



Greg G. Allen, Clerk
Forsyth County, Georgia

IN THE SUPERIOR COURT OF FORSYTH COUNTY
STATE OF GEORGIA

DEMOCRATIC PARTY OF GEORGIA, and
LIZ BARRETT,

Plaintiffs,

v.

FORSYTH COUNTY BOARD OF
ELECTIONS AND REGISTRATION, and
Mandi B. Smith, in her official capacity as
Elections Director of the Forsyth County Board
of Elections and Registration,

Defendants.

Civil Action No. _____

IMMEDIATE HEARING REQUESTED

**PLAINTIFFS' EMERGENCY MOTION FOR INTERLOCUTORY INJUNCTION AND
INCORPORATED BRIEF IN SUPPORT THEREOF**

Pursuant to O.C.G.A. § 9-11-65 and O.C.G.A. § 50-18-73(a), plaintiff Democratic Party of Georgia (the “DPG,” or “Plaintiff”) and Liz Barrett (“Elector Plaintiff”) hereby move this Court for an emergency interlocutory injunction requiring defendants Forsyth County Board of Elections and Registration (the “Board of Elections”) and Mandi B. Smith, in her official capacity as Director of Elections and Registration for Forsyth County, (“Smith,” and, together with the Board of Elections, “Defendants”) to *immediately* produce public election records as required by O.C.G.A. § 21-2-72 (“Elector Inspection Law”), as well as the Georgia Open Records Act, O.C.G.A. § 50-18-70 *et seq.* (the “Open Records Act”).

Plaintiffs request that the Court consider this Emergency Motion on an expedited basis, as DPG (and Elector Plaintiff on DPG’s behalf) are requesting documents that will enable DPG to assist voters in curing rejected ballots prior to the imminent cure deadline of November 6, 2020, which is crucial to DPG’s mission and will ensure that more Georgia voters are enfranchised. The

deadline to cure provisional ballots is this Friday, November 6, 2020. O.C.G.A. §§ 21-2-386(a)(1)(C)–(D), 21-2-381(b)(3), 21-2-419(c).

Defendants’ failure to comply with the Elector Inspection Law and Open Records Acts is preventing Plaintiffs from obtaining information on matters necessary to ensure that voters have their votes counted and, if this information is not obtained prior to the November 6 cure deadline, many voters—including DPG’s members and constituents—will be disenfranchised.

I. INTRODUCTION

Georgia law demands public transparency. Under the Elector Inspection Law, electors who are residents of a county have access to election records; these records “may be inspected and copied by any elector” and such inspection must take place immediately. O.C.G.A § 21-2-72. Likewise, under Georgia’s Open Records Act, public officials may not do their jobs in secret; they must respond promptly to requests for public records, and they must honor the public’s right to know what their public officials are doing and why.

This guarantee is especially important when, as here, there is an urgent need for that information, and particularly where its disclosure will help safeguard Georgians’ constitutional right to vote. It is precisely for that reason that the DPG (and Elector Plaintiff on DPG’s behalf) requested public records related to provisional ballots on November 4, 2020. To safeguard Georgians’ right to vote, the DPG employs volunteers to contact those voters and help them cure their defective ballots. But DPG cannot carry out this crucial aspect of its organizational mission without receiving the requested data from Defendants, and Defendants have refused to provide the requested data immediately, as required by O.C.G.A § 21-2-72, or “within a reasonable amount of time,” as required by O.C.G.A. § 50-18-71(b)(1)(a). Georgia voters—including DPG’s members and constituents—and Plaintiffs suffer as a result.

To ensure that the DPG can meaningfully engage in constitutionally protected political advocacy, the Court should schedule an emergency hearing and issue an interlocutory injunction requiring Defendants to produce responsive documents as soon as possible, but no later than November 5, 2020, as Georgia law requires.

II. STATEMENT OF FACTS

In every election, Defendants reject provisional ballots because a voter does not cure a provisional ballot in time. Verified Compl. ¶ 11. This is fatal to a voter’s ultimate ability to exercise their right to vote unless the voter cures their ballot within the statutorily allowed timeframe—by November 6, 2020 at 5:00 p.m. O.C.G.A. §§ 21-2-386(a)(1)(C) & 21-2-419(c)(1). This deadline is rapidly approaching. As part of its mission and as a service to its members and constituents, the DPG helps voters “cure” those ballots before the statutory deadline, so that their votes will count. Verified Compl. ¶¶ 7. Specifically, DPG staff and volunteers call voters whose ballots have been rejected to inform them about how to cure those defects. *Id.* ¶ 23. Without a meaningful opportunity to cure their defective ballots, thousands of voters—many of them members and constituents of the DPG—will be needlessly disenfranchised.

