fight litigation.

3 COURTROOM DEPUTY CLERK: I'm sorry. State your name
4 again, please.

5 MR. KASTORF: Kurt Kastorf.

6 COURTROOM DEPUTY CLERK: Spell your last name,
7 please.

8 MR. KASTORF: K-A, S like Sam, T like Tom, O, R like
9 Roger, F like Frank.

10 THE COURT: This is Judge Totenberg. Is that -- has
11 everyone on the phone announced themselves?

12 MS. LINDENBAUM: This is Dara Lindenbaum. I also
13 represent a number of the third parties that received
14 subpoenas.

15 COURTROOM DEPUTY CLERK: I'm sorry. State your name
16 again and spell your last name, please.

17 MS. LINDENBAUM: Dara Lindenbaum,
18 L-I-N-D-E-N-B-A-U-M.

19 THE COURT: Okay. I'm going to need everyone who is
20 a third party to immediately email, even if you are just from
21 your phone, Mr. Martin and indicate your name and who exactly
22 you are representing. I can't proceed with your just not
23 having identified yourself in advance. And I'm not expecting
24 you to put it on the docket at this late point, though I think
25 it would have been a courtesy to do so and appropriate.

1 But I need you to go ahead and -- do you have
2 Mr. Martin's email?

3 MS. LINDENBAUM: Yes.

4 THE COURT: So each one of you who is representing a
5 third party -- one or more third parties needs to go ahead and
6 email him this moment. Indicate your name, your law firm, and
7 who you are representing specifically. Not just a third
8 party -- you can't just say a third party.

9 MR. KASTORF: Understood, Your Honor.

10 THE COURT: Are there any other -- I have now had two
11 attorneys identify themselves as having been served with a
12 subpoena. And I'm not really sure what the purpose of your
13 presence is on the phone calls. But I'm going to start with
14 you. So that is why I want to know exactly who you are.

15 Is there anyone else here representing a third party?

16 Okay. All right. Meanwhile, of the defendants --
17 state defendants' counsel who identified themselves, the only
18 one I actually heard clearly was Mr. Tyson. I heard originally
19 Mr. Russo clearly. But not or maybe -- maybe not. But there
20 was a lot of electricity like you were on a -- are you-all on a
21 speakerphone? Mr. Belinfante and Mr. Russo and at least one
22 other was unclear.

23 MR. RUSSO: Yes, ma'am. This is Vincent Russo. Is
24 that -- can you hear me right now?

25 THE COURT: I can hear you. But there is a lot of

1 static. Are you on a speakerphone?

2 MR. RUSSO: We are on a speakerphone in our
3 conference room. And I'm getting a little bit of echo also.
4 We can try to call back in.

5 THE COURT: All right. All right. That would be
6 great. We might not get better than that. I can hear you, but
7 it is just more annoying than indecipherable.

8 MR. RUSSO: Yes, ma'am. We'll call right back.

9 THE COURT: Thank you very much. We're going to wait
10 here until we get the emails from the counsel for the third
11 parties.

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

13 THE COURT: That's better, Mr. Russo. Thank you very
14 much.

15 MR. RUSSO: Yes, ma'am.

16 Do you need me to clarify who all is here with me?

17 THE COURT: No. We could hear it. It was going to
18 make it very unpleasant to listen to you, which we have enough
19 communication issues without -- without your communication
20 issues.

21 All right.

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

23 MR. KASTORF: Your Honor, this is Kurt Kastorf, one
24 of the attorneys representing the third-party subpoena targets.
25 I just sent an email to Mr. Martin with my name and who I

1 represent, and it also included Dara Lindenbaum, who is the
2 other counsel on the call representing those -- the subpoena
3 targets named in that email.

4 THE COURT: So you are saying that you included the
5 information for the other third-party defendant also?

6 MR. KASTORF: Yes, Your Honor. Ms. Lindenbaum and I
7 are both representing the same set of third-party subpoena
8 targets.

9 THE COURT: I see.

10 MR. KASTORF: So there were subpoenas sent in this
11 litigation to the plaintiffs -- the named plaintiffs in the
12 Fair Fight litigation in front of Judge Jones. We received an
13 email from Mr. Martin notifying us of this telephone
14 conference. So we joined in case any issues related to those
15 subpoenas would be discussed.

16 If the Court doesn't need us for anything, we are
17 happy to get off of the phone. But that is why we called.

18 THE COURT: All right. So I'm sorry. Who served you
19 with a subpoena?

20 MR. KASTORF: The defendants in this litigation.
21 I'll need to check the subpoenas to see if it is each of the
22 named defendants -- but served subpoenas on the various named
23 plaintiffs in the Fair Fight litigation. And then we filed
24 objections on behalf of each of those plaintiffs. Those are
25 Docket Entries 515 through 521 on this docket. And there

1 hasn't been any further movement on that since we filed the
2 objections.

3 THE COURT: All right.

4 MR. BELINFANTE: Your Honor, this is Josh Belinfante.
5 It was the state defendants that did so. Just for some
6 background, as part of that, we received the joint litigation
7 document. And we had notified the third-party subpoena
8 recipients that we would put a placeholder on everything until
9 after the preliminary injunction hearing. And we have not
10 moved to do anything with the subpoenas since.

11 As we are now trying to determine what is the scope
12 of discovery going forward, there is no immediate deadline
13 there given where things stand currently.

14 THE COURT: But you sent them a subpoena in this
15 case, not in the Fair Fight case?

16 MR. BELINFANTE: That's correct.

17 THE COURT: And is there anything that Mr. Kastorf or
18 Ms. Lindenbaum need to be present for in this phone conference?

19 MR. BELINFANTE: From the state's perspective,
20 depending on what the Court, you know, provides in terms of
21 guidance on the future scope of discovery, I don't think so.
22 We have actually worked relatively well with the third-party
23 subpoena recipients. And as of now, there is nothing that we
24 are saying compels them to produce anything.

25 So depending on how this Court rules, then we may

1 have to go through a meet-and-confer and then revisit the
2 issue. But even that, Your Honor, has not been fully decided
3 as the joint defense or -- excuse me -- the joint litigation
4 document has been produced. And that would raise additional
5 issues that we're, frankly, not ready to address today.

6 THE COURT: All right. Is there any reason from the
7 perspective of the -- any of the plaintiffs that Ms. Lindenbaum
8 and Mr. Kastorf need to participate today?

9 MR. BROWN: This is Bruce Brown. No, Your Honor.

10 THE COURT: From the Curling plaintiffs?

11 MR. CROSS: No, Your Honor.

12 THE COURT: Is that Mr. Cross?

13 MR. CROSS: Yes. Sorry.

14 THE COURT: All right. Mr. Kastorf and
15 Ms. Lindenbaum, you are not maintaining that you need to
16 participate, I gather?

17 MR. KASTORF: No. We called in because we received
18 the telephone conference notice.

19 THE COURT: All right. I think that it simply is on
20 the docket. That is the -- it is the notice on the docket as a
21 whole.

22 All right. Well, then you are excused from
23 participation, and we'll try to get -- in the future make clear
24 who is needed in a more specific way then.

25 Thank you very much for participating in this long

1 introduction and piece of confusion. I appreciate it.

2 MS. LINDENBAUM: Thank you, Your Honor.

3 THE COURT: All right. So back to square one,
4 you-all have filed lots of different things about what you want
5 to talk about today. So it sort of has a little bit ballooned.
6 It likely will take a little more time than I initially
7 envisioned.

8 I think that the most fundamental question here is
9 this about where the case is moving forward and what the status
10 of discovery is and how -- just the welter of disputes that
11 exist. Obviously I issued a very long and comprehensive order.

12 Your scheduling order anticipated that there would be
13 still another trial on the merits in January and a final
14 decision. It is hard to imagine, frankly, any more litigation
15 resources being devoted to the current dispute in terms of the
16 DRE GEMS system as currently configured for a variety of
17 reasons, but not the least of which is that I think that the
18 Court has exhausted the resources of looking at this. And I
19 don't think there is more useful information for purposes of a
20 trial or more that would be achieved.

