

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

COMMON CAUSE GEORGIA, as an)	
organization,)	
)	
Plaintiff,)	
)	Civil Action
v.)	
)	File No. 1:18-CV-05102-AT
BRIAN KEMP, in his official capacity as)	
Secretary of State of Georgia, ¹)	
)	
Defendant.)	

**DEFENDANT’S SUNDAY SUPPLEMENTAL GENERAL SUBMISSION IN
RESPONSE TO COURT’S REQUESTS FOR INFORMATION AND
SUGGESTION OF MOOTNESS OF PLAINTIFF’S MOTION FOR
TEMPORARY RESTRAINING ORDER**

I. UPDATED INFORMATION AS OF 10:20AM ON SUNDAY.

COMES NOW Defendant Crittenden and supplements her prior responses to this Court’s request for information on the timing of election certification by

¹ Defendant Kemp resigned from his position as Secretary of State and Governor Deal appointed Robyn A. Crittenden as the new Secretary of State for the State of Georgia.

Georgia counties under O.C.G.A. § 21-2-493(k). As of 10:20 am November 11, 2018, 92 out of Georgia's 159 counties have certified their election results:²

- ATKINSON
- BAKER
- BALDWIN
- BARTOW
- BERRIEN
- BIBB
- BLECKLEY
- BRANTLEY
- BROOKS
- BRYAN
- BULLOCH
- BURKE
- BUTTS
- CALHOUN
- CARROLL
- CATOOSA
- CHARLTON
- CLAY
- CLAYTON
- COLQUITT
- COWETA
- CRAWFORD
- CRISP
- DECATUR
- DODGE
- DOOLY
- DOUGLAS

² It is important to note that the Office of the Secretary of State for the State of Georgia does not receive the certifications or results until the day after the deadline for certification under O.C.G.A. § 21-2-493(k) – *i.e.*, Wednesday November 14, 2018.

- EARLY
- ELBERT
- EVANS
- FAYETTE
- FLOYD
- FRANKLIN
- GILMER
- GORDON
- GREENE
- HARALSON
- HART
- HEARD
- IRWIN
- JACKSON
- JEFFERSON
- JENKINS
- JOHNSON
- LAMAR
- LAURENS
- LEE
- LONG
- MACON
- MARION
- MCDUFFIE
- MERIWETHER
- MILLER
- MITCHELL
- MONROE
- MONTGOMERY
- NEWTON
- OCONEE
- PEACH
- PICKENS
- POLK
- PULASKI

- PUTNAM
- QUITMAN
- RABUN
- RANDOLPH
- RICHMOND
- ROCKDALE
- SCREVEN
- SPALDING
- SUMTER
- TALBOT
- TALIAFERRO
- TAYLOR
- TELFAIR
- TERRELL
- THOMAS
- TIFT
- TOOMBS
- TOWNS
- TURNER
- UPSON
- WARE
- WARREN
- WASHINGTON
- WAYNE
- WHEELER
- WHITE
- WHITFIELD
- WILCOX
- WILKES
- WORTH

II. RESPONSE TO COURT'S REQUEST FOR INFORMATION REGARDING CODING OF PROVISIONAL BALLOTS.

Last night by email to counsel at 8:01pm, the Court requested additional explanations for the provisional ballot codes IR, X, and V, which appeared on the chart filed as Ex. A to [Doc. 43-1] and which had not been previously explained to the Court. The explanations provided by counsel for Defendant Crittenden are:

IR – this code is used for absentee or election-day voters who registered to vote by mail and did not provide identification with their registration. These voters can use more forms of identification to verify their identity than just a photo ID under O.C.G.A. § 21-2-417(c), which matches the requirements contained in the Help America Vote Act.

X – this is the code for someone flagged as a non-citizen. This was inadvertently referred to as CZ at the hearing.

V – this code is used when the voter was not verified by a match to Department of Driver Services or Social Security Administration databases when they registered to vote. If someone was in a pending verification status and did not have sufficient ID when they presented to vote, they would be assigned V status on a provisional ballot. This is essentially the same category as PI.

