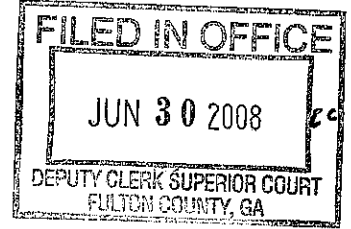


IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA



DEMOCRATIC PARTY OF GEORGIA,)
INC., a non-profit corporation)
Organized and existing under Georgia law,)

Plaintiff,)

v.)

SONNY PERDUE, in his)
official capacity as Governor; *et al.*)

Defendants.)

CIVIL ACTION
FILE NO. 2008-CV-151081

**STATE DEFENDANTS' BRIEF IN OPPOSITION TO
PLAINTIFF'S MOTION FOR EXPEDITED DISCOVERY**

I. INTRODUCTION

Governor Sonny Perdue, Secretary of State Karen Handel, and the State Election Board ("State Defendants") file this brief to oppose Plaintiff's Eleventh Hour effort to "shorten the time in which defendants may respond" to Plaintiff's Requests for Admissions and Interrogatories served in conjunction with its Complaint for Declaratory and Injunctive Relief. As shown below, prior state and federal challenges by Plaintiff's counsel to Georgia's law requiring in-person voters to present photographic identification ("the 2006 Photo ID Act" or "the Act") have been unsuccessful, the Act has been implemented in four separate elections since being upheld by the United States District Court for the Northern District of Georgia (including the 2008 Presidential Preference Primary), Plaintiff failed at any time over the past year to seek to enjoin any such elections in any state court, and Plaintiff should not now be permitted to abuse the judicial system by foregoing established procedural timelines to override its own dilatory conduct.

Additionally, to the extent that they are not otherwise objectionable, Plaintiff's discovery requests at issue do not lend themselves to expedited response, as discussed below. State Defendants are entitled to an opportunity to respond accurately and completely, and Plaintiff's decision to wait until this late date to file a fourth legal challenge on this issue should not operate to deny State Defendants that opportunity.

II. STATEMENT OF FACTS AND PRIOR PROCEEDINGS

This is the fourth incarnation of the nearly three-year attempt by Plaintiff's counsel to permanently enjoin Georgia's photographic identification requirement for in-person voting, an effort which has met with failure in three separate cases in both federal and state courts. This saga began on September 19, 2005, when a group of non-profit corporations, organizations, and associations, and two registered voters ("the Common Cause plaintiffs"), represented by most of the same counsel in this case, filed a complaint seeking to enjoin the 2005 version of the Act ("the 2005 Photo ID Act") on variety of grounds, including the contentions that it imposed an undue burden on the right to vote and was a poll tax in violation of the Equal Protection Clause of the Fourteenth Amendment. See Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) ("Common Cause/Ga. I").¹ On October 18, 2005, the District Court granted the Common Cause plaintiffs' motion for preliminary injunction and enjoined the enforcement of the 2005 Photo ID Act based upon the Court's view that they were likely to succeed on the merits of their undue burden and poll tax claims. Id. at 1377.

During its 2006 Regular Session, the Georgia General Assembly enacted amendments to Georgia's law requiring photographic identification at the polls, which were signed into law on January 26, 2006 (collectively, "the 2006 Photo ID Act"). See Common Cause/Ga. v. Billups,

¹ One individual plaintiff was voluntarily dismissed at the beginning of the Common Cause litigation. Common Cause/Ga. I, 406 F. Supp. 2d at 1366 n.8.

439 F. Supp. 2d 1294, 1305 (N.D. Ga. 2006) ("Common Cause/Ga. II"). The requirement that in-person voters present a government-issued photo ID remained. The new legislation also provided that photo ID cards would be issued free of charge to any registered voter who lacked one of the alternative photo IDs that could be used to verify identity and expanded the number of locations where a free photo ID could be obtained. Id.; see also O.C.G.A. §§ 21-2-417 & -417.1, § 40-5-103(d). Following the enactment of the 2006 Photo ID Act, the Common Cause plaintiffs amended their federal complaint to assert the exact same claims against both the 2005 and 2006 Photo ID Acts as those plaintiffs raised in their original complaint.