21 So I'm trying to understand what would be the purpose
22 of further discovery at this juncture about this old system. I
23 understand that there may be some in connection with
24 implementation of a remedy. But that is the first sort of
25 piece of confusion. And it is really, frankly, for both sides.

1 On one hand, I see that the plaintiffs are trying to
2 want discovery more on the DRE equipment. And on the other
3 side, the defendants appear to want to do more discovery on
4 Dr. Halderman's card that he used in the first preliminary
5 injunction hearing.

6 And so I'm just wondering where you-all are going on
7 both sides because it is hard for me to conceptualize what we
8 would be dealing with in January even if I said we could
9 actually proceed in January at this point given the amount of
10 information that already -- and evidence that has already been
11 filed and the fact that in some way or form something is going
12 to move forward.

13 Now, I understand that the plaintiffs and petitioners
14 who have challenged are seeking to challenge the new system.
15 But I'm just asking about this system. Are you-all
16 conceptualizing that you would actually go forward and seek a
17 full trial on the merits after what we've already gone through?

18 MR. CROSS: Your Honor, this is David Cross for the
19 Curling plaintiffs. I think for the Curling plaintiffs -- and
20 Mr. Brown and Mr. McGuire can obviously speak for their
21 plaintiffs. I think the short answer on that is no, with a
22 caveat, which is we have asked the defendants a number of times
23 a couple of important questions that they have declined to
24 answer.

25 One is will they stipulate to the preliminary

1 injunction as a permanent injunction. If they will, then I
2 think that certainly resolves any need for a trial on the
3 merits. But if they are going to refuse to do that, then I'm
4 not sure where we go. There would have to be some further
5 proceeding.

6 I certainly agree Your Honor doesn't need any further
7 evidence to turn that into a permanent injunction. But until
8 we have a permanent injunction that is either stipulated to by
9 defendants or is entered by the Court, then it is a live case.
10 It has to go forward.

11 And if they are going to take the position to keep
12 open the possibility that they will oppose a permanent
13 injunction, we have to get discovery to be in a position to
14 respond to whatever defenses they are going to assert.

15 And related to that, of course, is whether they are
16 going to appeal. They have not been willing to answer that
17 either. And that, of course, puts them in the permanent -- I'm
18 sorry -- the preliminary injunction becomes an open question if
19 they are going to exercise their appeal on that as well. So
20 the first point I would make is: As long as they are keeping
21 their rights open, the case is live and it goes forward.

22 The second point I would make, Your Honor, is there
23 are aspects of Your Honor's order that are going to require
24 some amount of cooperation and discovery between the parties.
25 Dr. Halderman's declaration -- and I apologize. We got it in

1 as quickly as we could. I know it went in late last night.

2 But if you have had an opportunity to just peruse
3 that --

4 THE COURT: I read it.

5 MR. CROSS: -- he identifies -- great -- he
6 identifies a number of areas where we think some amount of
7 discovery will be needed to make sure that prospective relief
8 is effected.

9 Then the last point I would make, Your Honor, is we,
10 of course, understand Your Honor's ruling on the 2019
11 elections. But I would just offer this. It still remains the
12 fact that no one has ever examined the system despite
13 Dr. Shamos himself emphasizing a number of ways that that needs
14 to be done before the election.

15 And so our concern is from a prospective basis just
16 imagine the situation where the system actually is compromised
17 and no one knows because no one will look. We believe we do
18 have a fundamental constitutional right to continue with that
19 discovery until we've confirmed that.

20 The problem is you've got the Secretary of State
21 repeatedly telling the public that they have complete
22 confidence in this system and the voters should have confidence
23 in the system and it will get used this year.

24 The reality is that the Secretary of State does not
25 have confidence in the system because, if he did, he would

1 allow Dr. Shamos or Ms. Payton or someone to examine it. We
2 think that it is important. As Your Honor pointed out in your
3 own order, as Dr. Shamos emphasized, voter confidence is
4 critical.

5 They have no basis to oppose the examination in a
6 live case. And if they are right that the system is fine, then
7 it is a win-win. Right. We'll confirm that. Voters will
8 confirm that. They will confirm that. And it can get done
9 before the 2019 election.

10 If they are wrong, then it doesn't matter what timing
11 is left. The system cannot be used. And I would hope we would
12 all agree on that.

13 So it seems there are only two paths forward on this.
14 One is: They are right. We do this. We get it done, and
15 everybody wins because voter confidence is confirmed. Or they
16 are wrong. And no matter if we figure that out a week before
17 the election, everyone would have to agree that the system
18 could not be used if it is compromised in a way that affects
19 the outcome.

20 And so that is where we come down on this, Your
21 Honor. It is a live case with prospective relief on the
22 election that is going forward. And to this day, no one has
23 done what their own experts said needs to get done for voters
24 to have confidence or even know that the results are going to
25 count in the way that they are intended.

1 MR. BROWN: Your Honor, this is Bruce Brown for the
2 Coalition plaintiffs. We would substantially agree with
3 Mr. Cross' statement. You introduced -- Your Honor, you
4 introduced the issue by referencing the implementation issues
5 that are still very much alive. And this is complex, of
6 course, significant injunctive relief that has a lot of
7 different aspects to it. The Court has a lot of flexibility in
8 fashioning relief to meet the equities in the underlying facts.

9 There are open issues with respect to whether the new
10 system will be certified and will be deployed in time, which
11 issues will aggravate the problems with the existing underlying
12 system as being deployable with hand-marked paper ballots.

13 So we believe that -- the other point that I would
14 make is that the state's position is not that this discovery
15 that is being sought is burdensome on the state because it is
16 not. This is forensic discovery, whether it is with respect to
17 the FBI image server, an issue that we had hoped to have to you
18 by this conference but was delayed -- and we will submit that
19 as soon as we can under the joint dispute resolution process --
20 or the forensic discovery of the servers. This is efforts that
21 will be undertaken by the plaintiffs.

22 And what we're asking of the defendants is simply to
23 allow us to do it for the most part. That is not all the
24 discovery. But that is sort of the most urgent right now that
25 Mr. Cross has been referring to.

1 And so we agree about the nature of this preliminary
2 injunction. It has been and is a material alteration of the
3 relationship between the parties. And in many ways, if it is
4 not like a TRO, it resembles much more a permanent injunction
5 already in practical effect. And so the utility of a trial on
6 these issues -- a formal trial is uncertain.

7 However, given the implementation issues and the
8 other issues that Mr. Cross mentioned, particularly the lack of
9 burden on the defendants, this kind of discovery needs to go
10 forward at this time.

11 THE COURT: All right.

12 MR. RUSSO: Your Honor, this is Vincent Russo for the
13 state defendants. You asked where is this case going and the
14 status of discovery. And I think that from our perspective
15 there is no need to expend additional resources on further
16 discovery related to the DREs and the GEMS.

17 Your order has laid out what we can and cannot do,
18 minus the need for clarification on a few issues that we have
19 raised, which are really more in terms of what we need to
20 provide to you. There is in our mind nothing else to do here.
21 And the order is the order.

22 Compliance with the order though does not require
23 additional discovery. So, you know, while I understand that
24 the plaintiffs are continuing to go on a mission to get more
25 information and would like to be able to review everything,

1 there is just no need for that at this point in the case.

2 And we have a motion to -- for leave to amend to file
3 a third amended complaint as to the BMDs. That is also on the
4 table for consideration. The case is going and appears to be
5 going in that direction. But, you know, there is no need for
6 us to continue to have to address these other -- these other
7 discovery issues. We had the hearing. And, you know,
8 compliance with the order does not require further discovery.

