

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

DEMOCRATIC PARTY OF)	
GEORGIA, INC., DSCC, and)	
WARNOCK FOR GEORGIA)	
)	CIVIL ACTION FILE NO.
Plaintiffs,)	2022CV372734
)	
v.)	
)	
THE STATE OF GEORGIA,)	
)	
Defendant.)	

**THE STATE OF GEORGIA’S OPPOSITION TO PLAINTIFFS’
EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER
AND/OR INTERLOCUTORY INJUNCTION**

The State of Georgia opposes Plaintiffs’ Emergency Motion for Temporary Restraining Order and/or Interlocutory Injunction for the reasons set forth below.

Introduction

The sole issue in this case is whether Georgia law permits counties to hold advance in-person voting on Saturday, November 26, 2022, for the general run-off election for U.S. Senate. It plainly does not, and Plaintiffs’ motion for interlocutory injunctive relief should be denied.

Advance voting is governed by Section 21-2-385(d) of Georgia’s elections code. It provides for a period of advance voting for primaries and elections, including “runoff[s] from any general primary or election,” and sets forth the

duration, days, and times for advance voting, so that Georgia counties conduct advance voting in a uniform manner. *Id.* The statute provides for advance voting on Saturdays, except when the Saturday “follows a public and legal holiday occurring on the Thursday or Friday immediately preceding.” *Id.* After receiving requests for guidance from counties regarding the dates for advance voting for the Senate run-off election, the Secretary of State issued an Official Election Bulletin advising that voting on Saturday, November 26 was not permitted under Section 21-2-385(d)(1) because the day follows the state Thanksgiving holiday on Thursday, November 24, as well as an observed state holiday on Friday, November 25.

Plaintiffs acknowledge that Section 21-2-385(d)(1) prohibits advance voting on a Saturday following a holiday, but argue that this provision only applies to a “primary” or an “election,” and not a “runoff.” (Plaintiffs’ Brief at 2, 7.) But Plaintiffs’ argument fundamentally misses the mark because the Senate run-off election *is* an “election” as that term is defined and used in the elections code. An “election” is any general election that is not a primary, O.C.G.A. § 21-2-2(5), including a “run-off election,” which is a “continuation of” a general election in which no candidate receives a majority of votes in a particular race. Ga. Const., art. I, § II, par. II; O.C.G.A. § 21-2-501(a). A “runoff” is not a separate and independent category of election as Plaintiffs contend—it is merely a continuation of a “primary” or “election” that fails to result in a

majority winner, as defined in the elections code and the Georgia Constitution. The rules that govern voting in primaries and elections apply equally to any runoff from those same primaries and elections, including Section 21-2385(d)(1)'s prohibition on holding advanced voting on a Saturday following a Thursday or Friday holiday. Plaintiffs' argument that counties are free to hold advance voting whenever they want subject to no restrictions because a "runoff" is not an "election" is not a credible or serious interpretation of the statute.

Because Plaintiffs' claims lack merit, their motion must be denied. But as a threshold matter, sovereign immunity bars the Court from entering a temporary restraining order or interlocutory injunction against the State. The limited waiver of sovereign immunity in Georgia Constitution Article I, Section II, Paragraph V(b) on which Plaintiffs rely does not give the Court jurisdiction to enter an injunction against the State on an *interlocutory* basis. Rather, it is only *after* awarding declaratory relief in a final judgment on the merits that the Court may enter an injunction necessary to enforce its judgment. The Court's lack of jurisdiction to order Plaintiffs' requested relief is reason alone to deny their motion.

Equitable considerations also warrant the denial of Plaintiffs' requested injunctive relief. The intent of the legislature's prohibition against voting on holiday weekends is not to disadvantage voters—the law provides for at least

5 days of advance voting, in addition to the available options of voting in person on Election Day or by mail-in absentee ballot. There are plenty of options available to voters. Having the polls closed on a holiday weekend is to allow poll workers needed time off on holiday breaks during an extremely busy election cycle, as well as provide uniformity for advance voting across Georgia's 159 counties, particularly among those that lack the resources of the more populous counties. A last-minute court order changing the rules that normally apply to elections will disrupt the ability of county elections workers to timely meet the notice requirements for advance voting and find poll workers to staff polling locations over a holiday weekend. In order to avoid disruption to the orderly administration of the election by the counties, the Court should deny Plaintiffs' motion.