In April 2006, an individual registered voter represented by another of Plaintiff's counsel filed suit in superior court to challenge the 2006 Photo ID Act as violative of the Georgia Constitution. Margaret Berry v. Sonny Perdue, et al., Superior Court of DeKalb County, Civil Action No. 06CV4751-7. The Berry case was voluntarily dismissed after a challenge to Ms. Berry's standing was raised by defendants. In July 2006, another state court challenge to the 2006 Photo ID Act was filed in this Court by that same counsel, which initially resulted in the granting of an injunction against the enforcement of the Act based upon a violation of Article II, Section I, Paragraphs 2 and 3 of the Georgia Constitution. Rosalind Lake v. Sonny Perdue, et al., Superior Court of Fulton County, Civil Action No. 2006CV119207 (Order of Sept. 19, 2006, Bedford, J.).

On July 14, 2006, the District Court granted a motion for preliminary injunction against the enforcement of the 2006 Photo ID Act only with respect to the July 18, 2006 primary and primary run-off elections, based in large part on the Court's conclusion that the State did not

have time to mount a significant educational effort to advise voters of the requirement.²

Common Cause/Ga. II, 439 F. Supp. 2d at 1346, 1360. The Common Cause plaintiffs next filed a motion to extend the District Court's July 14, 2006, preliminary injunction to the September 2006 special elections. By order dated September 15, 2006, the District Court preliminarily enjoined the application of the 2006 Photo ID Act with respect to the September 2006 special elections for much the same reason. See Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333, 1341 (N.D. Ga. 2007) ("Common Cause/Ga. III"). Thereafter, the District Court stayed proceedings pending resolution of the appeal of the Lake injunction to the Supreme Court of Georgia. Id.

Approximately nine months later, on June 11, 2007, the Supreme Court of Georgia vacated this Court's injunction and remanded the case with the direction that it be dismissed, based upon its finding that Plaintiff Rosalind Lake lacked standing to bring the lawsuit because she possessed a photo ID card which could be used to verify her identity at the polls. Perdue v. Lake, 282 Ga. 348 (2007). Following the decision in Lake, neither Plaintiff's counsel nor anyone else filed a state court action seeking to enjoin the 2006 Photo ID Act on state constitutional grounds until the present Complaint was filed on May 23, 2008.

Following the Lake decision, the District Court lifted its stay of proceedings and scheduled a trial on the merits of the Common Cause plaintiffs' challenge to the 2006 Photo ID Act. Common Cause/Ga. III, 504 F. Supp. 2d at 1341. Shortly before trial, the District Court granted State Defendants' motion to dismiss the remaining individual plaintiff, because she possessed the same photo ID that the Supreme Court of Georgia found acceptable for voting in-

² The District Court concluded that the Common Cause plaintiffs were not likely to succeed on their continued poll tax or other claims. See Common Cause/Ga. II, 439 F. Supp. 2d at 1355, 1357-58. The District Court earlier dismissed all remaining claims against the 2005 Photo ID Act. Id. at 1299.

person in Lake. Id. At the same time, the District Court granted the organizational plaintiffs' motion to amend to add two new individual plaintiffs. Id.

A trial on the merits was conducted by the District Court on August 22-24, 2007, at which the Common Cause plaintiffs proceeded only on their claim that the 2006 Photo ID Act unduly burdened their right to vote in violation of the Fourteenth Amendment to the U.S. Constitution. Id. at 1342. At the close of the Common Cause plaintiffs' case, the District Court granted a motion to dismiss all of the organizational plaintiffs, except the NAACP, because none of those organizations offered any facts in support of their standing to sue. Id. The District Court indicated that it would revisit the issue of standing for the NAACP and the two new individual plaintiffs in its final order. Id.

By Order dated September 6, 2007, the District Court dismissed the federal complaint in its entirety and directed that judgment be entered in favor of State Defendants. Common Cause/Ga. III, 504 F. Supp. 2d at 1383. First, the District Court concluded that the Common Cause plaintiffs had failed to prove, by a preponderance of the evidence, that the remaining organizational plaintiff NAACP or the recently-added individual plaintiffs had standing to sue. Id. at 1371-74. Second, even if standing would have been established, the District Court concluded that the 2006 Photo ID Act did not violate the Fourteenth Amendment's Equal Protection Clause because it imposed no undue burden on the right to vote. Id. at 1377-80. Aside from the fact that the Common Cause plaintiffs produced no credible evidence showing that the 2006 Photo ID Act resulted in an undue burden on Georgia voters, the District Court found that the State Defendants had undertaken, well in advance of the next series of elections, "a serious, concerted effort to notify voters who may lack Photo ID cards of the Photo ID requirement, to inform those voters of the availability of free DDS-issued Photo ID cards or free

Voter ID cards, to instruct the voters concerning how they can obtain the cards, and to advise voters that they can vote absentee by mail without a Photo ID.” Id. at 1380.