9 As to your question about Dr. Halderman and our
10 request for information about the memory card that was produced
11 to state defendants, that was simply part of the email chain
12 and could have -- should have just been ignored. That was more
13 a result of us leaving that in the email chain instead of
14 blacking it out. But it was also something that we had
15 requested prior to the preliminary injunction order being
16 issued. So that is no longer an issue at this juncture.

17 THE COURT: All right. Well, it seemed to me that
18 there were two major strands that the plaintiffs were focusing
19 on. One was the contention that because the elections still
20 are going on and the case is alive, even if I have already
21 ruled as to appropriate -- the relief I'm willing to grant at
22 this juncture, that you -- the plaintiffs' counsel still have
23 an obligation and right to complete discovery with respect to
24 the functionality and potential compromise of the hardware and
25 equipment, if I hear you correctly. And the second issue was

1 with respect to implementation of the remedy.

2 Is that a fair summary?

3 MR. CROSS: This is David Cross. Yes, I think that
4 is fair, Your Honor.

5 MR. BROWN: Yes, Your Honor.

6 THE COURT: Well, I think that I am going to just --
7 before we proceed, I'm going to take a few minutes and just go
8 offline. And I guess, you know, I really didn't know what your
9 position was. So I need to think about what you are all saying
10 for a moment. And then we'll resume.

11 All right. So it will be a few minutes.

12 MR. RUSSO: Your Honor, this is Vincent Russo. If I
13 could just clarify --

14 THE COURT: Sure.

15 MR. RUSSO: -- now that the plaintiffs have clarified
16 their two positions. Just regarding Number 1, on the
17 contention that elections are still going on and so discovery
18 is needed, you know, we don't see what relief the discovery
19 would lead to at this point in light of the preliminary
20 injunction -- in the light of the preliminary injunction order.

21 As to the implementation of the remedy, the order
22 requires certain updates and filings to be made. And that is
23 merely compliance with the order and not necessarily the need
24 for discovery. And if their amended complaint goes forward,
25 then we'll address these BMD issues when the time comes.

1 MR. CROSS: Your Honor, this is David Cross. Could I
2 just very briefly respond to the first point?

3 THE COURT: Yes.

4 MR. CROSS: The reason why the discovery is important
5 on the examination that we've requested -- and there are two
6 respects to it. Mr. Brown pointed out one, which is the KSU
7 server that we have been trying to get a copy of. And the
8 other, of course, is the GEMS servers and the DREs that are
9 still in use -- is because there is an upcoming election.

10 Again, we understand the order that Your Honor
11 entered. But that was on a particular record that we were able
12 to put together in the time that we had. And Your Honor may
13 recall that we did table the issue of the broader GEMS and DRE
14 examination when we first raised it just as a matter of time
15 and necessity to get what we could get to move forward in the
16 time frame that we had.

17 I think the reality is: As we sit here, no one can
18 say that this system is not compromised. And we have
19 prospective relief. So if Dr. Halderman can do the analysis
20 that Dr. Shamos has emphasized is needed before these machines
21 are used again, he could do that relatively quickly. He is on
22 the line, so he can talk to you about what that might involve.
23 Then we can at least figure that out.

24 And to the point that Mr. Russo made, I just think it
25 is not accurate as a matter of fact or law to say that there is

1 no relief to be had. Imagine the worst case scenario that
2 Dr. Halderman finds that there is malware that is actually
3 influencing the elections in the State of Georgia on the
4 existing system.

5 With all due respect, Your Honor, I would hope Your
6 Honor would agree that your existing order would not preclude
7 relief that would be vital under the Constitution in that
8 circumstance. The state would figure something out, whether it
9 is hand-marked paper ballots or something.

10 Surely we all agree on this call that the state would
11 have to figure something out, other than what would be in use.
12 Maybe it is a remedy. But it is something. So we're asking
13 for relief on an election that is going forward. And someone
14 has got to do what has never been done and that Dr. Shamos said
15 is critical.

16 Thank you, Your Honor.

17 DR. HALDERMAN: Your Honor, this is Alex Halderman.
18 If I could make one more point --

19 THE COURT: No, you really can't. I've got just a
20 threshold issue of really whether I'm allowing discovery and
21 what the posture of the case is. And I think that is -- you
22 know, that is really a legal issue as much as anything else,
23 Dr. Halderman. I appreciate the marvelous resource that you
24 provide to plaintiffs. But I don't think it is appropriate for
25 me to hear from you at this juncture.

1 DR. HALDERMAN: Yes, Your Honor. Thank you.

2 MS. RINGER: Your Honor, if we may, this is Cheryl
3 Ringer from Fulton County. I'm trying to make sure I
4 understand the point, particularly since we have two elections
5 going forward in 2019, September and November and a possible
6 one in October.

7 Am I to understand that plaintiffs are now seeking to
8 possibly have a renewed motion for preliminary injunction?

9 MR. CROSS: This is David Cross. I would say it
10 depends on what happens. I mean, my hope is no. My hope is
11 that we do an examination and that representations made by the
12 state prove to be what is accurate.

13 The reality is nobody knows. So I would think all
14 voters across the state would want to confirm that they are
15 voting on a system that has actually been confirmed to be
16 reliable.

17 MS. RINGER: And so Fulton County would submit that
18 was the whole reason for us having the preliminary injunction
19 hearing that we had. And we note that early voting has started
20 today -- I'm sorry -- yesterday on our September election.

21 So any changes to what we are supposed to be doing
22 would do, you know, harm to voters that are already out there
23 using the system if you are proposing that we would change it
24 at this late date.

25 MR. CROSS: I think we are putting the cart before

1 the horse.

2 MS. RINGER: It is. But actually we thought we had
3 direction, and we're just not understanding that you want to
4 change the direction that we were given. Thank you.

5 THE COURT: All right. I think that the only -- the
6 thing I would like to just explore before I take the few
7 minutes to think about what you've all said is that clearly it
8 is suggested to me in the motion for clarification that the
9 state filed that the state is determining whether it wants to
10 appeal or not appeal. And, you know, this is sort of a
11 triangulation in that decision between the state's wanting to
12 figure out whether it wants to appeal and the plaintiffs saying
13 on the other side, well, basically we might need more relief
14 right now and if we don't know -- if we don't have a
15 disposition of this case then there is no reason for us not to
16 continue to be proceeding towards basically getting a final
17 judgment -- final permanent injunction.

18 And that seems a little thornier in terms of if the
19 state is not -- I mean, you know, the state obviously can
20 decide what it wants to do. But if, in fact, it is going to be
21 an open question, then, of course, it is understandable -- more
22 understandable that the plaintiffs want to proceed -- figure
23 out a mechanism so that they can get a more -- a dispositive
24 ruling, though, you know, obviously what more exactly would
25 have to be produced for that is a whole other question.

1 But that is -- Mr. Russo, that part of things -- the
2 equation you didn't address. I don't know if there is anything
3 more you want to say about it from that angle.

4 MR. RUSSO: Your Honor, this is Vincent Russo.
5 Regarding the appeal, we're not -- we don't have the ability to
6 say what direction our client will want to go, which is the
7 reason for the motion for clarification. I do think though,
8 however, that some of the issues raised in the motion for
9 clarification would be more determinative of whether there was
10 an appeal than the others.

11 And, Your Honor, I don't know even if we were to
12 appeal that there would be a stay of the preliminary injunction
13 anyway or that we would even seek one.

14 THE COURT: All right. So I'm going to take a few
15 moments. And don't talk among yourselves because then I can
16 hear it. So just talk -- if you want to speak with the people
17 that you're present with, just go away from the phone and talk
18 with them off that and put yourself -- then we'll be back in a
19 few minutes. All right.

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

21 THE COURT: Mr. Cross or -- this is a limited
22 question for Dr. Halderman. So don't make -- don't construe my
23 question as an opportunity to go beyond the scope of the
24 question.

