

IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA

VOTERGA and PHILIP SINGLETON,	*	
	*	
Petitioners,	*	Civil Action No. 2021CV353604
v.	*	
	*	
	*	
STATE OF GEORGIA,	*	
	*	
	*	
Respondent.	*	
	*	

**STATE OF GEORGIA’S MOTION TO DISMISS AND BRIEF IN SUPPORT**

The State of Georgia moves to dismiss the Petition for Declaratory Judgment and Injunctive Relief (“Petition”) under O.C.G.A. § 9-11-12(b)(1), (2), and (6). The Petition should be dismissed because (1) the Court is without jurisdiction to grant Petitioners relief because the action is barred by sovereign immunity; (2) the Petition fails to state a claim for declaratory judgment upon which relief can be granted; and (3) the Petitioners’ claims are barred by laches. For the reasons set forth in the following brief in support, the State requests that this motion be granted and the Petition be dismissed by the Court.

**I. INTRODUCTION**

Petitioners in this action seek extraordinary relief: that the Court enjoin the State of Georgia from using the electronic voting equipment mandated by the Georgia General Assembly in 2019. Petitioners fail to provide any explanation for why they delayed for over two years—and after the voting equipment was used in six separate elections—in bringing their claims. But aside from Petitioners’ inexcusable delay in raising their objections, the Petition fails to show that the State’s electronic voting system does not comply with the statutory requirements.

Although Petitioners would prefer that voting in Georgia be conducted by hand-marked paper ballots, the Georgia General Assembly made the policy decision to adopt a unified system of electronic voting by ballot-marking device and optical scanner (the “BMD system”). The State made a significant investment of over \$100 million to purchase and distribute new equipment to every county, and significant time and resources were spent to train elections officials and educate voters on the new voting equipment. Despite Petitioners’ objections, there is simply no legal basis for the Court to set aside the policy decisions of the legislature for Petitioners’ preferred method of voting.

The BMD system complies with Georgia law. It has been certified by the United States Election Assistance Commission and independent testing laboratories. *See* O.C.G.A. § 21-2-300(a)(3). Voters make their selections on a ballot-marking device, which produces a paper ballot with the printed names of the candidates chosen by the voter, which the voter can read to confirm that the ballot was marked correctly. Thus, the paper ballots are “marked with the elector’s choices in a format readable by the elector” as required by O.C.G.A. § 21-2-300(a)(2). The paper ballot also includes a machine-readable barcode (or QR code), which is read by an optical scanner to tabulate the votes. The accuracy of the QR codes is confirmed before every election through rigorous logic and accuracy testing, which elections officials are required to conduct to ensure that the tabulations by the scanners match the printed paper ballots. *See* O.C.G.A. § 21-2-374(b). In sum, the BMD system meets the statutory requirements of the Georgia Elections Code.

Because even Petitioners admit that “an elector can verify the written portion of the paper ballot” (Petition ¶ 23) in compliance with state law, the Petition fails to state a cognizable claim for declaratory relief. But as a threshold matter, the Petition must be dismissed because there is

no waiver of sovereign immunity for Petitioners' claims for declaratory and injunctive relief against the State. Although Petitioners rely on the limited waiver of sovereign immunity created by constitutional amendment that went into effect on January 1, 2021, the amendment is expressly limited to acts that occur after January 1, 2021. *See* GA. CONST. art. I, § 2, par. V(b)(1). The acts complained of by Petitioner—namely, the State's selection of the BMD system and its use in the November 3, 2020, general election—occurred prior to January 1, 2021, and thus the amendment does not provide a waiver for Petitioners' claims.

Accordingly, the State's sovereign immunity bars this action and the Court is without jurisdiction to consider the Petition. But even if sovereign immunity were waived for Petitioners' claims against the State, the Court should hold that their claims are barred by the equitable doctrine of laches. The Petitioners inexcusably delayed in bringing this action for at least two years since the BMD system was selected, and after the State made a substantial investment in rolling out the system for use in the 2020 election cycle. For the Court to discard the BMD system contrary to the expressed will of the legislature would be extremely prejudicial to the State and the public. The Petition should be dismissed.

