

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

MICHAEL J. DAUGHERTY,
Contestant,

v.

FULTON COUNTY REGISTRATION AND
ELECTION BOARD, DEKALB COUNTY
REGISTRATION AND ELECTION BOARD,
COFFEE COUNTY BOARD OF
REGISTRATION AND ELECTIONS, GEORGIA
STATE ELECTION BOARD, BRAD
RAFFENSPERGER, IN HIS OFFICIAL
CAPACITY AS SECRETARY OF STATE,
RAPHAEL G. WARNOCK, AND THOMAS
JONATHAN OSSOFF,

Defendants.

CIVIL ACTION NO: 2021CV344953

FINAL ORDER

In the November 3, 2020 election, both of Georgia's United States Senate seats were on the ballot, one as a general election and the other as a special election. Because no candidate for either seat won a majority of the vote, the candidates who received the highest and second-highest number of votes in each election advanced to another election. On January 5, 2021, eligible Georgia electors voted at the polls in a runoff election and a special election runoff for the offices of United States Senator for the State of Georgia. Jon Ossoff and Raphael Warnock were unofficially declared the runoff victors the following day. Their opponents subsequently conceded. On January 19, 2021, these election results were certified. On January 20, 2021, the United States Senate administered the oath of office to and seated Senator Warnock and Senator Ossoff as Georgia's United States Senators without objection.

On January 25, 2021, Contestant Michael Daugherty filed his Petition contesting the election of Senator Warnock and Senator Ossoff. He claimed that misconduct, irregularities, or other problems with the November 3, 2020 election, and in significantly smaller respect a problem with voting in Columbia County in the January 5th runoff elections, required removing Senators Warnock and Ossoff from office and running new statewide elections under different conditions. In addition to the Senators, he named as respondents several county election and registration boards, the Georgia State Election Board, and Secretary of State Brad Raffensperger. As described further herein, the parties made several filings concerning service and moved to amend the petition, to strike various filings, and to dismiss the Petition.

On July 19, 2021, the Court heard argument from the parties at a hearing scheduled to consider all pending motions. Having considered the arguments of the parties and the record as a whole, the Court **GRANTS** the applications for admission *pro hac vice* and the motions to dismiss filed by Senator Warnock and Senator Ossoff.

Applications for Admission *Pro Hac Vice*

Counsel for Senators Warnock and Ossoff filed three verified applications for admission *pro hac vice* on April 19, 2021. According to their applications, all three applicants are in good standing in the jurisdictions in which they are barred, have previously been admitted *pro hac vice* to Georgia courts, have never had an application for admission *pro hac vice* denied or revoked, and have never been the subject of any sanctions in any proceedings or the subject of disciplinary action by any Bar or any Court. Likewise, Counsel affirmed that each case in which the applicants had previously appeared *pro hac vice* in Georgia concerned the specialties of election law or voting rights law, which are their areas of expertise.

On May 5th, Contestant filed his objections to these applications. On July 19th, having considered the applications and the objections thereto, the Court orally granted the applications for admission *pro hac vice* under Uniform Superior Court Rule 4.4 and hereby affirms that ruling in this Final Order.

Motions to Dismiss

Defendants filed several motions to dismiss the Petition. The Court need not address every argument Defendants collectively made because two are independently sufficient to require dismissal of the Petition with prejudice. First, the Contestant did not properly serve either Senator Warnock or Senator Ossoff, nor did he exercise the diligence required to serve process in an election contest under Georgia law. Second, the Petition is barred by the equitable doctrine of laches because the allegations in the Petition were not diligently pursued.

Service of Process

The Georgia Election Code requires an election contestant to act with diligence to serve any named defendants and the candidates for office in the contested election(s) with the contest petition and with special process requiring an expedited response. O.C.G.A. §§ 21-2-521(a), 524(b), 524(f); *Swain v. Thompson*, 281 Ga. 30, 31-32 (2006). In an election contest, the duty of the party bringing the action to ensure proper and timely service is heightened. *See id.* This is because the legislature has made clear that such actions should be swiftly resolved. *Id.* When the contestant knows or should know of any problem with executing timely and proper service, he then owes a heightened duty of “the greatest possible diligence” to correct the problem and then serve the appropriate parties, so that the action may swiftly proceed. *Swain*, 281 Ga. at 32.

The Contestant has not complied with his obligations to serve the necessary parties under Georgia’s contest statute. The record shows three attempts at service of process on Senator

Warnock, none of which showed the requisite diligence. The Contestant's affidavit of service concerning attempted service on February 13, 2021 (and not filed until April 28, 2021) reflects attempted ordinary service (not special) in Washington, D.C. by a private process server. The attempted service was never completed. The Contestant's next affidavit of service filed on March 30, 2021 states that another private process server served process on an aide to Senator Warnock on March 15th at his Atlanta office. This service was not served by the sheriff and the aide's affidavit, which was filed with the Court, shows that he was not an agent authorized to accept service on Senator Warnock's behalf, nor was he asked about his agency by the private process server who delivered the petition and other process. Neither of these attempts at service were sufficient under Georgia law, and no other attempts to serve Senator Warnock appeared in the record until July 12, 2021, the week before this Court had scheduled and conducted a hearing on motions pending since January 2021.