25 My question is this: Are you proposing that you're

1 going to sample a statistically significant representative
2 range of the DRE machines in the jurisdictions where there are
3 elections being held? Is that your proposal, or what is it?

4 MR. CROSS: Yes, Your Honor. This is David Cross.
5 We have statistical experts that have been engaged in the case
6 to address that. Certainly, they will work with Dr. Halderman.
7 But Dr. Halderman is not a statistician.

8 But the short answer to your question is: We would
9 want a statistical sample of DREs and memory cards of whatever
10 set that is being rolled out for elections this year and then,
11 of course, the GEMS servers as well.

12 And so our statistical experts would figure out what
13 is an appropriate sample. Dr. Halderman would do the forensic
14 analysis.

15 THE COURT: This is a very -- besides everything
16 else, it is a very peculiar election. You know, you've got --
17 you don't have anyone from Gwinnett. I'm not sure what it
18 tells you in terms of your confidence building. Many of your
19 major population areas have at best minor elections. You have
20 lots of small elections in very small jurisdictions. So I'm
21 not sure it is the -- it is meaningful for purposes of if you
22 actually -- if your true anxiety is that this system may
23 continue to live, it really may not tell you that much on that.
24 It may. But I don't -- but it may not.

25 MR. CROSS: I guess two thoughts on that, Your Honor,

1 if I may. One is: These machines and the GEMS servers are
2 going to get used this year. So at least looking at the GEMS
3 servers would give us some insight into whether that aspect of
4 the system has been compromised. And as Dr. Shamos agreed, if
5 you compromise GEMS, you likely compromise everything. So at
6 least getting that portion of it I think would be a critical
7 step.

8 The other point that I would make -- and
9 Dr. Halderman is better equipped to explain, but I understand
10 the reasons you don't want to get into a lengthy discussion
11 with him. So I'll give it my best shot.

12 The new system is not entirely new. There are
13 aspects of the existing system that are going to continue to
14 live even with the BMD system that would get rolled out. And
15 so the concern that we have is if the current system is
16 infected in any respect, certainly beyond just a handful of
17 DREs or memory cards, of course, again, as Dr. Shamos
18 acknowledged, those are penetration points to the broader
19 system.

20 But if the current system is infected, whether it is
21 in the voter registration database as a penetration point that
22 was acknowledged or something else, that very likely has the
23 potential to carry on into the BMD system because they are not
24 building something entirely from scratch. And so that is a big
25 concern we have.

1 Everyone needs to figure out now for the elections
2 this year and going forward is the system compromised. It is a
3 head scratcher to me that we don't all agree on that. But
4 apparently we don't. It is not just about the 2019 elections.
5 It is about the future elections as well.

6 THE COURT: All right. Well, to the extent it is
7 about the voter registration database and the way -- and
8 infection going forward, I'm willing to talk about that. And I
9 had questions for the defendants because I was -- even on the
10 record before because I was being told somewhat two different
11 things about how they were going to proceed forward. And
12 there's just some factual questions I have.

13 But I am just highly reluctant at this juncture to --
14 though I recognize the merits of the plaintiffs' position as
15 to, well, we still -- you know, it is not like your claims have
16 been dismissed, so why can't you go ahead and do discovery
17 but -- and potentially request again that on the eve of the
18 election or in October or perhaps it is even in the end of
19 September for other relief because you found contamination.

20 And I think I've given my level best here and I think
21 that -- in terms of trying to figure out a way that respects
22 the degree to which the jurisprudence in the area counsels
23 against excessive intervention and at the same time counsels to
24 ensure the protection of fundamental rights in the voting
25 system.

1 And so to get involved with this messiness on a part
2 of the system that is not going to proceed -- now, I can
3 understand that we might -- that if -- if the state ends up
4 having to use -- not be able to use the ballot marking device
5 and is required to use some sort of hand ballot, it may end up
6 needing to use the ballots created by the GEMS system. But
7 those would be printed ballots.

8 So I'm not sure, you know, why I would have to worry
9 about that. So it is a lot of resources still it seems to me
10 and potentially sort of dragging me into a whole other
11 preliminary injunction hearing come October revisiting issues
12 that I have attempted to balance as best as I can in terms of
13 equitable relief.

14 And I'm just -- and, you know, of course, I don't
15 have anything from Dr. Halderman at this point telling me, oh,
16 I also saw this and that and I have an affidavit from him where
17 he's actually also reviewed the materials he does have, which I
18 understood were very much a fourth choice on his part as a mode
19 of looking at evidence of manipulation or hacking. But,
20 nevertheless, I have nothing about that.

21 So I'm just -- I'm not sure where it gets us. I
22 understand that from a policy perspective and from a protection
23 perspective at the highest level one would say yes. But how
24 would I pragmatically even operate come October if that were
25 to -- you were to find some indication that in five counties

1 the machines were in some way infected or not functioning
2 correctly?

3 I don't -- I can't even conceive of what I would do
4 and whether I would say, well, I should infer that other --
5 everything else is corrupted, which maybe I should. But, you
6 know, this has been some degree of rough justice about this for
7 sure.

8 MR. CROSS: Your Honor, this is Davis Cross, if I
9 may. I think you are making exactly the right point. But I
10 think it cuts in favor of doing it, and here is why for two
11 reasons.

12 One, we're only at the discovery phase. So whatever
13 relief might be needed down the road, as Rule 26 makes clear,
14 doesn't drive the determination of whether we get the
15 discovery.

16 The second point is I would say the more important
17 practical point. The only way we end up in the world in which
18 you are envisioning where Your Honor would have to figure
19 something out late in the day is if the defendants are wrong
20 and that the system is compromised. That is the only way we
21 end up there.

22 And if we were in a situation where the defendants
23 had come forward and said, we've had an independent expert look
24 at this, examine it, and verify it, then we might be in a very
25 different posture. Right. Because they would have something

1 to present to the Court and to the public to say we have a
2 reasonable basis to believe that the system is secure and for
3 voters to have confidence and now we're just quibbling over
4 whether Dr. Halderman should do his own analysis. That would
5 be a different posture. They would have, I would confess, at
6 least a better position depending on the expert and what was
7 done to push back and say the equities weigh against doing
8 this.

9 But it is acknowledged by everyone that this has
10 never been done. And so where it leaves us is going forward
11 with an election this year and continuing to have some
12 components of that going into a new system where no one has
13 actually figured out whether anything coming out of that
14 election is reliable and accurate.

15 And so I would say, Your Honor, I completely
16 understand and share the concern. But that concern only arises
17 if we find something. And that is really the perversity of the
18 defendants' objection. If they are confident and they tell the
19 public time and time again that this is a secure system, then
20 they have no basis to object to an examination at all. They
21 should say, great, come in, take a look, spend several weeks,
22 we know what you're going to find, let's move forward.

23 The fact that they are objecting indicates to the
24 Court that they do not have confidence, that they are worried
25 something is going to get found here. And we can run it

1 together with Dr. Shamos if they want to have their own expert
2 involved to make sure that they are comfortable with the way it
3 happens. There are ways to do this.

4 But the mere fact that they are objecting is the very
5 reason it should be ordered because it says they are not
6 confident in their system.

7 THE COURT: Well, let's talk about right now the
8 parts of the system that are going forward, and I will continue
9 to think about what your argument is. And so let me have some
10 questions for the state.

11 Originally I get -- I get notified that ES&S is going
12 to no longer be housing the data for the voter registration
13 database -- I'm sorry -- PCC is not going to be doing that and
14 that -- and that the state itself will but that the
15 application -- that you'll maintain -- the state will maintain
16 the contract for the application and updates to the
17 application.

18 So while I am writing the order, that is what I'm at
19 first under the impression of. Then when I look at the
20 contract with the new vendor, Dominion, there is clearly a
21 provision instead for Dominion to run its software for the
22 voter registration database and the ExpressPoll function.

23 And then -- there is also then we get the notice
24 about the database being transferred. So I ask you-all which
25 database it is. Because at this point I'm wondering. And the

1 state very clearly responds and says it is the voter
2 registration database.