## **II. FACTUAL BACKGROUND**

### **A. Adoption and selection of Georgia's electronic voting system.**

In 2019, the Georgia General Assembly enacted House Bill 316 ("HB 316"), a comprehensive reform of Georgia's election laws, which also modernized and further secured Georgia's voting system. Specifically, the General Assembly chose to require a new unified system of electronic voting throughout the State, moving the State away from the secure, but older, direct-recording electronic ("DRE") voting system to a voting system utilizing ballot-marking devices ("BMDs") and optical scanners. The General Assembly determined this

replacement of DREs with BMDs should occur “as soon as possible.” O.C.G.A. § 21-2-300(a)(2). The legislation placed the responsibility of selecting the equipment for the new voting system on the Secretary of State. O.C.G.A. § 21-2-300(a). The procurement of Georgia’s new voting system was completed through an open and competitive bidding process as required by Georgia’s State Purchasing Act, O.C.G.A. § 50-5-50. The Secretary of State established a Selection Committee comprised of seven individuals who were tasked with reviewing bid proposals.<sup>1</sup> Selection Committee members evaluated those proposals using criteria and processes set forth on a Master Technical Evaluation spreadsheet.<sup>2</sup> Of the three requests for proposals evaluated by the Selection Committee, Dominion Voting Systems (“Dominion”) received the highest overall score. *Id.*

On July 29, 2019, the Secretary of State posted a Notice of Intent to Award the contract for the statewide voting system to Dominion. No bid protests were received by the State, and the Secretary of State issued a final Notice of Intent to Award on August 9, 2019. *Id.* The Dominion voting system consists of BMDs that print ballots by way of a connected printer and optical scanners connected to a locked ballot box. The Dominion BMDs allow the voter to make selections on a screen and then prints those selections onto a paper ballot, which the voter can review for accuracy. In addition to the printed names of the voter’s selections, the paper ballot also includes a QR code containing machine-readable data that is read by an optical scanner to tabulate the votes. After scanning, the paper ballot drops into a locked ballot box connected to the scanner. The scanners create an electronic image of the ballot along with an audit report,

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<sup>1</sup> See <https://sos.ga.gov/admin/uploads/Selection%20Committee%20Bios.pdf>

<sup>2</sup> See [https://sos.ga.gov/admin/uploads/MasterTechnicalEvaluation\\_redacted.xls](https://sos.ga.gov/admin/uploads/MasterTechnicalEvaluation_redacted.xls)

which confirms the QR code read by the scanner conforms to the printed selections on the paper ballot.<sup>3</sup> Thus, BMDs create an auditable, verifiable paper ballot, as required by statute. *See* O.C.G.A. § 21-2-300(a)(2) (“electronic ballot markers shall produce paper ballots which are marked with the elector’s choices in a format readable by the elector”).

**B. Testing and certification of the BMD system.**

The State’s electronic voting system is subject to two different certification requirements. First, the voting system must have been certified by the United States Election Assistance Commission (“EAC”) at the time of procurement. O.C.G.A. § 21-2-300(a)(3). Second, the voting system must also be certified by the Secretary of State as safe and practicable for use. The State’s BMD system meets both requirements. Under the Help America Vote Act (“HAVA”), the EAC is charged with establishing a rigorous process for voting-equipment certification, through working with committees of experts and coordinating with the National Institute of Standards and Technology. 52 U.S.C. § 20962; *see also* 52 U.S.C. §§ 20962, 20971 (test lab standards). The EAC certifies voting systems in compliance with the Voluntary Voting System Guidelines (“VVSG”), and does so by utilizing approved, independent Voting System Test Laboratories (“VSTL”). In the case of the Dominion voting system selected by the State, SLI Compliance served as the VSTL tasked with testing the system for EAC purposes, which was certified by the EAC on January 30, 2019.<sup>4</sup>

Separately, the Secretary of State utilized another independent EAC-certified VSTL, Pro V&V, to conduct testing for state certification of the voting system. Following the VSTL’s

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<sup>3</sup> An example of a scanned ballot image and audit report is attached as **Exhibit A**.

<sup>4</sup> *See* United States Election Assistance Commission, Agency Decision — Grant of Certification, [https://www.eac.gov/sites/default/files/voting\\_system/files/Decision.Authority.Grant.of.Cert.D-Suite5.5-A.pdf](https://www.eac.gov/sites/default/files/voting_system/files/Decision.Authority.Grant.of.Cert.D-Suite5.5-A.pdf)

testing, the Secretary issued a Certification of the Dominion Voting Systems as meeting all applicable provisions of the Georgia Elections Code and Rules of the Secretary of State on August 9, 2019.<sup>5</sup>

In addition to the certification requirements, the State's BMD system is subject to rigorous logic and accuracy testing prior to every election to ensure that the results tabulated by the scanners match the printed paper ballots. *See* O.C.G.A. § 21-2-374(b). Following the November 2020 general election, elections officials were required under O.C.G.A. § 21-2-498 to conduct a risk-limiting audit of paper ballots to confirm that the tabulated results were accurate prior to the certification of the results. The Secretary of State chose the Presidential race for this risk-limiting audit, which was conducted by hand recount of all paper ballots statewide. The risk-limiting audit confirmed the accuracy of the electronically tabulated results.<sup>6</sup> In sum, the certification, testing, and auditing conducted in 2019 and 2020 confirmed that the BMD system is accurate and in compliance with every requirement of Georgia law.

