

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

VOTERGA AND
PHILIP SINGLETON,
PETITIONERS,

v.

CIVIL ACTION NO.: 2021CV353604

STATE OF GEORGIA,
RESPONDENT.

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

COME NOW, THE PETITIONERS, by and through their attorney of record and files this response to the State's motion to dismiss, as follows:

I. **SOVEREIGN IMMUNITY HAS BEEN WAIVED AS TO PROSPECTIVE RELIEF, AS A MATTER OF LAW.**

Sovereign immunity has been waived as to prospective relief, as a matter of law. While the November 3, 2020, election is best known for the Presidential contest, as part of the same election Georgia voters were asked to weigh in on this question: "Shall the Constitution of Georgia be amended to **waive sovereign immunity and allow the people of Georgia to petition the superior court for relief from governmental acts** done outside the scope of lawful authority or **which violate the laws of this state**, the Constitution of Georgia, or the Constitution of the United States?"

The question was not close: a whopping 74% of voters answered the question in the affirmative. The new provision of the Georgia Constitution took effect on January 1, 2021: "(b)(1) **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. (2) Actions filed pursuant to this Paragraph against this state or any agency, authority, branch, board, bureau, commission, department, office, or public corporation of this state or officer or employee thereof shall be brought exclusively against the state and in the name of the State of Georgia. Actions filed pursuant to this Paragraph against any county, consolidated government, or municipality of the state or officer or employee thereof shall be brought exclusively against such county, consolidated government, or municipality and in the name of such county, consolidated government, or municipality. Actions filed pursuant to this Paragraph naming as a defendant any individual, officer, or entity other than as expressly authorized under this Paragraph shall be dismissed. (3) Unless otherwise provided herein, this Paragraph shall not affect the power or duty of a court to dismiss any action or deny relief based on any other appropriate legal or equitable ground or other limitation on judicial review, including, but not limited to, administrative exhaustion requirements, ante litem notice requirements, sanctions for frivolous petitions, standing, statutes of limitation and repose, and venue. The General Assembly by an Act may limit the power or duty of a court under this Paragraph to dismiss any action or deny relief. (4) No damages, attorney's fees, or costs of litigation shall be awarded in an action filed pursuant to this Paragraph, unless specifically authorized by Act of the General Assembly. (5) This Paragraph shall not limit the power of the General Assembly to further waive the immunity provided in Article I, Section II, Paragraph IX and Article IX, Section II, Paragraph IX. This Paragraph shall not constitute a waiver of any immunity provided to this 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 by the Constitution of the United States.” Ga. Const. Art. I, § 2, ¶ V (for completeness the entire amendment is cited; relevant sections are in bold.)

In the present case, the case citations pre-date the effective date of the sovereign immunity amendment. The Petitioners have asserted claims for declaratory and injunctive relief, which have been specifically waived by the sovereign immunity amendment. The Petitioners seek relief, not from the past act of procuring the ballot marking device system, but from the use of the ballot marking device system in future elections. The Petitioners contend the ballot marking device system do not comport with state law and the continued use in future elections violates state law. Specifically, the Petitioners seek a declaratory judgment declaring the ballot

marking device system violates state law because of the use of the QR code to tabulate votes, which the voter cannot read or verify, as required by state law. In addition, the Petitioners seek injunctive relief to enjoin the use of these ballot marking devices in future elections. Hence, sovereign immunity has been waived as to prospective relief, as a matter of law.

II. PETITIONERS HAVE STATED A CLAIM FOR DECLARATORY RELIEF, AS A MATTER OF LAW.

Petitioners have stated a claim for declaratory judgment, as a matter of law. The general rule that governs 12 (b)(6) motions is that: “Georgia law holds that “dismissal is appropriate ‘only where a complaint shows with certainty that the plaintiff would not be entitled to relief under any state of facts that could be proven in support of his claim.’” Walker County v. Tri-State Crematory, 284 Ga. App. 34 (2007).

In the present case, a careful reading of the petition will show that the Petitioners have alleged an uncertainty about their fundamental right to vote. The fundamental right to vote also entails the right to have your vote counted. The Petitioners have averred that the ballot marking device system tabulates a voter’s intent by reading the QR code, not the written text. The written text is not tabulated or otherwise used for the tabulation process. However, the voter cannot specifically read or verify the QR code that is used for the tabulation process, but must rely on other actors to honestly read and verify their intent. This creates an uncertainty as to the voter’s intent when participating in future elections because the voter cannot read and verify the QR code to ensure its accuracy, unlike voters who use an absentee ballot. Absentee voters can clearly read and verify if the ballot is marked accurately with their intent because their marks are accumulated as their votes. Petitioners have stated a claim for declaratory judgment, as a matter of law.

III. PETITIONERS’ CLAIMS ARE NOT BARRED BY THE DOCTRINE OF LACHES, AS A MATTER OF LAW.

Petitioners’ claims are not barred by the doctrine of laches, as a matter of law. The Respondent seems to be infatuated with discussing only the timeframe surrounding the purchase of the ballot marking devices. The Petitioners are not seeking relief from the prior purchase of the ballot marking devices, but from their use in future election, e. g. the 2022 general election

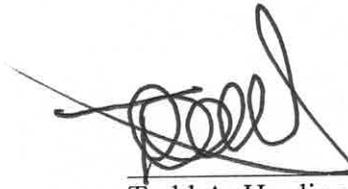
and other subsequent elections. The Petitioners have not allowed an unreasonable lapse of time in bringing these claims in relation to future elections because these future elections have not yet occurred. It is apparent that these future elections are going to be conducted by the State and its subdivisions. The Petitioner have not neglected in asserting their rights because they seek to prevent the future and continued use of the ballot marking devices in future elections. The timing of this civil action will not prejudice the Respondent because there are viable options to the use of the current ballot marking devices and plenty of time to implement any necessary changes to policies and procedures. The Respondent could easily implement future elections with the use of absentee ballots and optic scan devices until a replacement system could be acquired and implemented. Petitioners' claims are not barred by the doctrine of laches, as a matter of law.

THEREFORE, THE PETITIONERS pray:

- a). the Court **DENIES** the motion to dismiss; **AND**
- b). for any other relief the Court **DEEMS** necessary and proper.

Respectfully submitted this the 27th day of October, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I have served upon the Parties via their counsels of record, a true and correct copy of **RESPONSE TO STATE OF GEORGIA'S MOTION TO DISMISS AND BRIEF IN SUPPORT** in the above-styled case by email and the automated Odyssey service system.

Respectfully submitted this the 27th day of October, 2021.

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