IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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| **PAUL ANDREW BOLAND,**<br><br>**Plaintiff,**<br><br>***v.***<br><br>**BRAD RAFFENSPERGER, in his official capacity as Secretary of State of the State of Georgia, REBECCA N. SULLIVAN, in her official capacity as Vice Chair of the Georgia State Election Board DAVID J. WORLEY, in his official capacity as a Member of the Georgia State Election Board, MATTHEW MASHBURN, in his official capacity as a Member of the Georgia State Election Board, and ANH LE, in her official capacity as a Member of the Georgia State Election Board,**<br><br>**Defendants.** | CIVIL ACTION FILE<br>NO. 2020CV343018 |

**PLAINTIFF'S AND INTERVENOR-CONTESTANT'S BRIEF IN OPPOSITION TO DEFENDANT-INTERVENORS' MOTION TO DISMISS**

## INTRODUCTION

Defendants' brief focuses on the weak claims they "want" Plaintiff to make instead of the strong claims Plaintiff is actually making. This filing is distinct from other cases. It focuses solely on two empirical issues: An expert analysis that finds 20,312 out-of-state voters, and an abnormally low mail in ballot rejection rate. Plaintiff is requesting a decertification of the election as that relates to the merits of this case. In order to afford Plaintiff the opportunity to prove his case, Plaintiff requests that the certification be stayed, not decertified (yet), until these matters can be investigated through an audit to determine if further investigation is warranted.

A sample audit of signature match and out-of-state voters would take just a few days and put the matter to rest. It is telling that rather than simply conduct this experiment, an army of lawyers has marched in to stop it.

## I. ARGUMENT

### A. This Matter is not Moot.

The Plaintiff's Complaint is not moot or rendered moot, and is ripe to be heard on an expedited basis. As supported by historical precedent, in particular the 1960 Kennedy-Nixon contest, the real safe harbor deadline is January 6, 2021. January 6 is the date the Senate and House meet for the counting of electoral votes. The date which has "ultimate significance" under federal law, as Justice Ginsburg aptly noted, is the "sixth day of January," the date set by 3 U.S.C. § 15 on which the Senate and House determine "the validity of electoral votes." *Bush v. Gore*, 531 U.S. 98, 144 (2000) (Ginsburg, J., dissenting). Thus, January 6, 2021 is the first date on which any electoral votes are actually counted. On that date, the Twelfth Amendment directs, "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."

Thus, on January 6, when the vote of a state is presented, Members of Congress may object to the vote by stating in writing, "clearly and concisely, and without argument, the ground thereof." If Congress finds the evidence compelling, it may reject a state's vote even after it has been certified by the State. The empirical evidence from the audit we seek, is precisely what would be needed to bring such a challenge before Congress. While the prospects of a Congressional challenge might seem remote, that is only because the data has not yet been confirmed. For example, if upon review it turned out that 15,000 ballots were demonstrably shown to be cast by non-Georgians, while the margin of victory was only 12,670, the appetite for action would be quite different.

Art. II, § 1, cl. 4, gives Congress the power to specify the date "on which [the electors] shall give their votes, which Day shall be the same throughout the United States." Exercising that power, Congress has mandated that the electors "shall meet and give their votes on the first Monday after the second Wednesday in December" – this year, December 14, 2020 – "at such place in each State as the legislature of such State shall direct." 3 U.S.C. § 7. Article II requires that all electors throughout the United States vote on the same day, whether Congress could validly count electoral votes cast on a later date. The basic responsibility of the electors is to "make and sign six certificates of the votes given by them" for President and Vice President, 3 U.S.C. § 9; "seal up the certificates so made by them," *Id.*, § 10; and forward them by registered mail to the President of the Senate and toother officials. *Id.*, § 11. These actions are carried out without any involvement by state officials. It is also clear, that if, before the electors cast their votes, the candidates for whom they are voting have been issued certificates of election, it is the duty of the governor to deliver the certificates to the electors "on or before the day" they are required to meet, *Id. at* § 6, and the electors are then to attach the certificates to the electoral votes they transmit to the President of the Senate. *Id.*, § 9.

But nothing in federal law requires States to resolve controversies over electoral votes prior to the meeting of the electors. Indeed, there is no set deadline for a State to transmit to Congress a certification of which slate of electors has been determined to be the valid one. The duty of the state governor is merely to transmit the certification "as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment…." *Id.*, § 6.

The "safe harbor" provision of the Electoral Count Act, which purportedly mandates that a final result reached in a State by the safe harbor date "shall be conclusive" when votes are counted

in Congress. 3 U.S.C. § 5. There is no legal authority stating that the Electoral Count Act, enacted by the 5th Congress in 1877, can have any binding effect on the 117th Congress which will convene on January 3, regarding its authority and obligation to count electoral votes as it sees fit. The Senate, which convenes in January, has the inherent authority to set whatever rules it wishes for deciding challenges to the electoral votes cast in the 2020 election. This must be consistent with Art. I, § 5, providing that "[e]ach House may determine the Rules of its Proceedings…."