## II. ARGUMENT AND CITATION OF AUTHORITY

### A. Petitioners' claims are barred by sovereign immunity.

As a threshold matter, the Petition must be dismissed because there is no waiver of sovereign immunity under the Georgia Constitution for Petitioners' claims for declaratory and injunctive relief against the State.

“[T]he constitutional doctrine of sovereign immunity forbids our courts to entertain a lawsuit against the State without its consent.” *Lathrop v. Deal*, 301 Ga. 408, 408 (2017).

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<sup>5</sup> A copy of the Certificate may be found at [https://sos.ga.gov/admin/uploads/Dominion\\_Certification.pdf](https://sos.ga.gov/admin/uploads/Dominion_Certification.pdf).

<sup>6</sup> *See* [https://sos.ga.gov/index.php/elections/historic\\_first\\_statewide\\_audit\\_of\\_paper\\_ballots\\_upholds\\_result\\_of\\_presidential\\_race](https://sos.ga.gov/index.php/elections/historic_first_statewide_audit_of_paper_ballots_upholds_result_of_presidential_race)

Accordingly, suits against the State may only be permitted when there is an explicit waiver of sovereign immunity as stated in the Georgia Constitution:

Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies *can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity can be waived and the extent of such waiver.*

Ga. Const. Art. I, Sec. II, Par. IX(e) (emphasis added). “Where the sovereign has sovereign immunity from a cause of action, and has not waived that immunity, the immunity rises to a constitutional right, and cannot be abrogated by any court.” *Ga. Dep’t. of County Health v. Neal*, 334 Ga. App. 851, 854 (2015); *see also Ga. Dep’t. of Natural Res. v. Ctr. for a Sustainable Coast Inc.*, 294 Ga. 593, 597 (2014) (“the history of sovereign immunity in our State shows that the 1991 amendment intended to expressly reserve the power to waive sovereign immunity exclusively to the legislature.”).

The “sweep of sovereign immunity” under the Georgia Constitution is “broad.” *Olvera v. Univ. Sys. of Ga.’s Bd. of Regents*, 298 Ga. 425, 426 (2016). The doctrine extends to suits for declaratory relief, *see id.* at 428 n. 4, and suits seeking injunctive relief, *see Sustainable Coast*, 294 Ga. at 602. Georgia courts have also made clear that it is the Petitioner’s burden to demonstrate the existence of a specific waiver of sovereign immunity to authorize the suit. *See, e.g., Neal* 334 Ga. App. at 855 (“It is axiomatic that the party benefitting from the waiver of sovereign immunity bears the burden of proving such waiver.”).

Thus, Petitioners must show the existence of a specific waiver of sovereign immunity in order to avoid dismissal of their claims for declaratory and injunctive relief against the State. Petitioners fail to meet their burden if they cannot point to any applicable portion of the Georgia

Constitution, or the Code of Georgia, waiving sovereign immunity. *See Smith v. Chatham County*, 264 Ga. App. 566, 567-68 (2003).

Petitioners appear to rely on the new subparagraph (b) of Paragraph V of Article I, Section II, effective January 1, 2021, that provides a limited waiver of sovereign immunity for lawsuits seeking declaratory relief. (*See* Petition ¶ 3) (“State of Georgia is named because sovereign immunity is waived for claims of declaratory judgment and injunctive relief”). That amendment states:

Sovereign immunity is hereby waived for actions in the superior court seeking declaratory relief from acts of the state or any agency, authority, branch, board, bureau, commission, department, office, or public corporation of this state or officer or employee thereof outside the scope of lawful authority or in violation of the laws or the Constitution of this state or the Constitution of the United States. Sovereign immunity is further waived, so that a court awarding declaratory relief pursuant to this Paragraph may, only after award declaratory relief, enjoin such acts to enforce its judgment. *Such waiver of sovereign immunity under this Paragraph shall apply to past, current, and prospective acts which occur on or after January 1, 2021.* (emphasis added).

GA. CONST. art. I, § 2, par. V(b)(1).

Petitioners’ claims, however, do not fall within the scope of this limited waiver of sovereign immunity. The “act” that Petitioners refer to in their complaint occurred in 2019 when the State selected the Dominion BMD system as its method of voting. But the limited waiver by its express terms only applies to “acts which occur on or after January 1, 2021.” *Id.* Therefore, Petitioners cannot rely on this constitutional amendment as a waiver of sovereign immunity permitting their claims against the State.