To carry out its ballot curing efforts, the DPG must obtain county records that identify which voters cast provisional ballots. *Id.* ¶ 6. The DPG regularly obtains this information from other county elections boards, which either promptly respond to requests under the Elector Inspection Law and Open Record Act. *Id.* To successfully assist voters in the cure process before this deadline, the DPG urgently needs information about who cast provisional ballots. *Id.* Delay of production until shortly before or after the ballot cure deadline will render the information useless.

Accordingly, on November 4, 2020, the DPG sent the Board of Elections a public records request requesting records related to provisional voters, including information necessary to contact

voters and help them cure their ballots. (the “Records Request”). *Id.* ¶ 2. DPG also informed the board that an elector in the County would be separately reaching out to obtain the information pursuant to O.C.G.A § 21-2-72. On that same day, Elector Plaintiff contacted Defendants for the requested records and on November 5, 2020, Elector Plaintiff went to Defendants’ office and made the same request in person. Elector Plaintiff was not provided with the requested documents; DPG has not been provided with the documents pursuant to its public records’ request.

To prevent disenfranchisement and ensure that all voters have their votes counted, Plaintiffs seek an interlocutory injunction to prevent irreparable harm to itself, its members and constituents, and mission, and to the many Georgia voters who have attempted to vote in this election, but whose ballots will be rejected if they are not cured. Elector Plaintiff also seeks to prevent continued harm to its statutory right to receive the requested documents.

III. LEGAL STANDARD

In determining whether to issue an interlocutory injunction, “the trial 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. Servs., LLLP v. Branch Banking & Tr. Co.*, 289 Ga. 1, 5 (2011) (quotations omitted). “Although an interlocutory injunction is an extraordinary remedy, and the power to grant it must be prudently and cautiously exercised, the trial court is vested with broad discretion in making that decision.” *Id.* (quotations omitted).

IV. ARGUMENT AND CITATION OF AUTHORITIES

All four factors weigh heavily in favor of granting the requested interlocutory injunction and requiring Defendants to immediately produce documents responsive to the Records Request. Without an interlocutory injunction, the DPG will suffer irreparable injury to its mission as it will be unable to assist voters in curing provisional ballots before the November 6 deadline—many of whom are its members and constituents, and who will be disenfranchised without its assistance. The electoral prospects of DPG’s candidates will be harmed if votes for them are not counted, further harming DPG’s mission. This harm far outweighs any harm to the Defendants, who already maintain the requested records. Furthermore, the DPG is likely to succeed on the merits because Defendants have violated both the Election Inspection and Open Records Acts by failing to produce the requested documents in a reasonable time under the circumstances.

Likewise, Elector Plaintiff is also irreparably harmed as it has an immediate right to inspect these records to ensure transparency and open government. Yet, that right is being wholly denied. For that same reason, an interlocutory injunction also serves the public interest in open government and protecting the right to vote.

A. **Plaintiffs will suffer irreparable harm if an injunction does not issue.**

Unless the Court issues an interlocutory injunction requiring Defendants to produce the requested voter records immediately, the Plaintiffs will suffer irreparable harm. The DPG is a State Committee dedicated to electing Democratic Party candidates to public office throughout Georgia. Verified Compl. ¶ 8. To advance its mission, the DPG is also dedicated to ensuring that all ballots cast for Democratic candidates and by its members and constituents are counted. *Id.* The only way to determine which voters have cast provisional ballots that need to be cured is to obtain the information from Defendants. *Id.* But, as explained, Defendants have refused to provide the

requested information to DPG or Elector Plaintiff. *See supra* Section II. In the absence of an interlocutory injunction, the DPG will be unable to help its members and constituents remedy defective ballots to ensure that their votes are counted. For those members and constituents who are disenfranchised as a result and, consequently, for DPG, this harm is irreparable.