Relevant Background

The statewide general election in Georgia was held on November 8, 2022. In the general election for the office of U.S. Senate, no candidate received a majority of votes.¹ For this reason, a runoff election between the candidates receiving the two highest number of votes is required by Georgia law to take

¹ The unofficial election results, which have not yet been certified by the Secretary of State, are available at <https://results.enr.clarityelections.com/GA/115465/web.307039/#/detail/10100>.

place 28 days after Election Day, on December 6, 2022. O.C.G.A. § 21-2-501(a)(1).

In 2021, the General Assembly amended Section 21-2-501(a)(1) to set a 28-day run-off period for primaries and elections for federal offices (previously, only state and county general elections had a 28-day run-off period). Ga. L. 2021 p. 14 § 42. Along with amending the time for run-off elections, the General Assembly amended the provisions for advance voting in Section 21-2-385(d)(1), to account for this change. *Id.* § 28.

On November 12, 2022, the Secretary of State's office issued guidance to county elections officials in the form of an Official Elections Bulletin regarding certification of the general election results and preparation for the Senate runoff election. (Complaint, Ex. 1.) The guidance advised that, “[p]ursuant to O.C.G.A. § 21-2-385(d)(1)(B), advance voting for the December 6th general election runoff must begin as soon as possible prior to the runoff and no later than Monday, November 28th.” (*Id.*) At a minimum, advance voting must take place between November 28 and December 2. Counties have the option of holding advance voting on Sunday November 27, and even prior to Thanksgiving if they are able to complete the required preparations and notifications by then. The guidance further advised that advance voting “cannot occur on Thursday, November 24th (Thanksgiving Day), Friday, November 25th (Observance of State Holiday 1), or Saturday, November 26th.”

The reason that advance voting may not occur on Saturday, November 26 is because it “is prohibited by O.C.G.A. 21-2-385(d)(1), which states that if the second Saturday before the runoff follows a Thursday or Friday that is a state holiday, voting on that Saturday is not allowed.” (*Id.*)

Two days after this guidance issued, Plaintiffs filed this lawsuit, asking the Court to declare as a matter of law that counties may hold advance voting on November 26, 2022, despite the clear prohibition in Section 21-2-385(d)(1).

Argument

I. Standard of Review

In deciding whether to issue a TRO or interlocutory injunction, a court should consider whether:

(1) there is a substantial threat that the moving party will suffer irreparable injury if the injunction is not granted; (2) the threatened injury to the moving party outweighs the threatened harm that the injunction may do to the party being enjoined; (3) there is a substantial likelihood that the moving party will prevail on the merits of her claims at trial; and (4) granting the interlocutory injunction will not disserve the public interest.

SRB Inv. Services, LLLP v. Branch Banking & Tr. Co., 289 Ga. 1, 5 (2011) (quoting *Bishop v. Patton*, 288 Ga. 600, 607 (2011)). Although a party seeking interlocutory injunctive relief need not always “prove all four of these factors,” the Court must keep in mind that “an interlocutory injunction is an extraordinary remedy, and the power to grant it must be prudently and cautiously exercised.” *Jansen-Nichols v. Colonial Pipeline Co.*, 295 Ga. 786, 787

(2014) (quoting *SRB Inv. Services*, 289 Ga. at 5 (citation and punctuation omitted)).

Plaintiffs cannot satisfy the requirements for interlocutory injunctive relief because they are not likely to succeed on the merits of their claim and the balance of threatened injuries disfavors an injunction here. But as a threshold matter, the State's sovereign immunity under the Georgia Constitution prohibits the Court from entering interlocutory injunctive relief against the State. These reasons require the Court to deny Plaintiffs' motion.