Another court recently agreed with this interpretation of the amendment and rejected an attempt by plaintiffs to rely on the amendment to bring an action for declaratory judgment arising out of the November 2020 general election. In *Favorito v. Fulton County*, Civil Action

No. 2020CV342938 (Fulton Superior Court),<sup>7</sup> the court held that the constitutional amendment was not to be applied retroactively, and thus any acts that occurred before January 1, 2021 were not within the scope of the limited waiver of sovereign immunity. *See* Order attached as **Exhibit B**. This holding is consistent with the plain and clear language of the amendment, and this Court should similarly hold that sovereign immunity bars the Petitioners' claims for declaratory and injunctive relief.

**B. The Petition fails to state a claim for declaratory relief.**

Even if this action were not barred by sovereign immunity, the Petition fails to properly plead a cognizable claim for declaratory judgment. The Declaratory Judgment Act, O.C.G.A. § 9-4-2, provides that superior courts may declare rights and other legal relations of any parties petitioning for declaratory relief in “cases of actual controversy.” The purpose of the Act is to “settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.” O.C.G.A. § 9-4-1; *see also Hammond v. Sanders*, 210 Ga. App. 307, 308 (1993) (stating a declaratory judgment is to “protect [claimants] from uncertainty and insecurity with respect to some future act or conduct”). “Thus, a court may not declare the rights of parties when there is no actual or justiciable controversy; it has no province to determine whether or not a statute, in the abstract, is valid, or to give advisory opinions.” *Fourth Street Baptist Church v. Bd. of Registrars*, 253 Ga. 368, 369 (1984).

In order to be entitled to a declaratory judgment, Petitioners “must show facts or circumstances whereby [they are] in a position of uncertainty or insecurity because of a dispute and of having to take some future action which is properly incident to its alleged right, and which

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<sup>7</sup> The VoterGA organization is solely operated by Garland Favorito, a named plaintiff in *Favorito v. Fulton County*, Civil Action No. 2020CV342938 (Fulton Superior Court). He is represented by the same counsel in that action.

future action without direction from the court might reasonably jeopardize its interest.” *Phoenix Assurance Co. v. Glens Falls Ins. Co.*, 101 Ga. App. 530, 532-33 (1960). When a Petition for declaratory relief shows on its face “that there is no actual or justiciable controversy between adverse parties, a trial court does not have jurisdiction to render a declaratory judgment.” *Logan Paving Co. v. Peoples Bank & Trust*, 196 Ga. App. 42, 43 (1990).

The Petitioners here have pleaded “no uncertainty or insecurity with respect to their voting rights.” *Fourth Street Baptist Church*, 253 Ga. at 369 (denying declaratory relief). As an initial matter, Count I of the Petition for declaratory judgment does not specify what Petitioners would like the Court to declare as a matter of law. (See Petition ¶¶ 21-33). Petitioners allege that the BMD system does not comply with state law because the system does not “print a paper ballot marked with the elector’s choices in a format readable by the elector.” (*Id.* ¶¶ 27-28). But at the same time, Petitioners readily admit that “the paper ballot generated from the current ballot marking device has the elector’s intent written on the face of the paper ballot,” and the “elector can verify the written portion of the paper ballot.” (*Id.* ¶¶ 22, 23). Therefore, even assuming the allegations in the Petition to be true, the BMDs do not violate state law because they *do*, in fact, “print an elector verifiable paper ballot” as required by O.C.G.A. §§ 21-2-2(7.1) and 21-2-300(a)(2).

The Petitioners’ objection to the paper ballots is that *in addition to* the human-readable text, the paper ballots also include a machine-readable QR code, which is necessary for the scanners to tabulate the ballots. However, Petitioners cite to no provision of law that *prohibits* the use of a QR code on the paper ballots.<sup>8</sup> Any electronic system of voting is necessarily going

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<sup>8</sup> Even assuming incorrectly, as Petitioners do, that the amendment creating the new Article I, Section II, Paragraph V(b)(1) waives sovereign immunity for this action, the Petition still fails to

to involve encoded data in order for the ballots to be read by the scanners. After all, computers do not read the English language—they read code. The printed text is there for voters to confirm their choices and, as discussed above, the BMD system has a number of security measures to ensure the QR code matches voters’ printed choices.