Service attempts on Senator Ossoff fail for the same reasons. The record reflects that the Contestant attempted to serve ordinary (not special) process on Senator Ossoff on February 13, 2021 as well. This attempt failed for the same reasons as the February 13, 2021 attempt to serve Senator Warnock failed. No other attempts to serve Senator Ossoff appeared in the record until July 12, 2021, the week before this Court had scheduled and conducted a hearing on motions pending since January 2021.

Independently, and fatally for his claims, the Contestant did not pursue service on Senator Warnock or on Senator Ossoff with the required diligence. Mr. Daugherty filed his contest at the very end of the permitted period to do so, on the fifth day after certification of the runoff elections results. O.C.G.A. § 21-2-524(a). But more was required here. Each Senator was sworn in and seated without objection on January 20, 2021.

Assuming *arguendo* that this Court could grant the relief Contestant demands,¹ Contestant waited weeks even to attempt to serve the Senators at all, let alone in compliance with O.C.G.A. § 21-2-524. Moreover, the Contestant had notice since at least April 9, 2021 (if not sooner), when Senator Warnock filed his motion to dismiss that problems with service existed.² In particular, Senator Warnock's motion included argument that Contestant's purported March 15, 2021, service of process was ineffectual because it did not comply with O.C.G.A. § 21-2-524(f) and because it was not timely. Even so, case filings show that Contestant did not attempt to serve the Senators again *until July 2021*, nearly three months after the April 9, 2021 motion to dismiss was filed and six months after filing his Petition. Contestant's counsel stated at the hearing that Senator Ossoff had been served on July 12th and that he was still attempting to effectuate service on Senator Warnock through the Fulton County Sheriff's Office. Senator Warnock's counsel represented, however, that Senator Warnock was also served on July 12th. Contestant's counsel did not provide further explanation for his delay either in perfecting service as required by O.C.G.A. § 21-2-524(f) nor did he explain why, if he felt he could not do so, he did not seek assistance or relief from the Court in this regard.

In sum, nearly six months elapsed from the filing of the Petition to when Contestant could plausibly claim to have served all required parties. This falls far short of the diligence requirements for effecting service in an election contest, rendering contestant's conduct "inexcusable" and warranting dismissal of the contest. *Swain*, 281 Ga. at 32; *DeJarnette Supply Co. v. F.P. Plaza, Inc.*, 229 Ga. 625, 625 (1972) ("Where there has been no legal service on the defendant and no

¹ See, e.g., U.S. Const. art. I § 5.

² Defendants other than the Senators filed motions to dismiss this contest containing argument that Contestant failed to serve sufficient process. The record reflects that the Contestant was served with these motions soon after filing, and so had notice of these arguments as early as February 2021.

waiver of service, the court has no jurisdiction to enter any judgment in the case unless it be one dismissing the case for lack of jurisdiction.”).

Laches

The contest must also be dismissed for a separate, independent reason. The Petition is not based on facts that arose for the first time in connection with the January 5, 2021 runoff elections, but on allegations related to the November 3, 2020 general election. The equitable doctrine of laches may bar a claim when (1) the lapse of time and (2) the claimant’s neglect in asserting rights (3) prejudiced the adverse party or parties. *Waller v. Golden*, 288 Ga. 595, 597 (2011). In the context of election contests, the Supreme Court of Georgia has “wholly reject[ed] the notion that the laws of this State allow a candidate to sit on his rights hoping for the best.” *Jordan v. Cook*, 277 Ga. 155, 156 (2003). It has also cautioned that contestants “should make every effort to dispose of election disputes with dispatch” and that courts must not interfere with the “orderly process of elections” after one has been held. *Payne v. Chalman*, 267 Ga. 873, 876 (1997).

All three elements of laches are present here. *First*, the Petition purports to challenge the validity of the January 5th runoff elections, but the allegations contained within the Petition concern events that occurred at latest during the week immediately following the November 3, 2020 general election, and in some cases months beforehand. The sole allegation in the Petition concerning problems in the January 5th runoff concerns difficulties operating Columbia County’s voting system and poll books on the morning of January 5, 2021. According to Exhibit 30 of the Petition, the problem was resolved by 10:00 a.m. that morning and neither prevented anyone from voting nor caused any illegal votes to be cast.³

³ Contestant neither named the Columbia County election superintendent as a respondent to his Petition nor sought to amend his Petition to name it as a respondent.