II. The State's sovereign immunity bars Plaintiffs' request for interlocutory injunctive relief.

"The sweep of sovereign immunity under the Georgia Constitution is broad." *Lathrop v. Deal*, 301 Ga. 408, 424 (2017) (quoting *Olvera v. Univ. Sys. of Georgia's Bd. of Regents*, 298 Ga. 425, 426 (2016)). Suits against the state, its agencies, or state officials are permitted only where there is an explicit waiver of sovereign immunity by the legislature or within the Georgia Constitution. Ga. Const. art. I, § II, par. IX(e). Sovereign immunity applies to actions seeking either injunctive or declaratory relief. *Georgia Dep't of Nat. Res. v. Ctr. for a Sustainable Coast, Inc.*, 294 Ga. 593, 603 (2014) (sovereign immunity bars claims for injunctive relief); *Olvera*, 298 Ga. at 427 (sovereign immunity bars actions for declaratory judgment).

In their complaint, Plaintiffs allege that this suit is brought under to Article I, Section II, Paragraph V(b) of the Georgia Constitution. (Complaint ¶ 11.) This constitutional provision provides a limited waiver of sovereign immunity for certain actions in superior court seeking “declaratory relief from acts of the state. . . or . . . officer or employee thereof . . . outside the scope of lawful authority or in violation of the laws or the Constitution of this state,” and requires that the action be filed exclusively against the State. Ga. Const. art. I, § II, par. V(b).

However, this limited waiver of sovereign immunity does not give the Court jurisdiction to enter an injunction against the State on an *interlocutory* basis. Rather, it is “only *after* awarding declaratory relief” in a final judgment on the merits that the Court “may enjoin such acts to enforce its judgment.” *Id.* (emphasis added). Therefore, Plaintiffs cannot obtain a TRO or interlocutory injunction in this case because sovereign immunity bars injunctive relief unless and until this Court awards declaratory relief—which it is unlikely to do because Plaintiffs cannot succeed on the merits of their claim.

III. Plaintiffs fail to satisfy the requirements for an interlocutory injunction.

A. Plaintiffs are not likely to succeed on the merits.

The sole issue in this case is one of statutory interpretation: whether Section 21-2-385(d)(1) permits counties to hold advance voting on a November 26, 2022, the Saturday following state holidays on Thursday and Friday, for the Senate run-off election. The Plaintiffs contend that the provisions regarding Saturday voting do not apply because the election at issue is a “runoff” and not an “election.” But this is a distinction without a difference. Applying the established rules of statutory interpretation, the only proper conclusion the Court can reach is that the counties are prohibited from holding advance voting on this date, and the Secretary’s guidance is a correct interpretation of Georgia law.

Statutory interpretation starts with the text. When a court considers the meaning of a statute, it must afford the text its “plain and ordinary meaning,” and read it in the “most natural and ordinary way, as an ordinary speaker of the English language would.” *Deal v. Coleman*, 294 Ga. 170, 172-73 (2013). A statute should not be read in isolation, but rather “in the context of the other statutory provisions of which it is a part.” *Hendry v. Hendry*, 292 Ga. 1, 3 (2012)). “[A]ll statutes relating to the same subject matter are to be construed together, and harmonized wherever possible.” *Id.*

Applying these principles, the Court should first look at the text and structure of Section 21-2-385(d)(1), which is one paragraph consisting of three sentences. The first sentence states that “there shall be a period of advance voting,” and tells us when that period of advance voting starts and ends:

- (A) On the fourth Monday immediately prior to each primary or election; and
- (B) As soon as possible prior to a runoff from any general primary or election but no later than the second Monday immediately prior to such runoff
and shall end on the Friday immediately prior to each primary, election, or runoff.

O.C.G.A. § 21-2-385(d)(1). Applying this sentence to the Senate run-off election, the period for advance voting must start no later than November 28 (*i.e.*, the second Monday prior to election day on December 6, 2022), and must end by Friday, December 2.