The General Assembly made the informed policy decision to adopt a system of electronic voting consisting of BMDs and optical scanners, and the Petition fails to plead any violation of the cited statutory requirements. Although the Petitioners may disagree with the State’s adoption of an electronic voting system, their policy disagreement is not an “actual or justiciable controversy” upon which the Court can rule, and the Petitioners’ claim for declaratory judgment and related injunctive relief should be dismissed.

**C. Petitioner’s claims are barred by laches.**

The BMD voting system was approved by the legislature more than two years ago, and Petitioners offer no justification for why they waited until so long after the BMD system was procured and implemented to raise challenges to the readability and verification of the paper ballots. Although the Petition cites use of the system in the November 3, 2020 general election, the BMD voting system was in place and known to the general public long before that election. In fact, the Notice of Intent to Award was posted by the Secretary of State’s Office on August 9, 2019. The equipment was first used in March 2020 for the Presidential Preference Primary, again for the June 9, 2020 general primary election, and in the August 11, 2020 general primary runoff election. During this entire time, Petitioners sat on their rights.

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state a claim because it fails to show how the State has acted “outside the scope of lawful authority or in violation of the laws or the Constitution of this state.” *Id.* The Petition lacks any factual allegations that the BMD system is in violation of state law.

Due to Petitioners' inexcusable delay, their claims are barred by the equitable doctrine of laches. A trial court may apply laches "when the lapse of time and the claimant's neglect in asserting rights results in prejudice to the adverse party." *Waller v. Golden*, 288 Ga. 595, 597 (2011) (quoting *Hall v. Trubey*, 269 Ga. 197, 199 (1998)). Factors to consider in determining whether laches applies are "the length of the delay in the claimant's assertion of rights, the sufficiency of the excuse for the delay, the loss of evidence on disputed matters, the opportunity for the claimant to have acted sooner, and whether the . . . adverse party possessed the property during the delay." *Id.* "Courts should consider all the facts presented when balancing the equities to determine which party's rights are superior." *Id.* at 597-98 (quotation marks omitted).

All of the factual allegations in the Petition were known to Petitioners before the BMD voting system was used for the first time in early 2020. There is no doubt that Petitioners had ample opportunity to bring their claims sooner, including before the 2020 election cycle began. Petitioners fail to offer any justification for their delay.<sup>9</sup> Granting the injunctive relief sought by Petitioners would cause extreme prejudice to the State and the counties, all of whom have invested substantial resources to procure and implement the BMD system. More critically, if the Court grants Petitioners' extraordinary request to enjoin use of the current BMD voting system, it would eliminate the only legal method of voting available in Georgia. It is impossible for the State to acquire and implement a new system of electronic voting prior to the 2022 election

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<sup>9</sup> The Petition alleges that "a case in the Northern District of Georgia has already found that the ballot marking device system do[es] not comply with state law." (Petition ¶ 40). This is likely a reference to *Curling v. Raffensperger*, Civil Action No. 1:17-cv-2989-AT, which Petitioners misconstrue. That case involves a federal constitutional challenge to the BMD system, but even there the district court declined to enjoin use of the BMD system for 2020 election, and the limited injunctive relief entered by the district court was stayed by the Eleventh Circuit Court of Appeals. The decisions by the district court have no precedential value and are currently the subject of two pending appeals, Nos. 20-13730 and 20-14067.

cycle. Because every Georgia county is required by law to use the BMD system, *see* O.C.G.A. § 21-2-300, Petitioners would have county elections officials left with the “choice” to implement a voting procedure in violation of state law. The extreme prejudice to the State and to voters that would result from such an injunction far outweighs any justification for Petitioners’ delay. Accordingly, even if the Petition was not otherwise barred, the Court should find that laches bars Petitioners’ claims.

#### IV. CONCLUSION

For the foregoing reasons, the State of Georgia respectfully requests that the Court dismiss the Petition.

Respectfully submitted this 27th day of September, 2021.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day electronically filed the foregoing **MOTION TO DISMISS AND BRIEF IN SUPPORT** with the Clerk of Court using the electronic filing system, which will send notification of such filing to all parties of record via electronic notification.

Dated: September 27, 2021.