Second, many of the allegations connected to the November 3, 2020 general election could have been raised within the five days permitted to do so after certification of the November 3, 2020 general election. The Contestant's failure to do so bars him from contesting those results now under Georgia's contest statute. Moreover, as discussed above, Contestant has pursued this matter with an extreme lack of diligence, and his actions in even the last six months reflect not only a lapse of time, but significant neglect in asserting and pursuing his rights.

Third, there is no question that Contestant's unjustifiable delay is prejudicial. At least four million voters cast their votes in the January 5th runoff election, in which Senator Warnock won his race by over 93,000 votes and Senator Ossoff won by over 55,000. Senators Warnock and Ossoff have been sworn-in and seated by the United States Senate. They are actively engaged in the representation of Georgia's citizens in that legislative body and have been for over six months now. Even assuming it were within the judiciary's power to do, invalidating the certified results of that election, unseating the Senators, and re-running the entire runoff election would cause severe prejudice to the named Defendants as well as millions of Georgia voters. It would also do serious (and, likely, permanent) damage to the integrity of the state's elections system, and would, undoubtedly, cost the State and its taxpayers millions of dollars. In the meantime, Georgians would likely be left without full representation in the United States Senate. There is no precedent for this, and it is antithetical to the very fabric of our system of representative government.

Contestant posits that the runoff elections were a continuation of the general and special elections, per O.C.G.A. § 21-2-501, so that while he could have filed his contest to challenge those elections, he was not required to do so. Georgia's contest statute is clear, however, that challenges to election results that do not name a declared winner but instead the two participants in a runoff election should be brought within five days of the certification of those results. *See* O.C.G.A. §

21-2-521 (stating that “the eligibility of any person declared eligible to seek any such nomination or office in a run-off primary or election...may be contested...by an aggrieved elector...”). There is good reason for this: if there were sufficient reason under the Election Code to place into doubt results of a general or special election, resolving those issues to determine the candidates eligible for a runoff election *before* that runoff election were held is far preferable to doing so *after* that election. Accordingly, allegations contesting an election determining candidates eligible for a subsequent runoff election must be filed within the five days provided for in O.C.G.A. § 21-2-524(a). *See Broughton v. Douglas County Bd. of Elections*, 286 Ga. 528, 529 (2010). Contestant sat on his rights to challenge the November 3, 2020 election, foregoing the ability to contest those results.

At the hearing, Contestant argued that at no time did he relinquish a known right, and therefore cannot have his claims barred by laches. But Contestant bears the burden to timely serve required process under Georgia law. *Swain*, 281 Ga. at 31-32; *Hardy v. Lucio*, 259 Ga. App. 543, 544 (2003) (finding it “well established” that plaintiff bears burden to serve complaint within applicable statutory time period and must show “greatest possible diligence” once plaintiff receives notice of problem with service). By failing to diligently pursue an action to resolve problems he perceived in the November 3, 2020 election, and thereafter failing to timely serve the Senators such that they would be prejudiced were this action to proceed, Contestant forfeited his right to pursue remedies for those perceived issues. *Waller*, 288 Ga. at 597; *Jordan*, 277 Ga. at 156; *Payne*, 267 Ga. at 876. Accordingly, laches bars Contestant from pressing his claims now.

CONCLUSION

This Court has no jurisdiction to enter the relief that Mr. Daugherty seeks because he has failed to serve either Senator Warnock or Senator Ossoff with the diligence required and according

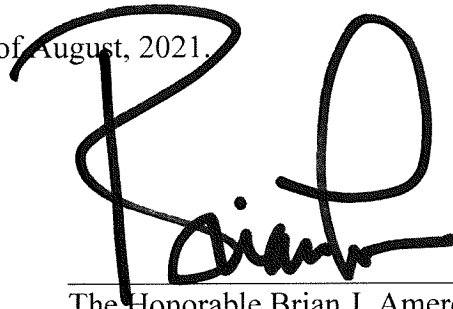
to the prescriptions of the Georgia Election Code. Independently, Mr. Daugherty's contest claims are barred by the equitable doctrine of laches.

It is thus **ORDERED** as follows:

1. The applications for admission *pro hac vice* are **GRANTED**;
2. The motions to dismiss filed by Senator Warnock and Senator Ossoff are **GRANTED**;
3. The motions to dismiss filed by all other Defendants are not considered as they are **MOOT**;
4. The motions to amend the petition, the motions to strike, and all other motions filed by Petitioner are not considered as they are **MOOT**; and
5. Petitioner's election contest is **DISMISSED WITH PREJUDICE**.

Petitioner is **FURTHER ORDERED** to serve a copy of this Order on all non-parties on which he has served a notice of inspection or other discovery document under the caption of this case **WITHIN SEVEN DAYS** of filing of this Order.

IT IS SO ORDERED, This 2nd day of August, 2021.

A handwritten signature in black ink, appearing to read "Brian J. Amero". The signature is written in a cursive style with a large initial "B".

The Honorable Brian J. Amero
Sitting by designation in the
Superior Court of Fulton County