On October 2, 2007, the Common Cause plaintiffs filed a Notice of Appeal from the trial court’s order on the merits, and the appeal was docketed in the Eleventh Circuit Court of Appeals on October 22, 2007. Young v. Billups, 11th Cir. No. 07-17664. No motion for stay of the District Court’s order was filed; in fact, the Common Cause plaintiffs asked and received permission from the Eleventh Circuit to stay the appellate briefing schedule until a decision was rendered by the Supreme Court of the United States in Crawford v. Marion County Election Board, in which the constitutionality of Indiana’s photo ID law was being considered.

Following the District Court’s decision, special elections were conducted in 23 counties on September 18, 2007 and in 93 counties on November 6, 2007 in which in-person voters were required to present a government-issued photo ID. Plaintiff’s counsel took no action to enjoin the photo ID requirement for either of these special elections. On February 5, 2008, Georgia’s Presidential Preference Primary was conducted in all of Georgia’s 159 counties, the 2006 Photo ID Act was again in effect for that primary, and Plaintiffs’ counsel again took no action to try to enjoin the implementation of the photo ID requirement. A special election to fill a vacancy in State House District 93 was also conducted on May 13, 2008, followed by a run-off election, and again no effort was made by Plaintiff’s counsel to enjoin the operation of the 2006 Photo ID Act.

On April 28, 2008, the U.S. Supreme Court issued its decision upholding Indiana’s photo ID law as constitutional under the Fourteenth Amendment. See Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 2008 U.S. LEXIS 3846 (2008). Pursuant to the Common Cause plaintiffs’ request, the briefing schedule has resumed in the Eleventh Circuit on that appeal.

Now, nearly one year after the final decision in Lake, nearly nine months after the decision of the District Court in Common Cause/Ga., and nearly one month after the Supreme Court's decision in Crawford, Plaintiff urges that this Court expedite discovery in its new lawsuit for the sole purpose of seeking a preliminary injunction to stop the 2006 Photo ID Act, which has been in effect for the past four elections, from being enforced for the 2008 general primary, which is set for July 15, 2008 (with advance voting to begin on July 7, 2008).

III. ARGUMENT AND CITATION OF AUTHORITY

There are no grounds for altering the statutory timetable for State Defendants to respond to Plaintiffs' discovery requests as set forth in O.C.G.A. §§ 9-11-33(a)(2) and 9-11-36(a)(2), and Plaintiff's request should be denied. Pretermittting the question of whether Plaintiff even has standing to maintain its Complaint, the timing and facts underlying the current challenge to the 2006 Photo ID Act are markedly different than when the Lake case was filed in this Court over two years ago. At that time, the Act had been in effect for about six months but had not been implemented for one primary or election. Since that time, however, the following significant events have occurred:

- (1) The Supreme Court of Georgia dismissed Lake based upon lack of standing.
- (2) The District Court dismissed Common Cause/Ga. based upon both lack of standing and the failure of those plaintiffs to establish that the 2006 Photo ID Act imposed any undue burden on the right to vote.
- (3) The Act was implemented for the September 18, 2007 special elections in 23 counties.
- (4) The Act was implemented for the November 6, 2007 special elections in 93 counties.

- (5) The Act was implemented for the February 5, 2008 Presidential Preference Primary throughout every county in Georgia.
- (6) The Act was implemented for the May 13, 2008 special election and following run-off election for State House District 93 to replace former Representative Ron Sailor.
- (7) Neither Plaintiff nor its counsel made any effort to enjoin the implementation of the Act for any of the four past elections or the run-off.
- (8) The Supreme Court of the United States upheld Indiana's photo ID law, which imposes greater restrictions on that state's registered voters than the 2006 Photo ID Act.³