In particular, Defendants' failure to respond to the Records Request harms DPG's constitutional rights as well as the constitutional rights of DPG's members, constituents, and candidates, which "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Defendants' refusal to produce the requested records infringes on constitutional rights in at least two ways. *First*, the Supreme Court of Georgia has repeatedly noted that "[t]he right to vote is fundamental, forming the bedrock of our democracy," but that right has little meaning if a voter's ballot is not counted. *Favorito v. Handel*, 684 S.E.2d 257, 261 (Ga. 2009) (quoting *Wexler v. Anderson*, 452 F.3d 1226, 1232 (11th Cir. 2006)); *see also Rhoden v. Athens-Clarke Cty. Bd. of Elections*, No. S21A0030, 2020 WL 6122297, at *8 (Ga. Oct. 19, 2020) ("[C]ourts have recognized the fundamental nature of the right to vote, including the right . . . to have an elector's vote counted on equal terms with those cast by other electors."). DPG seeks to assist its members and constituents in effectuating their right to vote by ensuring that they are informed of their need to cure provisional ballots. Denial of the requested list infringes on DPG's ability to do this and, as a consequence, the rights of its members and constituents to have their votes counted, an injury which cannot be remedied once the cure deadline passes, because much like with election day, "there can be no do-over and no redress." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014).

Second, Defendants' refusal to provide the records violates DPG's First Amendment rights by directly diminishing its ability to fully and freely associate with its members, constituents, and

Georgia voters. DPG is a political organization whose mission is to help its members and constituents gather together to advance their political interests, and the denial of the requested records inhibits DPG's rights to perform that function by preventing it from helping its voters ensure that their votes are counted. Guarding the DPG's right to advance its political interests is at the core of the First Amendment. *See, e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997) ("The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas."); *Colorado Republican Federal Campaign Comm'n v. Federal Election Comm.*, 518 U.S. 604, 616 (1996) ("The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees."); *Norman v. Reed*, 502 U.S. 279, 288 (1992) ("[T]he constitutional right of citizens to create and develop new political parties . . . advances the constitutional interest of like-minded voters to gather in pursuit of common political ends . . . "). By denying access to the requested list, Defendants have unquestionably infringed on that right.

Third, disenfranchising DPG's members and constituents raises the risk that Democratic candidates will be defeated resulting from provisional ballots that were not timely cured, directly impacting DPG's mission to elect Democrats up and down the ticket.

Finally, Elector Plaintiff has a clear, statutory right to inspect these records immediately. But that right will be wholly denied if Defendants are allowed to continue to delay production of the requested documents, which is directly contrary to very purpose of the Electors Inspection Statute and its promise of open and transparent government. Each of these harms is irreparable and all of them warrant the issuance of Plaintiffs' requested injunctive relief.

B. The threatened injury to Plaintiffs outweighs the threatened harm to Defendants.

For the reasons set out above, Plaintiffs will be seriously and irreparably harmed if Defendants are not ordered to immediately turn over the requested records.

In contrast, the Board of Elections does not face any significant harm from being required to carry out its statutory duty and provide the requested public records. The Board of Elections has already collected all of the requested provisional ballots. In fact, the ease of producing this information is borne out by the experience of other counties, many of which have already produced this data directly to DPG. The harm to the Board of Elections in requiring it to produce the records it is already keeping is therefore minimal, and, as set out below, the Board of Elections has a statutory obligation to produce the public records.

C. The DPG is likely to prevail on the merits of its claims.

The Board of Elections has failed to produce unquestionably public documents within the time period required by Georgia law in plain violation of the O.C.G.A. §§ 21-2-72, 50-18-71 *et seq.*, making it clear that Elector Plaintiff is likely to prevail on the merits of its claim.

Under the Elector Inspection Law, election records “shall be open to public inspection and may be inspected and copied by any elector of the county.” O.C.G.A. § 21-2-72. The custodian of the election requests must, upon request, provide copies of the records “to any member of the public.” *Id.* This language could not be clearer: *any* voter can request and copy election records related to absentee and provisional ballots and those documents *must* be made available upon request. DPG provided notice the Defendants that Elector Plaintiff would be requesting provisional ballots data on November 4. On that same day, Plaintiff DPG also had an individual elector Defendants regarding that request. On November 5, Elector Plaintiff physically went to

Defendants' office to inspect the documents but was denied the right to do so. This is a clear violation of O.C.G.A. § 21-2-72.

