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

COALITION FOR GOOD GOVERNANCE, *et al.*,

Plaintiffs,

v.

BRIAN KEMP, Governor of the State of Georgia, in his official capacity, *et al.*,

Defendants.

CIVIL ACTION

FILE NO. 1:21-CV-02070-JPB

RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PERMANENT INJUNCTION AND FINAL JUDGMENT AND VOLUNTARY DISMISSAL

INTRODUCTION

In response to Plaintiffs' earlier motion for a stay of this case, Defendants proposed they dismiss their case and refile when they had the resources to litigate. [Doc. 86, p. 2]. This Court then instructed the parties to complete discovery by November 17, 2022, and explicitly warned that any additional extensions are "unlikely absent exceedingly compelling circumstances." [Doc. 89]. Yet Plaintiffs still took no further action. After hearing nothing from Plaintiffs, Defendants noticed depositions of all Plaintiffs. [Doc. 91]. Only then did Plaintiffs file the present motion, seeking to convert the preliminary

injunction on one limited topic into a permanent injunction and to dismiss their remaining claims without prejudice. As discussed below, this Court should not reward Plaintiffs' attempt to short-circuit Defendants' ability to develop their defenses through discovery. Instead, the Court should dismiss the entirety of Plaintiffs' Amended Complaint.

FACTUAL BACKGROUND

Plaintiffs filed their 206-page complaint in this case on May 21, 2021. [Doc. 1]. They amended their complaint less than a month later, adding another twenty pages. [Doc. 14]. The amended complaint included fourteen individual and organizational plaintiffs and fourteen separate counts challenging eight different provisions of SB 202. *See generally*, [Doc. 14]. Although this Court subsequently denied Defendants' and Defendant-Intervenors' motions to dismiss on December 9, 2021, [Doc. 50], the Court noted that the Amended Complaint "contains some of the hallmarks of a shotgun pleading." [Doc. 50, p. 43 n.23].

In February 2022, Plaintiffs sought to add a fifteenth count in a Second Amended Complaint, which Defendants informed opposing counsel that they did not then oppose and this Court authorized on March 1, 2022. But Plaintiffs apparently never filed the proposed Second Amended Complaint. [Docs. 69, 74]. Also in February 2022, the Court granted the parties' request for a

scheduling order with a five-month discovery track, which provided that motions for summary judgment would be filed by July 1, 2022.

Thereafter, Plaintiffs served one set of interrogatories, requests for production, and requests for admission in February 2022, to which Defendants responded in March 2022. [Doc. 77]. To date, after Defendants answered a question from Plaintiffs, Plaintiffs have not notified Defendants of any deficiency in those responses. Defendants served discovery requests on Plaintiffs in March 2022, and Plaintiffs initially responded in April 2022. [Doc. 79]. But Plaintiffs did not produce responsive documents until August 12, 2022.

On September 13, 2022, Plaintiffs filed a motion for stay, asking the Court to stay this case until March 2023. [Doc. 85]. According to Plaintiffs, they lacked the resources to prosecute this case while also handling other litigation matters. *See id.* On September 20, 2022, the Court granted that motion in part, extending the discovery schedule in this case to November 17, 2022. [Doc. 89]. But the Court noted that it was "not willing to provide Plaintiffs with the full relief requested," "[g]iven the age of the case and the length of the discovery period already afforded to the parties[.]" *Id.* at 2. Accordingly, the Court stated that it was unlikely to permit any further extensions. *Id.*

Notwithstanding the Court's admonition, Plaintiffs took no further steps to advance the discovery process. After hearing nothing from Plaintiffs,

Defendants' counsel contacted Plaintiffs' counsel on October 4, 2022, to request deposition dates for Plaintiffs' witnesses. Email from B. Tyson to B. Brown, attached as Ex. A. Then, after receiving no response to that communication, Defendants sent deposition notices for Plaintiffs' witnesses. [Doc. 91]. Only then did Plaintiffs respond, stating that the witnesses were not available on the noticed dates. Email from B. Brown to B. Tyson, attached as Ex. B.

Additionally, Plaintiffs responded by filing their motion asking that the Court convert the existing preliminary injunction into a permanent injunction, which again claims that they cannot litigate this case because of the discovery efforts in the *Curling* litigation and because the elections are a busy time for at least one of the Plaintiffs. [Doc. 93, p. 11]. While the *Curling* litigation is not a basis for an extension for all the reasons raised in Defendants' Response to the earlier motion for stay, [Doc. 86, pp. 4–5], it is also no surprise that the 2022 general election is occurring. Plaintiffs' admitted decision to allocate their resources to other tasks, [Doc. 93, p. 11], is no excuse for their failure to prosecute their case, especially given their attacks on Defendants using this litigation. *See* [Doc. 86, pp. 5–6].