/s/ Charlene S. McGowan  
Charlene S. McGowan  
Assistant Attorney General

# EXHIBIT A

**FULTON COUNTY  
OFFICIAL BALLOT  
GENERAL AND SPECIAL ELECTION  
OF THE STATE OF GEORGIA  
NOVEMBER 3, 2020**

*"I understand that the offer or acceptance of money or any other object of value to vote for any particular candidate, list of candidates, issue, or list of issues included in this election constitutes an act of voter fraud and is a felony under Georgia law." [O.C.G.A. 21-2-284(e), 21-2-285(h) and 21-2-383(a)]*

1033-ML04



For President of the United States (Vote for One) (NP) Vote for Donald J. Trump (I) (Rep)	For State Representative in the General Assembly From 47th District (Vote for One) (NP) Vote for Jan Jones (I) (Rep)	For Fulton County Commissioner From District No. 2 (Vote for One) (NP) Vote for Bob Ellis (I) (Rep)
For United States Senate (Perdue) (Vote for One) (NP) Vote for David A. Perdue (I) (Rep)	For District Attorney of the Atlanta Judicial Circuit (Vote for One) (NP) Vote for Fani Willis (Dem)	For Fulton County Soil and Water Conservation District Supervisor (Vote for One) (NP) Vote for Alan Toney (I)
For United States Senate (Loeffler) - Special (Vote for One) (NP) Vote for Doug Collins (Rep)	For Clerk of Superior Court (Vote for One) (NP) Vote for Cathelene "Tina" Robinson (I) (Dem)	Constitutional Amendment #1 (NP) Vote for YES
For Public Service Commissioner (Vote for One) (NP) Vote for Jason Shaw (I) (Rep)	For Sheriff (Vote for One) (NP) Vote for Patrick "Pat" Labat (Dem)	Constitutional Amendment #2 (NP) Vote for NO
For Public Service Commissioner (Vote for One) (NP) Vote for Lauren Bubba McDonald, Jr. (I) (Rep)	For Tax Commissioner (Vote for One) (NP) Vote for Arthur E. Ferdinand (I) (Dem)	Statewide Referendum A (NP) Vote for YES
For U.S. Representative in 117th Congress From the 6th Congressional District of Georgia (Vote for One) (NP) Vote for Karen Handel (Rep)	For Surveyor (Vote for One) (NP) BLANK CONTEST	
For State Senator From 21st District (Vote for One) (NP) Vote for Brandon Beach (I) (Rep)	For Solicitor-General of State Court of Fulton County (Vote for One) (NP) Vote for Keith E. Gammage (I) (Dem)	

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President of the United States

Donald J. Trump (I) (Rep)

US Senate (Perdue)

David A. Perdue (I) (Rep)

US Senate (Loeffler) - Special

Doug Collins (Rep)

Public Service Commission District 1

Jason Shaw (I) (Rep)

Public Service Commission District 4

Lauren Bubba McDonald, Jr. (I) (Rep)

US House District 6

Karen Handel (Rep)

State Senate District 21

Brandon Beach (I) (Rep)

State House District 47

Jan Jones (I) (Rep)

District Attorney - Atlanta

Fani Willis (Dem)

Clerk of Superior Court

Cathelene "Tina" Robinson (I) (Dem)

Sheriff

Patrick "Pat" Labat (Dem)

Tax Commissioner

Arthur E. Ferdinand (I) (Dem)

Surveyor

BLANK CONTEST

Solicitor General

Keith E. Gammage (I) (Dem)

County Commission District 2

Bob Ellis (I) (Rep)

Soil and Water - Fulton County

Alan Toney (I)

Constitutional Amendment #1

YES

Constitutional Amendment #2

NO

Statewide Referendum A

YES

**FULTON COUNTY**  
**OFFICIAL BALLOT**  
**GENERAL AND SPECIAL ELECTION**  
**OF THE STATE OF GEORGIA**  
**NOVEMBER 3, 2020**

*"I understand that the offer or acceptance of money or any other object of value to vote for any particular candidate, list of candidates, issue, or list of issues included in this election constitutes an act of voter fraud and is a felony under Georgia law." [O.C.G.A. 21-2-284(e), 21-2-285(h) and 21-2-383(a)]*