3 But -- so the order is drafted with that in mind,
4 though I wasn't 100 percent sure still then why -- where the
5 data was being housed and how did that all relate to the
6 responses to PCC and the use of their software.

7 And I operated on the presumption you were not using
8 the PCC software. But, in fact, you might be using it because
9 of the fact that the contract provided for Dominion's software
10 to be used. But maybe they are one and the same. That I don't
11 know.

12 Clearly, the Fortalice evaluation indicated lots of
13 issues about the software that PCC was using and access issues.
14 And, obviously, that is something -- those are some issues that
15 Dr. Halderman has raised. But I didn't know -- and I guess I
16 operated on the -- on the face of the information that Dominion
17 had its own software and so that all we were talking about was
18 an infection through the database potentially, not through the
19 software.

20 But I would think that, Mr. Russo, if you or one of
21 your co-counsel could clarify this issue and how you are
22 proceeding as to PCC's software and what does it mean -- are
23 you permanently housing the data and that host of questions
24 I've just laid out.

25 MR. TYSON: Yes, Your Honor. This is Bryan Tyson. I

1 think I can clarify some of those points for you. So
2 initially -- you are correct -- the state is going to continue
3 to use eNet, which is PCC's software, for the voter
4 registration database going forward. The housing of all of
5 that data and software into the Secretary of State's data
6 center and the state maintaining control over that system will
7 allow for the Dell SecureWorks, the other monitoring software
8 that the state has in place, to work to protect the voter
9 registration information that is present there.

10 THE COURT: Wait just one second. There is a word I
11 didn't get. It will allow what to monitor? Dell you said?

12 MR. TYSON: Yes. I believe Mr. Beavers' testimony
13 was there is Dell SecureWorks it is called is a monitoring
14 system, along with Fortalice and others, that kind of police,
15 as we talked about, the boundaries of the castle of the
16 Secretary of State's network. So if an intruder was trying to
17 get in, those systems would detect that. And that was the
18 advantage of having that system housed in the existing data
19 centers because it falls under the protection schemes that
20 Fortalice had recommended.

21 So both the PCC software and the database will be
22 housed in that environment and will be continued to be used.
23 That system -- the voter registration system is separate and
24 distinct from the -- not to get into far away from your
25 question. But it is separate and distinct from the My Voter

1 page. It is separate from the online voter registration
2 system, and it is separate from the electronic pollbook
3 function that is used for election day and early voting
4 operations.

5 So what happens for the Dominion system is at the
6 time of an election a flat text file is taken out of the eNet
7 system. And that flat text file contains the voters'
8 information for all the voters in the state, along with the
9 ballot combinations or the type of ballot that that voter is
10 entitled to vote.

11 That information has to be matched up with the ballot
12 combinations that are built in the new Dominion system. So
13 there is going to be no connection between the prior GEMS
14 ballot building process and the Dominion ballot building
15 process.

16 But there has to be a reconciliation to be sure that
17 if Bryan Tyson is entitled to receive this particular ballot
18 combination in this particular county that that particular
19 plaintiff ballot combination exists in the Dominion system for
20 the ballot marking device so that it can generate that and also
21 so that when the voter comes to check in at the ExpressPoll
22 location that information can be reconciled -- not the
23 ExpressPoll because it is the new devices, the Poll Pads. But
24 those will be the devices that are used. So those are also
25 populated with that information.

1 Under the new rules under House Bill 392 and the
2 rules that went along with that, there has to be a malware scan
3 of the information coming out of eNet. So that will be an
4 important kind of sequence in that process. So whatever goes
5 into the Dominion system will be coming through that.

6 But I want to make sure we're clear on the database
7 itself that the Secretary of State is maintaining the data on
8 its own server. That is separate and distinct from PCC
9 maintaining the data on its server, which was the previous
10 setup and the previous setup about which Fortalice was
11 concerned.

12 So that's basically the interaction between those two
13 systems. And I am sure I have created more questions in trying
14 to answer yours. But I'll stop and see where we are.

15 THE COURT: So is that the permanent plan, or are you
16 at some point planning to use Dominion software? Because I saw
17 the provision for Dominion to be running an ExpressPollbook
18 software. So that is why I'm still just trying to get that
19 clarified.

20 MR. TYSON: Yes, Your Honor. So the e-pollbook
21 software is the Poll Pad units, which will replace the
22 ExpressPoll check-ins. So that is a distinct system. That
23 governs the voter coming in and checking in. It is that
24 system. That necessarily has to have information from the
25 voter registration database in it. But that is different from

1 the voter registration database itself, which will remain
2 housed with the Secretary of State's office.

3 So the database is the database. That is the thing
4 that county election officials, county registrars, will update
5 for individual voters as their information is updated. When it
6 is time for an election, the database is not exported. But
7 information from that database is used to populate the Poll Pad
8 e-pollbooks that will be used to check in voters. So we'll be
9 able to look up Bryan Tyson or Vincent Russo. Yes, you are a
10 Georgia voter. Yes, you have not already voted absentee. You
11 are eligible to go and generate a paper ballot off of the
12 ballot marking device in the polling place.

13 THE COURT: Well, let me ask sort of a simple
14 question sort of going back to the response that Mr. Barron
15 gave both in the hearing, as well as in the interrogatory
16 answers on behalf of Fulton County, about the way the software
17 worked to pull up the last individual who had been referenced
18 and how you could get stuck in the -- the poll worker you could
19 say erred by looking at the statewide voter registration data
20 system when looking for -- when looking for an individual
21 rather than the precinct or you could say the software looked
22 incorrectly and had this sort of misdirection.

23 Is that something that -- is the software that
24 operates the Poll Pads -- will it have that same feature? I'm
25 really not -- I understand you are saying it is a flat file of

1 information. But I'm not sure whether -- whether that is baked
2 in to the way that the information is provided or not.

3 MR. TYSON: Yes, Your Honor. So the thing that
4 Mr. Barron described -- and I'll be happy to let Ms. Ringer
5 jump in as well. But basically the way e-pollbook -- the
6 ExpressPoll itself was programmed when the software -- for
7 example, when you click the red X in Windows, it closes the
8 window that you currently have open. That is the way the
9 software is written. That was the way that the user was
10 interacting with data.

11 If you have looked up someone who is outside the
12 precinct and don't follow the correct sequence that you are
13 trained to do as the poll worker, the next voter will display
14 information that is different than what should be displayed.
15 So that was a user error issue.

16 That is limited to the ExpressPoll units. So the new
17 Poll Pad units will still allow a poll worker to look up
18 someone on a statewide basis because we want to provide that
19 convenience for voters to direct them to the correct place.
20 But it will be running -- this is not a correct analysis, but
21 it is like a Windows versus a Mac. It is going to be running a
22 different version -- a different type of software.

23 So I don't expect and we don't expect that there will
24 be a similar user sequence for a lookup on the Poll Pads. We
25 can get you some more information on that specifically, if you

1 would like it. But it is a completely different software that
2 is accessing the information that has been exported from eNet
3 into the e-pollbook software on the new system.

4 THE COURT: All right. Well, that was one of many
5 concerns. But it didn't seem to me that the Fortalice reports'
6 concerns regarding the integrity of the database -- of the
7 voter database was -- and the software issues were limited
8 simply to -- were as limited as you are indicating.

9 First of all, because of the scope of the exposure
10 issues, they clearly had concerns about the integrity of the
11 database that would be impacted. And that was one of the
12 reasons why obviously I also ordered relief in this area.

13 So I'm hearing you say though that, well, just
14 because we now have the database housed at the state, which
15 also has had its own issues, it is safe and it is fine. But
16 that sort of is inconsistent with what has happened with any
17 requirement that you look at what has happened to the database
18 thus far.