III. PLAINTIFF’S REQUEST FOR RELIEF IS NOW MOOT AND CAN BE ADDRESSED IN A NON-EMERGENCY CONTEXT.

A. Plaintiff’s request for a temporary restraining order is moot because of the ongoing certification process.

The relief sought by Plaintiff in its motion for TRO was to prevent county registrars³ from “rejecting any provisional ballots relating to the 2018 general election on the ground that the voter’s name is not found on the voter registration list, pending a decision on the permanent relief sought in this case” [Doc. 15-13, p. 2]. The deadline for registrars to make determinations about provisional ballots was the close of business on Friday. O.C.G.A. § 21-2-419(c)(3). That deadline has already passed. The information above also demonstrates that the certification process for counties is now more than halfway complete. In other words, the process that Plaintiff sought to enjoin is complete as to the consideration of provisional ballots and more than halfway complete as to certification.

As a result, any action taken by this Court will not grant the relief Plaintiff seeks. Any order can only apply to counties that have not already certified their election results. “This Court cannot prevent what has already occurred.” De La

³ While the motion also sought to prevent the Secretary of State from rejecting any provisional ballots, Georgia law vests all determinations about provisional ballots in local registrars, not the Secretary of State. O.C.G.A. § 21-2-419(c). The only statutory responsibility of the Secretary of State related to provisional ballots is the receipt of a report on the number of provisional ballots after certification. O.C.G.A. § 21-2-419(e).

Fuente v. Kemp, 679 F. App'x 932, 933 (11th Cir. 2017); Yates v. GMAC Mortg. LLC, No. 1:10-CV-02546-RWS, 2010 WL 5316550, at *2 (N.D. Ga. Dec. 17, 2010) (“The Court is powerless to enjoin what has already occurred”).

A request for emergency relief becomes moot when the event sought to be enjoined has already occurred. For example, when a foreclosure sale happens before an injunction is granted, a motion for emergency relief to stop the sale is moot. See, e.g., Johnson v. Bank of New York Mellon, N.A., No. 1:11-CV-03365-SCJ, 2012 WL 13012803, at *2 (N.D. Ga. Jan. 9, 2012); Harrod v. Bank of Am., N.A., No. 1:12-CV-04261-SCJ, 2012 WL 12876111, at *1 (N.D. Ga. Dec. 13, 2012); Ross v. PNC Bank, N.A., No. 1:14-CV-0872-SCJ, 2014 WL 12577113, at *1 (N.D. Ga. Apr. 3, 2014). A motion for emergency relief also becomes moot when a subsequent event occurs that prevents the challenged activity from recurring. Smith v. Leach, 294 F. Supp. 862, 866 (N.D. Ga. 1968) (request for injunction regarding Selective Service Act mooted by subsequent event that prevented plaintiff from reenlisting in the military); see also Ethredge v. Hail, 996 F.2d 1173, 1175 (11th Cir. 1993) (appeal of denial of preliminary injunction mooted by intervening event).

In this case, Plaintiff's request for a temporary restraining order is moot because the subsequent event of local certification of election results means “it no

longer presents a live controversy with respect to which the court can give meaningful relief.” Troiano v. Supervisor of Elections in Palm Beach Cty., Fla., 382 F.3d 1276, 1282 (11th Cir. 2004). Mootness is jurisdictional—because a federal court may only adjudicate cases and controversies, a ruling that cannot provide meaningful relief is an impermissible advisory opinion. Id.; Brooks v. Ga. State Bd. of Elections, 59 F.3d 1114, 1118 (11th Cir. 1995).

B. Plaintiff’s claims can be addressed by this Court at a later time or in an election contest.

Denying Plaintiff’s motion as moot will not prevent the issues Plaintiff raises in its Complaint from being reviewed by this Court in a non-emergency context. All provisional ballot materials are retained and can be reviewed after the election process is over. O.C.G.A. § 21-2-419(c)(3). Plaintiff’s claims can be litigated even without the actual ballots, because their claims focus on the security of the state voter registration database. [Doc. 1, p. 21].