Whereas the first sentence tells us the *period* during which advance voting may place, the second sentence states the *days* and *times* voting may occur during the advance voting period. In short, when the polls may be open. This sentence provides that voting “shall be conducted beginning at 9:00 A.M. and ending at 5:00 P.M. on weekdays, other than observed state holidays,” during the advance voting period. *Id.* It further provides for limited voting on weekends, including Saturdays, and permissive voting on Sundays, subject to the limitation that if the Saturday “follows a public and legal holiday occurring

on the Thursday or Friday immediately preceding” such second Saturday, advance voting shall not be held. *Id.*

The third and final sentence of Section 21-2-385(d)(1) states that counties may extend the hours for advance voting and establish additional voting locations, but also provides that “voting shall occur only on the days specified in this paragraph and counties shall not be authorized to conduct advance voting on any other days.” *Id.* In other words, counties do not have discretion to hold advance voting on days not expressly authorized in the statute.

Construing this statute as a whole, the legislature clearly intended that advance voting not be permitted on a Saturday following a Thursday or Friday holiday for all elections and primaries, including run-off elections and primaries. Plaintiffs’ argument, however, is that the prohibition applies “only to primary and general elections, not runoffs,” because the statute refers to a Saturday “prior to a primary or election.” (Plaintiffs’ Brief at 7) But this is an unsupportable interpretation because the phrase “prior to a primary or election” as used in that sentence is merely a reference point for how counties are to calculate the “second and third” Saturdays and Sundays on which they may have advance voting—it’s not a substantive limitation on the types of elections to which the prohibition applies.

But in any event, there is no reasonable interpretation of the phrase “primary or election” that excludes a “run-off election,” because those terms are not mutually exclusive as defined and used in the elections code. The terms “primary” and “election” are defined terms. A “primary” is held for the purpose of “nominating candidates for public offices to be voted for at an election.” O.C.G.A. § 21-2-2(29). An “election” is a “general or special election” in which candidates are elected. O.C.G.A. § 21-2-2(5). If no candidate receives the majority of votes needed to win nomination in a primary, a “run-off primary” is held to determine the winner. O.C.G.A. § 21-2-501(a)(1). If a general election fails to result in a candidate receiving a majority of votes, a “run-off election” is held to determine the winner. *Id.* Therefore, a “run-off” is either a “primary” or an “election,” and is not a separate category of election as Plaintiffs contend. Rather, a “run-off primary” or “run-off election” is “a continuation of the primary...[or] election...for the particular office concerned.” O.C.G.A. § 21-2-501(a)(5); *see also* Ga. Const., art. I, § II, par. II (stating that “[a] run-off election shall be a continuation of the general election”).

The legislature is presumed to know the meaning of these terms, and when it prohibited advance voting on a Saturday following a holiday, it clearly intended for the prohibition to apply to both an “election” as well as any necessary “run-off election” that may follow, even though the word “runoff” is not specifically used in that sentence. Generally, the provisions in the elections

code that govern the rules for voting refer only to “primaries and elections,” and not “run-offs,” yet these rules are equally applied to run-off primaries and elections because they are commonly understood to be the same thing.²

Georgia courts also consider the term “election” as inclusive of a “run-off election,” as shown in numerous decisions using the terms “election,” “run-off election,” and “runoff” interchangeably in reference to the same election. *See, e.g., Fuller v. Thomas*, 284 Ga. 397 (2008) (referring to a contested run-off election as an “election,” “runoff,” and “runoff election” throughout the decision); *Spalding County Bd. of Elections v. McCord*, 287 Ga. 835 (2010) (same); *Meade v. Williamson*, 293 Ga. 142 (2013) (same).

The use of these terms interchangeably by the legislature and the courts underscores that the ordinary meaning of “runoff” is considered to be an “election.” *See Hasty v. Castleberry*, 293 Ga. 727, 731 (2013) (a statute is “to be construed in connection and in harmony with the existing law, and as a part of a general and uniform system of jurisprudence,” “with reference to other statutes and the decisions of the courts”). In this proper context, it is clear that when the legislature prohibited advance voting on a second Saturday prior to

² *See, e.g.,* O.C.G.A. § 21-2-300(a) (requiring that the state’s electronic voting equipment be used in “general primaries and general elections”); O.C.G.A. § 21-2-403 (requiring that polls be open between 7:00 A.M. and 7:00 P.M. for “all primaries and elections”); O.C.G.A. § 21-2-385(a) (setting forth the procedures for voting by absentee ballot in a “primary or election”); O.C.G.A. § 21-2-522 (providing for the “result of a primary or election” to be contested in court).

an “election” where such Saturday follows a state holiday, it intended and understood that this prohibition would apply to advance voting in a run-off election.