858-09D



For President of the United States (Vote for One) (NP) Vote for Joseph R. Biden (Dem)	For State Representative in the General Assembly From 53rd District (Vote for One) (NP) Vote for Sheila Jones (I) (Dem)	For Fulton County Commissioner From District No. 4 (Vote for One) (NP) Vote for Natalie Hall (I) (Dem)
For United States Senate (Perdue) (Vote for One) (NP) Vote for Jon Ossoff (Dem)	For District Attorney of the Atlanta Judicial Circuit (Vote for One) (NP) Vote for Fani Willis (Dem)	For Fulton County Soil and Water Conservation District Supervisor (Vote for One) (NP) Vote for Alan Toney (I)
For United States Senate (Loeffler) - Special (Vote for One) (NP) Vote for Raphael Warnock (Dem)	For Clerk of Superior Court (Vote for One) (NP) Vote for Cathelene "Tina" Robinson (I) (Dem)	Constitutional Amendment #1 (NP) Vote for YES
For Public Service Commissioner (Vote for One) (NP) Vote for Robert G. Bryant (Dem)	For Sheriff (Vote for One) (NP) Vote for Patrick "Pat" Labat (Dem)	Constitutional Amendment #2 (NP) Vote for YES
For Public Service Commissioner (Vote for One) (NP) Vote for Daniel Blackman (Dem)	For Tax Commissioner (Vote for One) (NP) Vote for Arthur E. Ferdinand (I) (Dem)	Statewide Referendum A (NP) Vote for YES
For U.S. Representative in 117th Congress From the 5th Congressional District of Georgia (Vote for One) (NP) Vote for Nikema Williams (Dem)	For Surveyor (Vote for One) (NP) BLANK CONTEST	Atlanta Homestead Exemption - Special (Vote for One) (NP) Vote for YES
For State Senator From 38th District (Vote for One) (NP) Vote for Horacena Tate (I) (Dem)	For Solicitor-General of State Court of Fulton County (Vote for One) (NP) Vote for Keith E. Gammage (I) (Dem)	

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Poll ID: 461 Ballot ID: 487

President of the United States  
Joseph R. Biden (Dem)  
US Senate (Perdue)  
Jon Ossoff (Dem)  
US Senate (Loeffler) - Special  
Raphael Warnock (Dem)  
Public Service Commission District 1  
Robert G. Bryant (Dem)  
Public Service Commission District 4  
Daniel Blackman (Dem)  
US House District 5  
Nikema Williams (Dem)  
State Senate District 38  
Horacena Tate (I) (Dem)  
State House District 53  
Sheila Jones (I) (Dem)  
District Attorney - Atlanta  
Fani Willis (Dem)  
Clerk of Superior Court  
Cathelene "Tina" Robinson (I) (Dem)  
Sheriff  
Patrick "Pat" Labat (Dem)  
Tax Commissioner  
Arthur E. Ferdinand (I) (Dem)  
Surveyor  
BLANK CONTEST  
Solicitor General  
Keith E. Gammage (I) (Dem)  
County Commission District 4  
Natalie Hall (I) (Dem)  
Soil and Water - Fulton County  
Alan Toney (I)  
Constitutional Amendment #1  
YES  
Constitutional Amendment #2  
YES  
Statewide Referendum A  
YES  
Atlanta Homestead Exemption - Special  
YES

# **EXHIBIT B**

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

GARLAND FAVORITO, MICHAEL	)	
SCUPIN, TREVOR TERRIS, SEAN	)	
DRAIME, CAROLINE JEFFORDS,	)	
STACY DORAN, CHRISTOPHER PECK,	)	
ROBIN SOTIR, and BRANDI TAYLOR,	)	
Petitioners,	)	
	)	CIVIL ACTION NO.
v.	)	
	)	2020CV343938
FULTON COUNTY, FULTON COUNTY	)	
BOARD OF REGISTRATION AND	)	
ELECTIONS, and FULTON COUNTY	)	
CLERK OF SUPERIOR AND	)	
MAGISTRATE COURTS,	)	
Respondents.	)	

**ORDER**

On June 21, 2021, Respondents appeared before the Court and argued that sovereign immunity bars Petitioners’ due process and equal protection claims under the Georgia Constitution. Without conceding the merits of Respondents’ position, Petitioners asked the Court to add the members of the Fulton County Board of Registration and Elections in their individual capacities because these same claims may not be similarly barred.<sup>1</sup>

Having considered the arguments of the parties and the record as a whole, the Court finds that Respondents are entitled to sovereign immunity on Petitioners’ constitutional claims. Additionally, the Court exercises its discretion under OCGA § 9-11-21 and, in accordance with

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<sup>1</sup> Although these claims against the members of the Fulton County Board of Registration and Elections in their individual capacities may be barred by official immunity, the record is not sufficiently developed to warrant such a conclusion. See generally *Lathrop v. Deal*, 301 Ga. 408, 434 (III) (B), 801 S.E.2d 867 (2017) (“the doctrine of sovereign immunity usually poses no bar to suits in which officers are sued in their individual capacities for official acts that are alleged to be unconstitutional.”).

Petitioners' requests to add parties, hereby joins Alex Wan, Mark Wingate, Kathleen Ruth, Vernetta Nuriddin, and Aaron Johnson, as Respondents to this action.

No suit alleging violations of due process or equal protection rights under the Georgia Constitution, that seek declaratory or injunctive relief, may be initiated against either the state or county or any subsidiary department, bureau, or entity of the state or any county, unless there is a waiver of sovereign immunity. *Lathrop v. Deal*, 301 Ga. 408, 801 S.E.2d 867 (2017); *Gilbert v. Richardson*, 264 Ga. 744, 745-47 (1), (2), 452 S.E.2d 476 (1994) (sovereign immunity extends to counties).