DPG is also likely to succeed on its claim under the Open Records Act. The Board of Elections is an "agency" as defined by the Open Records Act. *See* O.C.G.A. § 50-18-70(b)(1) ("Agency" shall have the same meaning as in Code Section 50-14-1."); O.C.G.A. § 50-14-1(a)(1)(B) (defining "agency" to include "every department, agency, [and] board" of every county in Georgia). The Open Records Act requires the Board of Elections to provide "all records responsive to a request within a reasonable amount of time not to exceed three business days of receipt of a request."¹ O.C.G.A. § 50-18-71(b)(1)(A). If all of the requested records are not available, Defendants must produce any information that is available within three business days. *Id.* And if records exist but are not available within three days, the Board of Elections must, "within such time period, provide the requester with a description of such records and a timeline for when the records will be available for inspection or copying and provide the responsive records or access thereto as soon as practicable." *Id.*

The DPG emailed a written records request to the Board of Elections on November 4, 2020. But the Board of Elections has still not provided those documents. Under the Open Records Act, Defendants must provide any responsive documents "within a reasonable amount of time." In light of the November 6 deadline for curing provisional ballots, three days (or more) is not a reasonable amount of time. O.C.G.A. § 50-18-71(b)(1)(a). Rather, Defendants have an obligation to respond with the requested documents sooner. To respond to the request within three days would make the need for the request moot. Courts have explained that "[t]he Act is designed to make the production

¹ An agency does not have to produce documents that fall under one of the statutory exceptions enumerated in O.C.G.A. § 50-18-72. The Board of Elections has not claimed that the information described in the Records Requests falls under one of these exceptions.

of records expeditious.” *Schick v. Bd. of Regents of Univ. Sys. of Ga.*, 334 Ga. App. 425, 429 (2015); *see also Dunn v. City of Fort Valley*, 5:19-cv-00287, 2020 WL 2544792, at *19 (N.D. Ga. May 19, 2020) (explaining that requests made under Georgia’s public records law “must be timely produced”); *see supra* Section II, O.C.G.A. § 21-2-386(a)(1)(B)-(C). This is a clear statutory violation. *Wallace v. Greene Cnty.*, 274 Ga. App. 776, 783 (2005) (“[I]f the person or agency having custody of the records fails to affirmatively respond to an open records request within three business days by notifying the requesting party of the determination as to whether access will be granted, the ORA has been violated.”). Accordingly, DPG is likely to succeed on its claims.

D. An interlocutory injunction is in the public interest.

There is no question that the requested injunction, which will protect the right to vote and foster the goals of transparency and open government is in the public interest. Through the Open Records Act, the Georgia General Assembly has affirmed that “the strong public policy of this state is in favor of open government; that open government is essential to a free, open, and democratic society; and that public access to public records should be encouraged to foster confidence in government and so that the public can evaluate the expenditure of public funds and the efficient and proper functioning of its institutions,” O.C.G.A. § 50-18-70; *see also Athens Observer, Inc. v. Anderson*, 245 Ga. 63, 66 (1980) (noting that a purpose of the Open Records Act is to “foster confidence in government through openness to the public”), making it clear that issuing records pursuant to the Open Records Act is in the public interest. Moreover, the Election Inspection Law allows *any* voter to request and copy election records in the clearest possible terms. O.C.G.A. § 21-2-72. Indeed, without an injunction requiring Defendants to perform their statutory duties, Georgians will be deprived of their right to information about the ongoing election—an issue of intense and urgent public concern.

More importantly, an injunction would also facilitate Georgians' fundamental right to vote. And, "[t]he public, of course, has every interest in ensuring that their peers who are eligible to vote are able to do so in every election." *See, e.g., Jones v. Governor of Fla.*, 950 F.3d 795, 831 (11th Cir. 2020). Thus, this factor also weighs in favor of granting Plaintiffs' requested injunctive relief.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully requests that the Court grant their emergency motion and issue an interlocutory injunction requiring Defendants to provide records responsive to the Records Request on an immediate basis, and no later than 8:00 p.m. on November 5, 2020. DPG also respectfully requests its reasonable attorneys' fees and expenses incurred in litigating this matter pursuant to O.C.G.A. § 50-18-73(b).

Respectfully submitted, this 5th day of November 2020.

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