As of last evening, Plaintiff appears to have recognized that none of the statewide elections will be impacted – one way or another – by the provisional ballots. [Doc. 55]. Effectively conceding that there is no irreparable harm, Plaintiff apparently now, and for the first time, believes that this Court must enter an injunction to address potentially close elections in three Georgia House of Representatives districts. [Id.] This argument fails for four reasons.

First, Georgia law already provides a remedy for elections that could be decided by uncounted provisional ballots. One of the grounds for an election contest is that the number of “legal votes rejected” was “sufficient to change or place in doubt the result.” O.C.G.A. § 21-2-522(3). If an election could have been decided by provisional ballots that Plaintiff believes were improperly rejected by county officials, the losing candidate or an aggrieved elector can contest the election and address any issues involving provisional ballots. O.C.G.A. § 21-2-521. There is no reason for this Court to enter an injunction when Georgia law already provides a sufficient remedy for the new issues raised by Plaintiff.

Second, at some point, Plaintiff must be limited by the claims that it brought to this Court. From the inception of this litigation, and certainly since this Court closed the evidentiary hearing on Thursday, November 8, Plaintiff has continually supplemented, changed, amended, and raised new arguments and new factual contentions. This may be permitted in some contexts, but given the serious, burdensome, and extraordinary relief it seeks against the Secretary of State, Plaintiff should not be permitted to present a moving target up to the very hour of this Court’s expected ruling. As is uncontested, any of the relief sought by the Plaintiff will harm the Secretary’s ability to prepare and approve ballots for upcoming runoffs and harm the county elections officials’ ability to uniformly and

successfully manage early and absentee voting for the December runoff elections. If Plaintiff's loss of the temporary restraining order was fatal to its overall challenge to voter security in Georgia or to the provisional ballot system, that would be one thing. Further, if the denial of the temporary restraining order were to prevent an overall challenge to Georgia's provisional ballot system, Plaintiff's shifting strategy could be more excusable. Neither, however, is true. And accordingly, the Secretary should be permitted to certify the state election as soon as she is able to under the law and facts as they are presented to her from all county election superintendents by Tuesday, November 13.

Third, Plaintiff's eleventh-hour shift in strategy and theory still fails for a lack of evidence. Plaintiff's theory comparing the total number of provisional ballots cast in three of Georgia's most populous counties – Fulton, Cobb, and Gwinnett – fell short of its evidentiary burden to show by clear and convincing evidence that the number of provisional ballots cast in each of the respective Georgia House of Representatives districts are enough to change the outcome of that specific election. McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998) (establishing evidentiary burden). Indeed, Plaintiff has not provided any evidence regarding the number of provisional ballots that were cast in those

State House districts. This falls quite short of the type of showing needed to stop a statewide certification.

Finally, at the very least, Plaintiff's latest filing [Doc. 55] shows that there is no basis for a statewide injunction. If there are state House races that are at issue that this Court believes cannot be resolved through the election contest processes in Georgia law, any injunction should be limited to only those races—not the statewide contests where the provisional ballots will not affect the outcome.

Testimony of Chris Harvey, [Doc. 54, p. 44:9-20].

III. CONCLUSION.

For all the reasons previously briefed by Defendant Crittenden, this Court should deny the emergency relief sought by Plaintiff. This Court should also deny the request for emergency relief because it is now moot. Counties have completed their review of provisional ballots and are more than halfway finished certifying election results and this Court cannot grant relief to Plaintiff at this stage in the election process.

Respectfully submitted this 11th day of November 2018.

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L.R. 7.1(D) CERTIFICATION

I certify that this Notice has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1(C). Specifically, this Notice has been prepared using 14-pt Times New Roman Font.

/s/ Bryan P. Tyson

Bryan P. Tyson

Georgia Bar No. 515411

CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the within and foregoing
**DEFENDANT'S SUNDAY SUPPLEMENTAL GENERAL SUBMISSION IN
RESPONSE TO COURT'S REQUEST FOR INFORMATION AND
SUGGESTION OF MOOTNESS OF PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING ORDER** with the Clerk of Court using the
CM/ECF system, which automatically sent counsel of record e-mail notification of
such filing.

This 11th day of November, 2018.

/s/ Bryan P. Tyson