Sovereign immunity may only be waived through the Georgia Constitution or by an act of the General Assembly. *Lathrop*, 301 Ga. at 425-26 (III), 801 S.E.2d 867 (2017). Further, “[s]overeign immunity is not an affirmative defense that must be established by the party seeking its protection. Instead, immunity from suit is a privilege, and the waiver must be established by the party seeking to benefit from the waiver.” *Athens-Clarke County v. Torres*, 246 Ga. App. 215, 216 (1), 540 S.E.2d 225 (2000) (citation and punctuation omitted). Accordingly, a claimant has failed to meet their burden if they point to no applicable portion of the Georgia Constitution, or the Code of Georgia, waiving sovereign immunity. See *Smith v. Chatham County*, 264 Ga. App. 566, 567-68 (1), 591 S.E.2d 388 (2003).

Petitioners contend that a recent amendment to the Georgia Constitution permits their claims where *Lathrop* prohibits them. The Court disagrees.

Ga. Const. Art. I, § 2, ¶ V (b) (1), provides that

Sovereign immunity is hereby waived for actions in the superior court seeking declaratory relief from acts of the state or any agency, authority, branch, board, bureau, commission, department, office, or public corporation of this state or officer or employee thereof or any county, consolidated government, or municipality of this state or officer or employee thereof outside the scope of lawful authority or in violation of the laws or the Constitution of this state or the

Constitution of the United States. Sovereign immunity is further waived so that a court awarding declaratory relief pursuant to this Paragraph may, *only after awarding declaratory relief*, enjoin such acts to enforce its judgment. *Such waiver of sovereign immunity under this Paragraph shall apply to past, current, and prospective acts which occur on or after January 1, 2021.* (emphasis added).

Here, Petitioners urge the Court to interpret the amendment to mean that Respondents' sovereign immunity is waived for actions alleging constitutional violations that seek declaratory and injunctive relief, no matter when the alleged violation(s) occurred. However, that reading would render the language "which occur on or after January 1, 2021" meaningless.

Accordingly, because Petitioners allege violations of their due process and equal protection rights under the Georgia Constitution – as a result of acts that occurred prior to January 1, 2021 – and seek declaratory and injunctive relief, Petitioners have failed to meet their burden to show an applicable waiver of sovereign immunity such that their constitutional claims may proceed against these governmental actors in the petition's current form.

However, misjoinder of parties is not a ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. OCGA § 9-11-21.

Therefore, **IT IS HEREBY ORDERED** that Fulton County's motion to dismiss is **GRANTED** on the basis of sovereign immunity and the remaining grounds are not reached as they are moot. Accordingly, Count I, II, III, IV, V, VI, and VII, are **DISMISSED** as it pertains to Fulton County. Further, Count XI of the second amended petition filed by Petitioners Favorito, Scupin, Terris, Draime, Doran, Peck, and Taylor, is **DISMISSED** as it pertains to Fulton County.

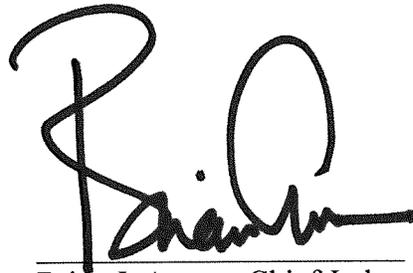
**IT IS FURTHER ORDERED** that the Fulton County Board of Registration and Elections' motion to dismiss is **GRANTED** on the basis of sovereign immunity and the

remaining grounds are not reached as they are moot. Accordingly, the Fulton County Board of Registration and Elections is **DISMISSED** as a party to this action.

**IT IS FURTHER ORDERED** that the Fulton County Clerk of Superior and Magistrate Courts' motion to dismiss is **GRANTED** on the basis of sovereign immunity and the remaining grounds are not reached as they are moot. Accordingly, the Fulton County Clerk of Superior and Magistrate Courts is **DISMISSED** as a party to this action.

**IT IS FURTHER ORDERED** that Petitioners' motions to add parties is **GRANTED**. Therefore, hereafter Alex Wan, Mark Wingate, Kathleen Ruth, Vernetta Nuriddin, and Aaron Johnson, are joined as Respondents to this action.

**SO ORDERED** this 24<sup>th</sup> day of June, 2021.



Brian J. Amero, Chief Judge  
Superior Court of Henry County  
Flint Judicial Circuit  
By Designation, a Fulton County  
Superior Court Judge