For the Court to adopt Plaintiffs’ interpretation, it must conclude, as Plaintiffs do, that the legislature intended to exclude run-off elections from all of the provisions for advance voting in the second sentence of Section 385(d)(1). But this would lead to the absurd result that the counties would be required to have at least 5 days of advance voting for a run-off election, but given no instructions regarding what days of the week on which voting may occur, the hours during which the polls may be open, or whether the polls are required to be open on holidays. That cannot possibly be the legislative intent, and the Court is not required “to reach an unreasonable result unintended by the legislature.” *Haugen v. Henry County*, 277 Ga. 743, 745 (2004); *see also Spalding County*, 287 Ga. at 840 (stating that statutes should not be construed to produce absurd results).

But if Plaintiffs are correct, then the Court must necessarily conclude that *no* voting on Saturdays or Sundays is even *permissible* for a run-off election. If the weekend voting provisions do not apply to run-off elections, then counties are limited to holding advance voting on weekdays. As the statute makes clear, “voting shall occur only on the days specified in this paragraph and counties *shall not be authorized* to conduct advance voting *on any other*

days.” O.C.G.A. § 21-2-385(d)(1) (emphasis added). Plaintiffs conveniently ignore this last sentence of the subsection, but it completely undermines their position that counties have the discretion to allow advance voting on the days they choose (*see* Plaintiffs’ Brief at 6). Rather, the statute is clear that if weekend voting is not expressly *permitted* in a run-off election in the statute, then it is expressly *prohibited*. Plaintiffs cannot have it both ways.

In sum, the Secretary’s guidance that counties may not hold advance voting on Saturday, November 26 for the Senate run-off election is a correct interpretation of Georgia law, and Plaintiffs are not likely to succeed on the merits of their claim. Moreover, the Secretary’s guidance is the only interpretation consistent with the text and legislative intent of the statute, while also maximizing the number of days counties may hold advance voting.

B. The balance of harms and the public interest weigh strongly in favor of denying injunctive relief.

Plaintiffs also fail to show the likelihood of irreparable harm necessary to support a request for injunctive relief. Plaintiffs argue their members and constituents will be “irreparably harmed” by the “Secretary’s attempt to restrict Georgians’ ability to participate in advance voting.” (Plaintiffs’ Brief at 10.) But Plaintiffs fail to show how the Secretary’s guidance, which is consistent with Georgia law, restricts the ability of Georgians to vote all. There are at least 5 days available for counties to hold advance voting pursuant to

the Secretary's guidance, including a possible 6th day on Sunday, November 27. Voters may also vote absentee-by-mail or in person on December 6, 2022. Plaintiffs' argument that the Court must order that 7 days of advance voting be available because providing only 6 days of advance voting is a violation of voters' fundamental constitutional rights is not a serious argument, especially when viewed in the context of all options available to Georgia voters. *See New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1281 (11th Cir. 2020) (holding that Georgia's absentee ballot receipt deadline was not burdensome on voters because of the "numerous avenues to mitigate chances that voters will be unable to cast their ballots").

While there is no likelihood that Plaintiffs will be irreparably harmed absent injunctive relief, the State has a "strong interest in [its] ability to enforce state election law requirements." *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 244 (6th Cir. 2011). For this reason, the Supreme Court has repeatedly emphasized that courts "should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (April 6, 2020) (per curiam) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)); *see also New Ga. Project*, 976 F.3d at 1283 (11th Cir. 2020).

