

EXHIBIT A

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

BLACK VOTERS MATTER FUND, *et al.*,

Plaintiffs,

vs.

BRAD RAFFENSPERGER, in his
official capacity as Secretary of State of
Georgia, *et al.*,

Defendants.

Civil Action No.: 20-cv-1489-AT

PLAINTIFFS’ SUR-REPLY
IN OPPOSITION TO DEKALB DEFENDANTS’ MOTION TO DISMISS

DeKalb’s¹ reply brief in support of their motion to dismiss the amended complaint cites, for the first time, O.C.G.A. §§ 21-2-30, 21-2-31 with respect to the second “arm of the state” factor; and *Ballard v. Chattooga Co. Bd. of Tax Assessors*, 615 Fed. Appx. 621, 628 (11th Cir. 2015), with respect to the third and fourth factors. Their reliance is misplaced.

¹ “DeKalb” refers to Defendants DeKalb County Board of Registration & Elections (the “Board”) and Anthony Lewis, Susan Motter, Dele Lowman Smith, Samuel E. Tillman, Baoky N. Vu, and Erica Hamilton, in their official capacities.

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With respect to the second “arm of the state” factor (state control), DeKalb refers to the “overarching power of the State,” pointing to a statute providing, “It shall be the duty of the State Election Board to promulgate rules and regulations so as to obtain uniformity in the practices and proceedings of superintendents, registrars, deputy registrars, poll officers, and other officials, as well as the legality and purity in all primaries and elections.” O.C.G.A. §§ 21-2-30, 21-2-31. Doc. 111 at 3. Plaintiffs have acknowledged that, based on the evidence so far, both the counties and the Secretary have power over the postage requirement, so the second factor is a “closer question.” Doc. 107 at 11.² But at the end of the day, DeKalb fails to satisfy its burden³ of establishing immunity because the statute does not specifically restrict DeKalb’s ability to impose or lift the postage requirement. *See* Doc. 107 at 12-13 (citing cases). Perhaps more importantly, the State Election

² Indeed, this very statute was the premise of some of Plaintiffs’ arguments for class certification. *See* Doc. 110-1 at 11-12. But of course, the standards for Rule 23(b)(1)(A) and (b)(1)(B) defendant class certification are different from whether a defendant has carried its burden of demonstrating Eleventh Amendment immunity on a motion to dismiss posture.

³ DeKalb’s reply does not dispute that DeKalb has the burden of establishing Eleventh Amendment immunity at this early stage. Doc. 107 at 3-4.

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Board has not “promulgate[d] rules and regulations” restricting DeKalb’s ability to impose or lift the postage requirement. *Id.*

Next, with respect to the third (source of funding) and fourth factors (responsibility for liability), DeKalb cites *Ballard v. Chattooga Co. Bd. of Tax Assessors*, 615 Fed. Appx. 621, 628 (11th Cir. 2015). DeKalb argues that they are akin to the county board of tax assessors who established immunity in that case. Doc. 111 at 4.⁴

But *Ballard* found that the third factor tilted in the defendant’s favor in part because a state official determined their salaries pursuant to state law. *Ballard*, 615 Fed. Appx. at 627. Here, DeKalb points to no state official that sets their salaries, or any state law authorizing it. And even if the state did set their salaries, the third factor would still tilt in Plaintiffs’ favor under the published Eleventh Circuit decisions cited in Plaintiffs’ prior brief, namely because it is the county who ultimately pays the salaries. Doc. 107 at 17-18.

As for the fourth factor (which DeKalb previously appeared to concede tilted against them, Doc. 80 at 8), *Ballard* compared the county tax assessors to the

⁴ DeKalb also compares themselves for the very first time to the sheriff’s office in *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003). (The word “sheriff” is not mentioned in DeKalb’s opening brief.) But because *Ballard* substantially duplicates *Manders*’s analysis, Plaintiffs focus on *Ballard*.

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sheriff's office in *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003). *Ballard* found that while the defendant entity is itself responsible for adverse judgments, that entity ““must recoup that money from somewhere . . . [and thus] both county and state funds are implicated.”” *Ballard*, 615 Fed. Appx. at 627-28 (quoting *Manders*). Here, however, DeKalb does not assert that judgments against DeKalb are recouped by state funds. To the contrary, as discussed previously, DeKalb appears to concede that state funds are not implicated and has admitted that it would have to spend money if Plaintiffs won. Doc. 107 at 20-21. Thus, the fourth factor remains tilted in Plaintiffs' favor.

For these reasons, DeKalb's motion to dismiss the amended complaint should be denied.

Respectfully submitted this 3rd day of June, 2020.

Sean Young

Attorney Bar Number: 790399
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF GEORGIA, INC.
P.O. Box 77208
Atlanta, GA 30357
Telephone: (678) 981-5295
Email: syoung@acluga.org

Sophia Lin Lakin
Dale E. Ho
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street, 18th Floor
New York, NY 10004

EXHIBIT A

Telephone: 212-519-7836

Email: slakin@aclu.org

dho@aclu.org

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

Pursuant to N.D. Ga. Local Civil Rule 7.1(D), I hereby certify that the foregoing has been prepared in compliance with N.D. Ga. Local Civil Rule 5.1(C) in Times New Roman 14-point typeface.

Sean Young

Attorney Bar Number: 790399

Attorney for Plaintiffs

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF GEORGIA, INC.

P.O. Box 77208

Atlanta, GA 30357

Telephone: (678) 981-5295

Email: syoung@acluga.org

CERTIFICATE OF SERVICE

I hereby certify that on the aforementioned date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system.

Sean Young

Attorney Bar Number: 790399

Attorney for Plaintiffs

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF GEORGIA, INC.

P.O. Box 77208

Atlanta, GA 30357

Telephone: (678) 981-5295

Email: syoung@acluga.org