The purpose of an interlocutory injunction is to maintain the status quo pending final adjudication, and the status quo is that the photo ID requirement is and has been in effect. Both the Supreme Court of Georgia and Georgia Court of Appeals have stated repeatedly – including as recently as within the last three months – that “[i]t is axiomatic that the *sole purpose* of a temporary or interlocutory injunction is to maintain the status quo pending a final adjudication on the merits of the case.” Hampton Island Founders v. Liberty Capital, 283 Ga. 289, 293 (2008) (citing Bailey v. Buck, 266 Ga. 405, 405-06 (1996)) (emphasis added); accord State Farm Mut. Auto. Ins. Co. v. Mabry, 274 Ga. 498, 509 (2001); Poe & Brown of Ga. v. Gill, 268 Ga. 749, 750 (1997); Metro. Atlanta Rapid Transit Auth. v. Wallace, 243 Ga. 491, 494 (1979); Hipster, Inc. v. Augusta Mall P’ship, No. A08A0010, 2008 Ga. App. LEXIS 468, at *3 (Apr. 24, 2008); Cotton States Mut. Ins. Co. v. Stephen Brown Ins. Agency, Inc., Nos. A07A1720 & A08A0960,

³ See Crawford v. Marion County Election Board, 128 S. Ct. 1610, 1644 (2008) (Breyer, J., dissenting) (“By way of contrast, two other States – Florida and Georgia – have put into practice photo ID requirements significantly less restrictive than Indiana’s.”).

2008 Ga. App. LEXIS 390, at *10 (Mar. 28, 2008); Hicks v. Doors by Mike, Inc., 260 Ga. App. 407, 408 (2003).

Moreover, status quo “is not defined by the parties’ existing *legal rights*; it is defined by the *reality* of the existing status and relationships between the parties, regardless of whether the existing status and relationships may ultimately be found to be in accord or not in accord with the parties’ legal rights.” Hampton Island Founders, 283 Ga. at 293 (quoting SCFC ILC, Inc. v. VISA USA, Inc., 936 F.2d 1096, 1100 (10th Cir. 1991)) (emphasis in SCFC). The party which seeks an interlocutory injunction must present evidence that the status quo is “endangered and in need of preservation,” and it is abuse of discretion to grant the injunction without such a showing. See, e.g., Green v. Waddleton, 288 Ga. App. 369, 370 (2007) (citing Kennedy v. W. M. Sheppard Lumber Co., 261 Ga. 145, 146 (1991)). In short, some “vital necessity” is required for the injunction. Chambers v. Peach County, 268 Ga. 672, 673 (1997); accord Kennedy, 261 Ga. at 146.

The status quo here is the 2006 Photo ID Act, which has been implemented in the last four elections and for which challenges have been rejected by federal and state courts. Because Plaintiff cannot meet the principal legal standard for the granting of an interlocutory injunction in this case (because it wants to *change* the status quo, not maintain it), it is not entitled to expedited discovery for the sole expressed purpose of expediting a hearing on a future motion for interlocutory injunction.

Additionally, the discovery requests served by Plaintiff do not lend themselves to expedited response. Rather than a proper request for admissions of fact, the thirty (30) Requests for Admissions seek to require State Defendants to review a number of outside sources, including reports, data compilations, and other documents and admit or deny a fact that Plaintiff has stated.

To the extent that requests are even proper and are not objectionable (and some are objectionable), responding to them requires review and response by more than one person. State Defendants intend to respond as required by law but are entitled to adequate time to do so, and Plaintiff has given no sound reason for the Court to rule otherwise.

Plaintiff has also served more than fifty (50) interrogatories, including subparts, which exceeds the number allowed by law. See O.C.G.A. § 9-11-33(a). Setting that problem aside for the moment, to the extent that those Interrogatories are not objectionable (and some are objectionable) and that State Defendants even have the information requested, Plaintiff knows full well that the responses to its requests will take time and more than one person to assemble. Having waited one year after the decision in Lake and nine months after the decision in Common Cause/Ga. to bring its case and showing no emergency, Plaintiff is not entitled to an expedited schedule, discovery or otherwise.

Plaintiff can undertake discovery in accordance with the statutory timetable, and the Court can decide the merits of the Complaint without any necessity to expedite the proceedings. To do otherwise would be to condone Plaintiff's attempt to disrupt the status quo and to use this Court to further its own political purposes.

IV. CONCLUSION

For the reasons set forth above, State Defendants respectfully request that the Court deny Plaintiff's Motion for Expedited Discovery.

(signatures contained on next page)

This 30th day of June, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of STATE DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR EXPEDITED DISCOVERY upon the following counsel of record via electronic mail and U.S. mail addressed as follows:

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