There is also harm to the public that can result from last-minute court orders changing election rules.³ The deadline for counties to publish their advance voting locations and hours is fast approaching and many counties have already published their advance voting locations and hours for the run-off election. *See* O.C.G.A. § 21-2-385(d)(3) (requiring publication seven days prior to the beginning of the advance voting period). State Election Board regulations state that counties “shall endeavor not to remove or alter any advance voting locations after they are published, unless there are emergency or unforeseen circumstances that make such a change necessary.” Ga. Comp. R. & Regs. 183-1-14-.02(2). Changes to the schedule will only serve to disrupt the ability of county elections workers to timely meet the notice requirements for advance voting, staff polling locations, and do the necessary preparations for the election. Last-minute changes can also lead to voter confusion and incentivize voters to stay away from the polls. *Purcell*, 549 U.S. at 4-5.

³ Contrary to Plaintiffs’ assertion that this is a new position taken by the Secretary of State’s office, the current guidance is consistent with guidance previously given on the same question, which arose in run-off special elections in Summer 2021. The run-off special election was held on July 13, 2021, and the second Saturday prior to the election fell over the July 4th holiday weekend. When asked by the counties participating in that special election if Saturday voting over the July 4th weekend was allowed, the guidance was that it was not allowed. *See* Exhibit 1 (June 23, 2021 Email from Elections Director Blake Evans to County Liaisons).

Finally, a court order exempting the Senate run-off election from the statutory prohibition against voting on holiday weekends will undermine the legislature's intent to allow elections workers needed time off on holiday breaks during an extremely busy election cycle. It further undermines the legislature's intent that advance voting have some uniformity across Georgia's 159 counties, particularly among those that lack the resources of the more populous counties and are unable to staff polling locations on holiday weekends. In order to avoid disruption to the orderly administration of the election by the counties with last-minute changes, the Court should deny Plaintiffs' motion.

Respectfully submitted, this 17th day of November, 2022.

CHRISTOPHER CARR 112505

Attorney General

BRYAN K. WEBB 743580

Deputy Attorney General

RUSSELL D. WILLARD 760280

Senior Asst. Attorney General

/s/ Charlene S. McGowan

CHARLENE MCGOWAN 679316

Assistant Attorney General

Attorneys for the State of Georgia

Office of the Georgia Attorney General

40 Capitol Square

Atlanta, Georgia 30334

(404) 458-3658

cmcgowan@law.ga.gov

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing **STATE OF GEORGIA'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TRO** with the Clerk of Court using the electronic filing system, which will send notification of such filing to counsel for the parties of record via electronic notification.

Dated: November 17, 2022.

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

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EXHIBIT 1

RETRIEVED FROM DEMOCRACYDOCKET.COM

From: [Evans, Blake <bevans@sos.ga.gov>](mailto:bevans@sos.ga.gov)
To: [Combs, Leigh <lcombs@sos.ga.gov>](mailto:lcombs@sos.ga.gov)
[Carr, Robin <rcarr@sos.ga.gov>](mailto:rcarr@sos.ga.gov)
[Carbone, Dennis <dcarbone@sos.ga.gov>](mailto:dcarbone@sos.ga.gov)
Date: 6/23/2021 12:36:51 PM
Subject: Saturday Voting for July 13 Runoff

Please send the text below to your 5 counties having state runoffs in July (Cobb, Montgomery, Toombs, Appling, and Jeff Davis):

For Saturday voting requirements, as provided in O.C.G.A. § 21-2-385(d)(1)(D) as currently in effect and O.C.G.A. § 21-2-385(d)(1)(B) as amended by SB202 and in effect on July 1, if such second Saturday immediately precedes a public and legal holiday pursuant to O.C.G.A. § 1-4-1 occurring on the following Monday, advanced voting shall not be held on the second Saturday but shall be held on the third Saturday prior to the election. The third Saturday prior to the election is this Saturday, June 26. Prior to conducting advanced voting, the county must give seven days public notice, meaning, if a county didn't give advanced voting notice last week, then they cannot conduct Saturday voting at all for this runoff. Saturday voting cannot occur on July 10 because advanced voting must end the Friday prior to the election, which is July 9.

Blake Evans
Deputy Elections Division Director
Georgia Secretary of State
Direct: 470-312-2745
Cell: 470-701-6901



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