19 And it doesn't mean that there hasn't been some
20 fundamental problems when you end up having also people being
21 left out; people in the same home, husband and wife, being
22 assigned to different precincts; or simply, in fact, malware
23 having been inserted that would have eliminated or changed
24 people's voting status.

25 So I'm not clear from what you are saying whether you

1 are thinking that the -- that kind of the remedy that you have
2 implemented, which is we've brought the data into our own home,
3 our own castle, that that is sufficient by itself. And I'm not
4 clear also, you know, whether you are talking about the
5 standard malware that one runs or anything more sophisticated
6 than that as well.

7 But the first issue really is the data itself. I
8 guess you are saying that you're not going to be using your
9 software there -- but I'm not 100 percent sure -- that you've
10 maintained from PCC to opt -- to manage the data. But if you
11 are, there may be other issues of concern. Because I guess I
12 would say I had thought from looking at the contract it was --
13 that you maintained the option of using PCC but that you were
14 planning to use Dominion's software instead. But I think that
15 might have been an error.

16 MR. TYSON: Well, Your Honor, this is Bryan Tyson.
17 If I could, maybe I'll try to make sure I've closed the point.
18 I apologize for not being clearer on this.

19 The system that Dominion uses -- the Dominion system
20 is replacing DRE and GEMS and ExpressPoll books. That is what
21 that is replacing --

22 THE COURT: Right.

23 MR. TYSON: -- separate and apart from eNet and what
24 is there. The security benefit that we get from bringing the
25 database into the Secretary of State's environment is,

1 Number 1, we have been able to then take further control, the
2 two-factor authentication for users, the having users time out
3 over time. All of those are steps that are taken to address
4 the security issues surrounding the voter registration
5 database. So I don't want you to hear me say that the mere act
6 of bringing it in the Secretary of State's office alone is what
7 we believe is sufficient. There has been a continuing effort
8 and will be a continuing effort to harden that, especially
9 given the focus of Homeland Security and others on voter
10 registration databases.

11 The other thing I think you should be aware of
12 related to that is the Secretary of State's office has looked
13 at the number of provisional ballots cast in 2018 versus 2016,
14 which had similar turnouts of raw total voters, around 4
15 million voters. There were about 21,000 provisional ballots
16 cast in 2018, about 6000 in 2016. So there is an increase.

17 But almost the entirety of the increase was due to
18 properly registered voters who were following the instructions
19 of voter turnout groups to vote in a precinct -- a wrong
20 precinct in their home county. So when a precinct was held
21 open late, voters would be directed to -- say if you are a
22 Gwinnett County voter and you have not yet voted, you can go to
23 this precinct that will be open until 9:00 and cast a
24 provisional ballot there.

25 Those ballots are then counted for all the races for

1 which the voter was eligible to do. That was all but about 100
2 in terms of the raw vote increase in provisional ballots in
3 2018.

4 So if there were widespread database problems in the
5 voter registration database, we would expect to see a higher
6 number of those kind of issues. The issues related to husband
7 and wife being in different voting -- being directed to
8 different precincts, those kind of issues -- those we have to
9 look at really kind of on a person-by-person basis since the
10 county registrar may have taken some action. If the husband
11 had updated a driver's license or some other action had been
12 taken, the voter may not have understood that that was also
13 updating their voter registration record due to Georgia's
14 automated voter registration system.

15 So there are some unique issues like those. But we
16 obviously are extremely concerned about database security and
17 will remain focused on that in the new system. But that really
18 is unrelated to what is happening with Dominion and the
19 system -- the new system that is being unveiled.

20 THE COURT: Well, I don't know what your plan is at
21 this point to look at this. And I mean, it seemed to me that
22 the record obviously is as I saw it. And I obviously
23 identified the variety of concerns and regardless of the -- I
24 don't know what -- I am going to assume and take you at your
25 representation as to your analysis of the provisional ballots.

1 However, I will say that also there was a lot of evidence as to
2 people not being able to cast provisional ballots or being
3 discouraged from doing it and giving up.

4 So this is a many-headed monster in some ways. But
5 the point really is -- where I started was I really wasn't sure
6 how you were proceeding from -- because of the two sources of
7 information as to -- that suggested that you were possibly just
8 giving it over to Dominion to completely handle or possibly
9 keeping it on your own. So I tried to write it to accommodate
10 either possibility.

11 I would have been a little bit more specific if I had
12 known for sure. But I think that it was -- the state was not
13 100 percent clear about this, frankly. And it was something we
14 didn't go into in as much depth as probably would have been
15 helpful. But it was late on the last night of the hearing.

16 Is the state planning to have its contractor follow
17 my order and have Fortalice do more work on this issue? Or are
18 you only looking at -- and I think that is a really important
19 thing to me to understand what are you planning. And I know
20 you wanted to know what you were -- I was expecting. But I
21 think the first threshold issue is what is -- how are you
22 planning to use your contractor in this regard.

23 MR. TYSON: Your Honor, this is Bryan Tyson. I don't
24 know that all of those decisions have been made quite yet.
25 Mr. Russo obviously can fill me in on that. I know the state

1 obviously plans to comply with the order.

2 We asked the questions we asked to try to make sure
3 we had a good grasp on those points. But I don't think the
4 decisions have been made yet in terms of exactly what we're
5 going to do. We obviously plan to follow your order.

6 THE COURT: All right. Well, one of the questions
7 that you asked was -- the quite simple question of are you
8 going to -- is the state required to file its plan to deal
9 with -- address the voter registration information and database
10 on the docket.

11 And I didn't provide for that because I actually was
12 trying to encourage you-all to have conversations with
13 plaintiffs' counsel about this. And, you know, it was not that
14 I was thinking I was going to be actively engaged unless there
15 was evidence that you hadn't done it in good faith and had
16 made -- and made -- and had a true plan for proceeding that you
17 had also shared with plaintiffs and had dialogue about.

18 But -- and that is why I'm just also trying to
19 clarify where we're at. I didn't perceive myself as having,
20 you know, weekly monitoring or anything like that. But I was
21 hoping to encourage better communication and dialogue about the
22 plans and things that might, in fact, address some of the
23 plaintiffs' concerns and hoping to avoid the tenor of the
24 conversation that seemed to manifest itself in the
25 correspondence apparently that I didn't need to have part of

1 but that was part of the submissions that were provided to me.
2 There was very bitter communications on both parties' side --
3 all parties' side.

4 So because I do understand how this can keep on
5 moving -- keep on going, going, going. But I don't -- it is
6 not my role to be at this juncture monitoring. On the other
7 hand, I do have an obligation to make sure that the injunctive
8 relief is -- ultimately that it is implemented in good faith.

9 So I guess that is my answer to the question you
10 posed. I was not expecting it to be filed. But I was
11 certainly trying to encourage -- I did require you to share it
12 with the plaintiffs' counsel. And the purpose for that was so
13 that you could actually have some true dialogue and
14 communication about it and hoping that would move us forward as
15 well.

16 With respect to the state's question as to what were
17 the precise requirements for -- as to the filing -- are state
18 defendants to file the referenced rules -- that is Number 2 in
19 your motion for clarification -- when they are made available
20 for public comment or after they have been promulgated and
21 adopted.

22 This was really so that I would have notice of really
23 what you were doing. Just simply if you were putting up
24 proposed rules for comments, I would like to know that. And
25 that is just -- it is not that I'm expecting that I'm going to

1 jump in and give any comments. But it will give me notice of
2 what is going on.

3 I don't want to be having to have the court librarian
4 maintain a Google alert for when you are doing it since it is
5 easy enough for you to file it. This is a matter of public
6 record, and that is the same thing for when your rules have
7 been adopted.

8 But I am not myself intending at this juncture to do
9 a substantive review of the proposed regulations as part of
10 this litigation unless it somehow becomes a part of the
11 litigation for the BMDs in some way. But I mean, there are
12 other mechanisms obviously that the interested parties can do
13 that. But to the extent that auditing is a central part of
14 whatever you are doing, it is obviously of some concern to the
15 Court. But I'm not the reviewer of the regulations. But it is
16 relevant to the litigation. I hope that answers that question
17 to your satisfaction.