Notably, when this Court granted part of Plaintiffs' motion for preliminary injunction regarding photographing ballots outside the polling place, it relied on declarations from Plaintiffs to find four Plaintiffs had

standing to bring this case. [Doc. 49, pp. 7–8, 10–11, 14]. While Defendants have received documents from Plaintiffs, they have not yet been able to depose Plaintiffs regarding the allegations in those declarations. Likewise, in determining that Plaintiffs were entitled to an injunction on one of the photography rules, this Court only determined that Plaintiffs were "*substantially likely to succeed* as to Photography Rule II." [Doc. 49, p. 23] (emphasis added].

ARGUMENT AND CITATION OF AUTHORITY

A. This Court should not grant a permanent injunction.

Plaintiffs ask this Court to make its preliminary injunction permanent but offer no basis to do so. Indeed, Plaintiffs' request fails for a multitude of reasons.

First, they cite the wrong standard. Plaintiffs rely on *United States v. McGee*, 714, F. 2d 607, 613 (6th Cir. 1983), but that case sat for two years and the district court entered an injunction after a motion for summary judgment. *Id*. at 610. Further, the Sixth Circuit found there was "no factual dispute" regarding the issues involved. *Id*. at 613. But here, Defendants vigorously contest Plaintiffs' standing, along with the merits of the remaining claims. *See, e.g.,* [Doc. 60, pp. 5–7, 14]. Thus, this is far from a case where there is no factual dispute.

Second, while Plaintiffs are correct that they must show actual success on the merits to obtain a permanent injunction, [Doc. 93, p. 3], they only cite to cases where there was no triable issue of fact or where only a preliminary injunction was issued. *See id*. at pp. 3–4. Further, the cases Plaintiffs cite about permanent injunctions involved summary-judgment cases that expressly recognized that "findings of fact made in support of a preliminary injunction are not controlling at a later hearing for a permanent injunction." *United States v. Prater*, No. 8:02-cv-2052-T-23MSS, 2005 U.S. Dist. LEXIS 24952, at *8 (M.D. Fla. Aug. 30, 2005) (citing *E.Remy Martin & Co., S.A. v. Shaw-Ross Int'l Imports, Inc.*, 756 F.2d 1525, 1527 n.1 (11th Cir. 1985)); *see also Citibank N.A. v. Nat'l Arbitration Council, Inc.*, Nos. 3:04-cv-1076-J-32MCR, 3:04-cv-1205-J-20MCR, 2006 U.S. Dist. LEXIS 67133, at *12 (M.D. Fla. Sep. 19, 2006). Plaintiffs have not cited a single case where a preliminary injunction was converted to a permanent injunction apart from summary judgment or without any discovery.

Third, it is not abnormal, even in the election context, for claims made earlier in a proceeding to fail to hold up to evidence after discovery. In 2007, for example, after granting multiple preliminary injunctions enjoining Georgia's photo-identification requirements for in-person voting, this Court denied plaintiffs' attempt to obtain a permanent injunction after trial, finding

that "although Plaintiffs contended at the preliminary injunction hearing that many voters who lack an acceptable Photo ID for in-person voting are elderly, infirm, or poor, and lack reliable transportation to a DDS service center or a county registrar's office, the evidence in the record fails to support that contention." *Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333, 1378 (N.D. Ga. 2007), *aff'd and rev'd in part on other grounds by* 554 F.3d 1340 (11th Cir. 2009). This Court went on to explain:

> The Court acknowledges that in its previous Orders addressing the preliminary injunction motions, it concluded that the Photo ID requirement severely burdened voters. It is important to note, however, that the preliminary injunction motions were made at an earlier stage of the litigation and were made under more relaxed evidentiary standards. Here, however, Plaintiffs must actually prove their contentions by a preponderance of the evidence, using evidence reduced to an admissible form. Plaintiffs have failed to do so here.

Id. at 1379.

In this case, Plaintiffs must prove their contentions with evidence that has been tested in discovery. Instead, they seek to deprive Defendants of that opportunity by requesting this Court move immediately to final judgment on a record that is no more complete than it was on August 20, 2021, when this Court issued its preliminary-injunction order. Moreover, the record is only deficient because *Plaintiffs* have opted to not participate in the discovery process.

Fourth, triable issues remain in this case. When this Court granted part of Plaintiffs' motion for preliminary injunction regarding photographing ballots outside the polling place, it relied on declarations from Plaintiffs to find that four Plaintiffs had standing to bring this case—declarations from individuals Defendants have so far been unable to depose despite noticing depositions. [Doc. 49, pp. 7–8, 10–11, 14]. To grant a permanent injunction prior to the completion of discovery and after Plaintiffs' delays would be extremely prejudicial to Defendants.