Thus, since the true deadline is January 6, 2020, this action is not rendered moot and this action is ripe to proceed.[1]

**B. Defendants' laches argument is based on a misunderstanding of plaintiff's claims**

Laches is an equitable bar that is inapplicable when there has been no undue delay by the Plaintiff. The Plaintiff questions the outcome of the election results based on the certification. Plaintiff could not raise those questions until after the election. This case was timely filed under the state law limitations period, which requires election contests be filed within five days of certification. *See* O.C.G.A. § 21-2-524(a). *Cf. SCA Hygiene Prod. Aktiebolag v. First Quality Baby Prod., LLC*, 137 S. Ct. 954, 960 (2017) (laches does not generally apply within statutory limitations period).

Plaintiff simply wants an audit of 20,312 specific ballots that appear to have been cast by voters who do not live in Georgia. Plaintiff could not possibly have identified those ballots prior to the certification of the election results. (In fact, the election results are undergoing yet another recount, and many of the ballots are subject to individual challenge. It is hard to see under the

[1] Significantly, the audit plaintiff seeks would help identify potential issues with the planned January 5 runoff election. The audit may reveal names to be removed from the voter list, or the need to better educate poll workers in following the signature match requirements. Even if the audit showed no large-scale irregularities, that too would be helpful by setting otherwise skeptical minds at ease. Such individuals, might otherwise not participate in the runoff election on the theory that "the fix is in." Accordingly, the case should proceed.

circumstances how the Defendants will show the (1) undue delay or (2) harm to the Defendants needed to invoke the equitable doctrine of laches.)

Similarly, Plaintiff does not seek injunctive relief to change the signature match procedures, although it seems that the signature match procedures should have been revised to comport with the requirements of the Election Code. *See* O.C.G.A. § 21-2-386.. It is the fact that the abnormally low ballot rejection rate suggests that the procedures, whatever they were, were not enforced with their usual rigor. Again, the data to establish this potential lax enforcement was not available until after the election.

The laches argument is also disingenuous. The Plaintiff would not have been able to bring this action before the certification of the election results – Defendants would have then claimed the issue was not "ripe." An audit of the certified results can only be requested after the results have been certified.

**C. An Election Contest is an Available Remedy**

Georgia's election contest statute applies to "the election of any person who is declared elected to any" federal office. Defendant claims that it does not apply because the presidential elections are actually "election[s] for presidential electors" who are not themselves the persons elected to federal office. This construction of the statute is so parsimonious that defendants themselves do not believe it. Earlier in their own brief, they describe the election as being not for electors, but for the Presidency itself: "On November 3, 2020, Georgia voters chose Joseph R. Biden, Jr. as the next President of the United States." Likewise, the contest statute's reference to electing a person to a federal office can safely be interpreted consistent with the common understanding that disregards the technical intermediate step of appointing Electors. Georgians were electing a President, the President is a federal officer, the statute applies.

Either way, the election was a federal election, *see Baker* v. *Carr*, 369 U.S. 186, 206 (1962) (“Voters who allege facts showing disadvantage to themselves as individuals have standing to sue”); and the Supreme Court has "long recognized that a person's right to vote is 'individual and personal in nature.'" *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quoting Reynolds v. Sims, 377 U.S. 533, 561 (1964)).

In *Bognet v. Sec'y Commonwealth of Pa*., slip op. (3rd Cir. Nov. 13, 2020), the court recognized the right of a plaintiff to proceed when they “allege facts showing disadvantage to themselves" citing, *Baker*, 369 U.S. at 206 (emphasis added), but noted a disadvantage to the plaintiff exists only when the plaintiff is part of a group of voters whose votes will be weighed differently compared to another group. In *Bognet*, the plaintiffs were not held to have shown individual harm when the harm complained of was the admission of legal votes where the only objection to those votes was the timeliness of receipt. *See id* at 40. In this case, the harm was to the generalized group of in-person voters whose votes were diluted by not requiring mail in voters to be verified as required by the Election Framework adopted by the State Legislature.

It should be noted that in addition to the Plaintiff Boland, a Trump Elector, Shawn Still, has moved to intervene as a Plaintiff/Contestant in this matter. If Intervenor’s argument were accepted, then no citizen in Georgia would have the right to contest a Presidential election. It is inconceivable that the legislature ever intended such a bizarre interpretation of the Georgia statute. Neither state law nor state action can limit the right of a voter in a federal election to contest the same.

**D. Plaintiff’s Empirical Analyses are Correct**

Defendants breezily assure the court that Plaintiff’s claims about illegal votes are an “unsupported guess.” They are simply trying to discourage the court from taking a closer look, because the evidence is clearly sufficient to establish probable cause for an audit.

**Out-of-State Voters**

Plaintiff agrees that the mere fact someone matches the National Change of Address (NCOA) database is not sufficient basis to remove their name from the voter rolls prior to an election.