18 I have answered Question 3 regarding the plan being
19 filed. I mean, obviously I know that if the plaintiffs think
20 that you haven't done it in good faith they are going to file
21 the plan. Or you may want to file the plan to show that you're
22 in good faith compliance and the process that you have gone
23 about. But that is up to you.

24 And if the plaintiffs don't think you have, then that
25 is up to them whether they are going to file it. But I am

1 trying not to put myself in a monitoring -- an independent
2 monitoring role.

3 If something comes up and I have to have an actual
4 hearing about something -- relief not being entered, that is
5 another matter. But I'm not independently monitoring. We're
6 already discussing the question of Number 4.

7 I have one question about the -- that I wanted to
8 understand. The scanners in the Dominion system that you're
9 planning to purchase, are those scanners -- the ones at the
10 precinct level, are they able to scan a -- the full ballot for
11 counting purposes, if that was necessary?

12 MR. TYSON: Your Honor, this is Bryan Tyson. Yes.
13 The precinct scanners from Dominion are the more advanced
14 technology scanners that we had discussed in the hearing. And
15 just so you're aware, Dominion equipment has already started
16 arriving in Georgia. We're on the -- there is some in the
17 Secretary of State's warehouse already that is being prepped
18 for acceptance testing. So that process is well underway. But
19 they are the precinct scanners that will take a full image of
20 the ballot for processing.

21 THE COURT: So if you ended up having to have a hand
22 ballot, they would be able to count a hand ballot?

23 MR. TYSON: Yes, Your Honor. They could be
24 programmed to count a hand ballot or programmed to count a
25 ballot marked device ballot. That is correct.

1 THE COURT: All right. And you also asked in
2 Question 1, regarding the pilot project required at
3 Document 579 on Page 148, Paragraph 2, does the requirement to
4 implement a pilot election November 2019 utilizing hand-marked
5 paper ballots include all advanced in-person voting or is it
6 limited to election day voting.

7 It includes the whole process. The advanced
8 in-person voting. So you get a full run-through.

9 Have you been able to identify three potential
10 counties or jurisdictions alternatively?

11 MR. RUSSO: Yes, Your Honor. This is Vincent Russo.
12 The pilot project counties are -- as we understand them, are
13 currently to be Carroll, Catoosa, Bartow, Decatur, Paulding,
14 Lowndes. There is a potential that Bacon and Treutlen will
15 also be included. We understand that they are -- will be
16 attending the training. But it is not definite whether they
17 will be pilot project counties.

18 And then Cobb County -- we understand that they have
19 agreed to do a hand-marked paper ballot pilot in four cities.

20 THE COURT: So you are basically saying the Cobb
21 County running of the -- of the hand -- Cobb County will run
22 the pilot project for hand ballots in the four cities -- the
23 four -- use those as four jurisdictions?

24 MR. RUSSO: Yes, Your Honor. I misheard you. I was
25 giving you the full overview on both pilots. But that is

1 correct.

2 THE COURT: And do you know what cities those are?

3 MR. RUSSO: Let me check my email. I asked that
4 question. Yes. It is Smyrna, Austell, Powder Springs, and
5 Kennesaw.

6 THE COURT: All right. Thank you.

7 MR. RUSSO: You're welcome.

8 THE COURT: Have I addressed the state's questions?

9 MR. TYSON: Your Honor, this is Bryan Tyson. Yes, I
10 believe that answers all of our questions except for the fourth
11 one, which I know we're still talking through that. But yes,
12 that is very helpful and we appreciate that very much. Thank
13 you.

14 THE COURT: I want to bring one point to your
15 attention, which is it may be that the Secretary of State was
16 frustrated or his spokesperson. But I don't think it is
17 helpful for him to be -- a representative of the Secretary of
18 State's office -- they are free to say whatever they want to
19 say. But I don't think it is helpful in this process for a
20 representative to be saying all of this is silly and just
21 rhetorical. You know, they are free to say what they want.

22 But it doesn't inspire confidence that we're going to
23 be able to collaborate. That is my focus is being able to
24 resolve these issues. But I hope that that is not
25 representative of a different viewpoint on their part.

1 And I don't know who has reviewed anything within the
2 department. But I would say that -- as Dr. Halderman pointed
3 out, that the Court -- it is a minor, minor thing in the larger
4 scheme of things. But the Court identified this problem of
5 getting a bad voter -- bad website message that you do not
6 proceed on the My Voter page at Document -- on the order at
7 Footnote 59. And it still remains. The same -- you pull it
8 up, and the same thing happens. It doesn't matter what browser
9 you use.

10 MR. CROSS: Your Honor, this is David Cross. Could I
11 offer one thing?

12 THE COURT: Yes.

13 MR. CROSS: On Question 4, the debate raised about
14 discovery, Your Honor made a good point earlier, which reminded
15 me. We actually have not put into the record some of the
16 disconcerting anomalies that Dr. Halderman found in the GEMS
17 databases. I'm wondering if we could have an opportunity,
18 understanding Your Honor is struggling with what the right path
19 forward is with respect to discovery, whether there is any at
20 all -- if we could have an opportunity this week to put in just
21 a concise filing including a declaration from him that details
22 things.

23 Just to give Your Honor an example, one of the things
24 we did discover is that there are discrepancies between the
25 vote totals that were reported for certain counties and the

1 actual number of votes cast that was reflected. In their
2 numbers, over a thousand in some counties. Meaning they are
3 reporting in some counties 1600 more votes totaled in terms of
4 the election results than actually show up as votes cast in the
5 GEMS databases for those counties.

6 And so he's done some preliminary analysis, and that
7 is at least preliminarily what we found. If it is helpful to
8 the Court, we can put in a declaration that provides more
9 factual predicate for why we think the examination that we're
10 asking to do is important.

11 THE COURT: You can submit that.

12 MR. CROSS: Okay. Thank you, Your Honor. We'll do
13 that as soon as possible this week.

14 MR. RUSSO: Your Honor, this is Vincent Russo. We
15 would just ask if that is okay that we respond to whatever is
16 submitted.

17 THE COURT: Of course. Just --

18 MR. BROWN: Your Honor, this is Bruce Brown.

19 THE COURT: I'm sorry. Just one second.

20 Since -- so we don't end up eating up too much time,
21 if they file it this week on Friday, when would the state want
22 to be able to file something in response by?

23 MR. RUSSO: Your Honor, we would ask until the
24 following Friday.

25 THE COURT: All right.

1 MR. RUSSO: We have a response to their motion for
2 leave due this Friday.

3 THE COURT: All right. Mr. Brown?

4 MR. BROWN: Thank you, Your Honor. Circling back to
5 one issue that I wanted to make sure that I presented clearly,
6 because it may relate to several of these issues, in our status
7 report the issue -- one of the issues that we raised was the
8 possibility that in 20 -- for the 2020 elections that proceed,
9 the presidential preference primaries in March -- that would be
10 elections in January, February, and March.

11 THE COURT: What are those? I looked at the
12 Secretary of State's page, and I didn't see any identified.

13 So what are those?

14 MR. BROWN: Every year there are a slew of special
15 elections in January and February that are not on the Secretary
16 of State's -- anticipated on the Secretary's web page. And we
17 have some data on that. I do not have it in front of me. I
18 think we probably submitted it as evidence in the hearing.
19 Although I can't cite to it this second.

20 But there are special elections -- my understanding
21 is there are special elections throughout the state in January
22 and February as they come up every year. And the reason why
23 that is -- that may be important is that -- and this could go
24 into the pilots in November '19 as well. If and to the
25 extent -- first, of course, paper ballots will be used for

1 those elections because those are -- that is required under
2 your order. Of course, that is certainly what we asked.
3 There's not a quarrel with that.