Further, Defendants have not yet been able to put forward evidence of potentially compelling government interests, [Doc. 93, p. 5], because Plaintiffs seek to short-circuit that process by obtaining a permanent injunction without summary-judgment briefing. While Plaintiffs believe that Defendants "will never be able to . . . articulate a compelling interest," [Doc. 93, p. 6], they cannot know that because they have not participated in discovery in this case beyond providing a few documents. The proper place to test those theories is in a motion for summary judgment, backed up by citations to evidence. Plaintiffs continue to claim there is no issue of material fact—but if that is so, why not move for summary judgment where that allegations can be truly tested?

Fifth, Plaintiffs cannot just restate their preliminary-injunction arguments to obtain a permanent injunction, especially when the findings of

fact that supported a preliminary injunction must be re-evaluated. *E.Remy Martin & Co., S.A.*, 756 F.2d at 1527 n.1. Plaintiffs spend barely a page restating their earlier arguments on the remaining prongs of the preliminary-injunction standard but again cite no facts that have been tested in discovery to support those propositions.

Sixth, while Plaintiffs argue that this Court should enter final judgment and/or sever their one preliminary-injunction claim from the remaining claims, they could do so by seeking leave to amend their Complaint. Plaintiffs seek to short-circuit this process by asking the Court to sever the claim, apparently in service of their efforts to avoid discovery.

For these myriad reasons, Plaintiffs have fallen far short of identifying any basis for converting the existing preliminary injunction into a permanent one. Rather, doing so would cause significant prejudice to Defendants.

B. This Court should dismiss this case.

Rather than grant Plaintiffs' requested permanent injunction, the Court should dismiss this case. Defendants advised Plaintiffs they would join a stipulation dismissing Plaintiffs' *entire* case without prejudice. Email from B. Tyson to B. Brown, attached as Ex. C. But, as noted above, Plaintiffs wish to receive final judgment on one claim, without being required to satisfy their burden on that claim.

The Court should not do so. Rather, Defendants urge this Court to dismiss the *entirety* of Plaintiffs' Complaint without prejudice. Fed. R. Civ. P. 41(b); *Taylor v. Spaziano*, 251 F. App'x 616, 619 (11th Cir. 2007) (distinguishing between dismissal with prejudice, which requires record of delay or contumacious conduct and dismissal without prejudice, which is not an adjudication on the merits); *see also Morewitz v. W. of Eng. Ship Owners Mut. Prot. & Indem. Ass'n (Lux.)*, 62 F.3d 1356, 1366 (11th Cir. 1995) (dismissal with prejudice is "a sanction of last resort that is to be utilized only in extreme situations").

Plaintiffs chose to file this lawsuit and, as long as it is pending, the lawsuit places a cloud over Georgia's elections and the challenged provisions of SB 202. Plaintiffs again argue they are too busy to litigate, but still make no reference to the *four* law firms representing them in this case. This Court should dismiss the entirety of their case and they can refile when they are ready to back up their claims about SB 202.

CONCLUSION

Rewarding Plaintiffs by allowing part of the case to enter final judgment and preserving the option for future litigation is not an appropriate exercise of this Court's discretion. Instead, this Court should dismiss the entirety of Plaintiffs' case without prejudice so they can refile whenever they decide they

have the resources to litigate. In the meantime, this Court should deny the motion for permanent injunction and for stay and dismiss Plaintiffs' claims in their entirety without prejudice.

Respectfully submitted this 31st day of October, 2022.

Christopher M. Carr
Attorney General
GA Bar No. 112505
Bryan K. Webb
Deputy Attorney General
GA Bar No. 743580
Russell D. Willard
Senior Assistant Attorney General
GA Bar No. 760280
State Law Department
40 Capitol Square, S.W.
Atlanta, Georgia 30334

/s/ Bryan P. Tyson
Bryan P. Tyson
Special Assistant Attorney General
Georgia Bar No. 515411
btyson@taylorenglish.com
Bryan F. Jacoutot
Georgia Bar No. 668272
bjacoutot@taylorenglish.com
Taylor English Duma LLP
1600 Parkwood Circle
Suite 200
Atlanta, GA 30339
Telephone: 678-336-7249

Gene C. Schaerr*
gschaerr@schaerr-jaffe.com
Erik Jaffe*
ejaffe@schaerr-jaffe.com

H. Christopher Bartolomucci*
cbartolomucci@schaerr-jaffe.com
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 787-1060
Fax: (202) 776-0136
* Admitted *pro hac vice*

Counsel for Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing Response has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

/s/Bryan P. Tyson
Bryan P. Tyson