The issue is whether a sample audit should be done when expert analysis identifies 20,312 specific ballots cast by individuals with non-Georgia addresses when the margin of victory is only 12,670 votes. Defendant argues that there may be benign explanations for those out-of-state votes. Plaintiff agrees, perhaps for some. But since the Secretary of State has simply been unable to keep track of this questionable cast of voters, Plaintiff has requested an audit to see whether this default, combined with other defaults, had a material effect on the outcome of the election contest. An audit on this issue would put the matter to rest.

Defendants have no answer to the point that of those 20,312 votes, 4,926 were found to have actively registered to vote in another state. Under the Election Law, that is conclusive evidence of a change of residency, so those votes are invalid. O.C.G.A. § 21-2-217(a)(2) ("A person shall not be considered to have lost such person's residence who leaves such person's home and goes into another state or county or municipality in this state, for temporary purposes only, with the intention of returning, unless such person shall register to vote . . . .") Accordingly, these 4,926 ballots alone call into question a significant portion of the margin of victory in the presidential contest, and show that an analysis of the remaining 20,312 flagged out-of-state votes is necessary.

Finally, Defendants smugly deride Plaintiff as basing his argument on a YouTube video. Plaintiff is a prosthetist from Middle Georgia. He does not get his information from perusing legal briefs and statistical journals. Nevertheless, to avoid the distractions of pedigree, he

attaches the affidavit of the expert who performed the analysis as Exhibit A to his filing – this was documented in the YouTube video discussing this analysis.

**Low Ballot Rejection Rate**

The defendants claim that plaintiff's arguments have already been made and rejected in other litigation. They have not read carefully.

They cite *Wood* for the proposition that the ballot rejection rate in the 2020 general election is the same as it was in 2018. But plaintiff's affidavit, from a statistical expert with specific expertise in voting cases, points out the elementary error made in that analysis. The Secretary of State used different methodology in calculating the 2020 vs. 2018 numbers. When the same methodology is applied in both cases, and looking only at signature issues and not oath issues, the drop off in the rate is dramatic – from 0.2% in 2018 to 0.15% in 2020, or a 25% drop between the two election cycles. An even better comparison would be a comparison between the 2016 and 2020 general elections. That data reflects that in 2016 general election, 0.28% ballots were rejected for specific signature reasons. It's worth noting that this figure matches with the 2020 primary, when the Consent Decree was in effect, thus establishing a reasonable baseline for comparison. In the 2020 general election, the reject rate drops 46% to 0.15 %. Such a drop reflects a high probability that signature verification procedures were not carried out in the general election with their usual and expected rigor. This analysis has not been rebutted by the Secretary of State's office, who put out the erroneous information originally.

That is the crux of plaintiff's claim. That even under the settlement procedures, the evidence suggests the in the 2020 general election, the signature match rules were not enforced with their usual rigor.

## II. CONCLUSION

Plaintiff has offered empirical evidence of irregularities of a magnitude that could change the election result. Plaintiff agrees that the result should not be changed without further analysis. However, the evidence establishes probable cause for an audit. Plaintiff estimates such an audit would take only a matter of days and would finally put the matter to rest. Were this litigation on a three or six month discovery track, there is no question that Plaintiff would be entitled to the information he seeks. He is effectively seeking nothing more that expedited discovery. If defendants are confident in the election results, they should have nothing to fear from this modest audit request. In the time they have spent litigating it, it would already be done.

We respectfully ask the Court to allow for modest discovery to address the concerns of millions of Georgia voters. As Governor Kemp stated in his press release yesterday, this is a matter which must be addressed in the courts. You, Judge Richardson, are the court to which the Governor was speaking. You have the authority to grant modest relief to millions of Georgia voters in the form of either an affirmation that their vote was validly cast or that an issue in fact exists as to its legitimacy. Mr. Boland respectfully requests that you grant the very limited relief requested herein.

Respectfully submitted this 7th day of December 2020.

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## CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court via Odyssey eFileGA, which will provide notice and service to all counsel presently of record

I hereby certify that a copy of the foregoing will be served upon all Respondent/Defendants in this matter by causing a copy of the same to be deposited in the United States mail, postage prepaid, on Monday, December 6, 2020, addressed as follows:

Hon. Brad Raffensperger
Secretary of State
214 State Capitol
Atlanta GA 30334

Hon. Rebecca Sullivan
Hon. David Worley
Hon. Matthew Mashburn
Hon. Anh Lee
Ga. State Board of Elections
2 MLK Jr. Drive
Suite 802, Floyd West Tower
Atlanta GA 30334

As a matter of courtesy, service was similarly made by e-mailing the same to the following members of the Attorney General's Office identified by the Secretary of State's Office as counsel for Defendants:

Russ Willard rwillard@law.ga.gov
Charlene McGowan cmcgowan@law.ga.gov

This 7th day of December 2020.

*/s/ David F. Guldenschuh*
David F. Guldenschuh
*Attorney for Plaintiff and for Movant-Intervenor Shawn Still*