4 The issue is the ballot building infrastructure that
5 is used to print those ballots and to build those ballots and
6 ultimately to scan them and tabulate them. Currently, that is
7 done by the GEMS system. Your order contemplates that after
8 January 1, 2020, that infrastructure, which is the ballot
9 building and the scanning tabulation, will be done by the
10 state's new system. There is the possibility that the state's
11 new system will not be ready either because of certification or
12 because of the delays that -- it is a tight schedule, et
13 cetera, given the complexity of the implementation.

14 And so there is a little bit of a gap, if you will,
15 or potential gap in the coverage of your order as to what will
16 be the infrastructure for implementing the hand paper ballots.

17 In our status report, what we're suggesting is that
18 provided -- this is a gigantically important proviso. Provided
19 there are robust audits, hand-marked paper ballots may safely
20 be used with the existing GEMS infrastructure, which composes
21 the ballots and gives the print orders to the printers for
22 those ballots.

23 And then after the votes are hand marked actually
24 using the AccuVote scanners, like I said, if the new scanners
25 are not available. And so anticipating that, the state should

1 be on notice that if the new system is not going to be
2 available to use with the hand-marked paper ballots, then they
3 are going to need to have something.

4 And what we're suggesting is, again, provided there
5 are robust audits, which will be used with the artifact of the
6 voter's choice, because you will have hand-marked paper
7 ballots, that the old GEMS systems could be used. However, I
8 think this underscores sort of the live nature of the case in
9 that we need to get to the truth of what the GEMS system and
10 the DREs actually are infected with, if anything. But that is
11 what we --

12 **(Unintelligible crosstalk)**

13 THE COURT: Well, listen, first of all, you could
14 obviously have this conversation between yourselves. If there
15 is something that is a reasonable modification -- if you need
16 the ballot builder to print ballots, then I mean that is -- to
17 print the ballots to be done by hand, that is a simple enough
18 thing. You're not worrying about what happens then.

19 I don't know what the -- if they have -- you know,
20 the whole question about the AccuVote scanners and how they
21 count, et cetera, and do they have them, that is a whole other
22 question. Those are -- I mean, those are things that you could
23 all explore, and I would hope you might rather than having to
24 come on an emergency hearing if there are, in fact, elections
25 that they are not ready to handle in January, February, and

1 March.

2 That is why I'm trying to give you some mechanisms
3 all to talk to each other and not to have to be coming always
4 here. But --

5 MR. BROWN: Your Honor, we hear you loud and clear.
6 And in our submission, I suggested that we be able to talk with
7 the state defendants. I wanted to raise that today since we
8 are having this thing. But we will do so.

9 THE COURT: All right. All right. So you can -- the
10 plaintiffs may submit additional information about the results
11 to the extent he's completed -- Dr. Halderman's review of the
12 GEMS database and any outstanding issues that he would want to
13 review in the hardware. The defendants may respond the
14 following Friday.

15 So we're talking about this Friday and the following
16 Friday. And I am not sure that my position has changed very
17 much. But if you actually do have a -- if your statisticians
18 actually have already their statistical proposal, you can
19 provide it. If not or if it is going to take a lot more work,
20 I would not bother if I were you.

21 I have really my major concerns about our going down
22 this pathway. But if it is already done, that is something
23 else. I just don't think it is useful. I'm more concerned
24 about the database at this point that is going to continue --
25 clearly going to continue on, no matter what, in terms of the

1 the voter database.

2 And I do encourage you-all to continue talking. I
3 didn't get a very clear idea about what -- what the state is
4 thinking about at this juncture. But I realize it has not been
5 very long since I issued the order and there are a lot of
6 moving parts.

7 But I will say that the requirement that you use your
8 consultant to be involved in looking at this was to have, in
9 fact, a genuine, fulsome review of the issues raised. And I --
10 it would require likely other analyses. That was my thought of
11 what you were going to be doing with the assistance of your
12 expert. And I saw that, in fact, in many different ways
13 Fortalice had not been able to do the complete type of analysis
14 it thought was essential as to the database and that there were
15 limits to looking at anything only from the perspective of the
16 castle perimeter and that they hadn't been able to focus the
17 way they would have if they had been authorized to do so.

18 So that was my expectation. But, you know, I also
19 thought it was something that you were -- with the proper
20 incentive would do -- were well capable of doing and guiding.
21 And counsel would be able to make sure it happened. At least
22 that is the hope.

23 So I think that those issues in terms of how they
24 have a continuing impact are the ones that are the greatest
25 concern to me in terms of the old -- what gets carried forward

1 from the old system to the future. And the Court is future
2 focused.

3 Tell me what the schedule -- the schedule exactly is
4 on the state's response to the motion to amend the complaint.
5 I haven't really tried to plot it out. When is the briefing
6 going to be complete?

7 MR. RUSSO: Your Honor, this is Vincent Russo. Our
8 response is due -- state defendants' response is due this
9 Friday.

10 THE COURT: All right. The plaintiffs' reply?

11 MR. RUSSO: I didn't actually calculate their
12 deadline.

13 THE COURT: That is fine. I can figure it out.

14 All right. Many different things were provided to
15 me. Is there something else that I missed in your papers? I
16 know that I had Dr. Halderman's affidavit. I had the Coalition
17 plaintiffs' status report. And we discussed some part of that
18 and in particular about the use of the GEMS system and the
19 AccuVote scanners.

20 But is there anything else that you-all wanted to
21 discuss?

22 All right. Well, hearing nothing, I am going to
23 assume not. Because I know all of you are very capable of
24 making 5 million points. So I'll look to the submissions on
25 Friday -- this Friday and the following Friday.

1 I had one last issue myself, which was about the
2 servers. I just wanted to understand what the basis of -- what
3 was happening about the servers. Have they first of all been,
4 in fact, picked up? The copies of the servers from the FBI
5 that is.

6 MR. BELINFANTE: Your Honor, this is Josh Belinfante.
7 The FBI has delivered the servers to our office. They are now
8 with a forensic expert of the plaintiffs. We have made -- we
9 had all agreed that they would copy the hash information, which
10 as I understand it is the way you can tell if after that
11 anything had been changed.

12 There was a misunderstanding on Saturday. There was
13 an email sent around asking whether that could be copied. I
14 took it to mean the hash information. The plaintiffs took it
15 or were intending for it to mean the actual image itself. So I
16 agreed to it thinking it was the hash information, even though
17 on just the day before we had all agreed that it would be just
18 the hash information.

19 And so there is a copy now with the expert. The FBI
20 drive is with the expert. And we had agreed to not provide it
21 to either party unless and until we had some further guidance
22 from this Court on the scope of the remaining discovery issues.

23 MR. BROWN: Your Honor, this is Bruce Brown. We will
24 be submitting pursuant to your standing order a summary of the
25 dispute and the positions of the parties on that issue probably

1 today. And that will tee that issue up. The issue there is
2 whether we can look at it or whether the plaintiffs' experts
3 can review the FBI image, which is a copy of the original CES
4 image that the state ended up destroying. And so it is highly
5 relevant for the reasons that will be apparent anyway but also
6 as explained in our submission.

7 THE COURT: All right. It is a joint submission
8 though?

9 MR. BROWN: It is.

10 THE COURT: All right. Well, then I'll deal with it
11 when it gets here. All right.

12 MR. BROWN: Thank you, Your Honor. Thank you for
13 your time today.

14 THE COURT: All right. Thank you, everybody. Have a
15 good day.

16 MR. CROSS: Thank you.

17 MR. RUSSO: Thank you.

18 MR. TYSON: Thank you, Your Honor.

19 **(The proceedings were thereby concluded at**
20 **12:22 P.M.)**

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C E R T I F I C A T E

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UNITED STATES OF AMERICA
NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 59 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 28th day of August, 2019.

Shannon R. Welch

SHANNON R. WELCH, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT