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

DEBORAH GONZALEZ, et al., **Plaintiffs,** **v.** **BRIAN KEMP, et al.,** **Defendants.**	**Case 1-20-cv-02118-MHC**

PLAINTIFFS' POST-HEARING BRIEF

Plaintiffs file this Post-Hearing Brief to address two potential obstacles to the granting of injunctive relief raised by the Court during the June 25, 2020 hearing ("the Hearing") on Plaintiffs' Motion for Preliminary Injunction (Doc. 5): first, whether this Court should abstain from deciding the questions of Georgia law raised in this case; and, second, whether *Duncan v. Poythress,* 657 F.2d 691 (5th Cir. 1981), applies to this fact pattern where state officials have complied with Georgia election statutes but not, Plaintiffs contend, the Georgia Constitution.

A. Abstention

During the Hearing, this Court requested examples of a federal court determining the constitutionality of a state statute under the state's constitution prior to a ruling by the state's supreme court. The only cases that Plaintiffs have

found are two cases under the Federal Tort Claims Act which, like a *Duncan* claim, involve the interpretation and application of state law within a federal cause of action. In *Estate of McCall ex rel. McCall v. United States*, 642 F.3d 944, 951 (11th Cir. 2011), the Eleventh Circuit decided that Florida's statutory cap on tort damages did not violate the Florida Constitution's Takings Clause. The Eleventh Circuit certified to the Florida Supreme Court other state constitutional claims that the Court said raised "important questions about the interpretation and application of Florida constitutional law in areas that remain unsettled." *Id*. at 952. In *Clemons v. United States,* No. 4:10-CV-209-CWR-FKB, 2013 WL 3943494, at *6 (S.D. Miss. June 13, 2013), the district court considered (and rejected) a claim that the state law violated the Mississippi Constitution without certifying it to the state supreme court.

The more general issue the Court's question raises is whether the Court should decide the state constitutional issue in this case or abstain from doing so. Defendants have not argued that this Court should abstain,[1] and Plaintiffs believe the arguments against abstention are compelling:

[1] Defendants' failure to raise the issue does not, of course, prevent the Court from considering abstention. It could hardly be considered an abuse of discretion for the Court to deny abstention, however, when no party is urging it and "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976).

1. Absention "Particularly Inappropriate" in Election Cases

The Eleventh Circuit's decision in the Federal Tort Claims Act case, *Estate of McCall,* is an example of the standard application in *non-election cases* of abstention under *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496 (1941). As the Eleventh Circuit held in the *en banc* decision *Siegel v. LePore,* 234 F.3d 1163, 1174 (11th Cir. 2000), however, in election cases Pullman abstention is "particularly inappropriate." *See also League of Women Voters of Fla., Inc. v. Detzner*, 354 F. Supp. 3d 1280, 1283 (N.D. Fla. 2018) ("The law is crystal clear in the Eleventh Circuit. Federal courts do not abstain when voting rights are alleged to be violated."). *See also Edwards v. Sammons,* 437 F.2d 1240, 1244 (5th Cir. 1971) (mayoral election) (reversing the District Court's decision to abstain under *Pullman,* holding that "the delay which follows from abstention is not to be countenanced in cases involving such a strong national interest as the right to vote"); *Wexler v. Lepore*, 385 F.3d 1336, 1339 (11th Cir. 2004) (district courts have a "'virtually unflagging' duty 'to adjudicate claims within their jurisdiction.'" (citation omitted) (reversing district court's abstention in an election case)).

Absention also is not appropriate here because this case raises important First Amendment issues given the Governor's unfettered discretion to cancel an election based on candidates' and voters' expressions of their political beliefs. *See*

Duncan, 581 F.2d at 697 ("It therefore appears that 'when voting rights, racial equality and First Amendment rights of expression have been at stake the (United States Supreme Court) has been reluctant to abstain.'" (citation omitted)).

2. Duncan's Abstention Analysis

The best example of a federal court interpreting issues of state law in an election case is, indeed, *Duncan v. Poythress,* 657 F.2d 691 (5th Cir. 1981). In *Duncan,* the Court evaluated whether Georgia officials violated the State's "Special Election Statute" by failing to fill a Georgia Supreme Court vacancy through special election. The Special Election Statute had not previously been interpreted by a Georgia state court. Though *Duncan* did not evaluate the Special Election Statute to determine compliance with the State Constitution, it nonetheless interpreted a state law, not previously considered by a state court, to determine Defendant's compliance therewith.

The *Duncan* Defendants argued that the District Court should abstain because the case involved "a constitutional challenge which is intertwined with an ambiguous issue of state law and there is a likelihood that clarification of the state law will moot or substantially alter the federal question." *Id*. at 696. The Fifth Circuit affirmed the District Court's refusal to abstain, ruling that abstention would have been "simply inappropriate." *Id*. at 699. "The Supreme Court has frequently emphasized that abstention is not to be ordered unless the state statute is of

uncertain nature, and is obviously susceptible of a limiting construction. . . . We have therefore rejected Pullman abstention in all cases lacking ambiguity in state law." *Id* at 698 (internal citations omitted). Importantly, the court held that "[t]he mere fact that this statute has never been interpreted by the state courts does not indicate sufficient ambiguity to justify Pullman abstention." *Id*. at 698.

Another reason that the *Duncan* Court gave for refusing to abstain was the harm that would be cause by the delay:

> At issue in this case is nothing less than the fundamental right to vote. The delay inherent in abstention is least tolerable where, as here, fundamental constitutional rights enjoyed by a broad class of citizens would be suspended while adjudication begins in state court. . . . The delay inherent in abstention takes a particularly heavy toll when a voting rights challenge raises doubts in the public mind about the legitimacy of officeholders and the governmental bodies on which they serve.

Id. at 699.

The same is true in this case. Particularly since there is no pending state court action raising this issue, abstention would cause delay and a multiplicity of litigation. The parties agree that if this Court grants injunctive relief in this case, there will be ample time for the Secretary to conduct an election on November 3, 2020. If Plaintiffs are forced to file another lawsuit in state court seeking the identical relief, however, the resulting delay may make it more difficult for the Secretary to conduct the election on time.

3. The Case Does Not Present a Difficult Issue Under Georgia Law

As discussed above, in this Circuit abstention in election cases is not appropriate even in those instances in which difficult or novel state law issues are presented. In this case, however, even though the Georgia Supreme Court has not specifically addressed the constitutionality of O.C.G.A. § 45-5-3.2 (the "2018 Law"), the 2018 Law plainly is unconstitutional under well-settled Georgia law. The plain language of the Georgia Constitution requires elections for district attorneys every four years; the plain language of the 2018 Law prevents elections for district attorneys every four years where, as here, the Governor makes a late-term appointment. Further, it is not just the unambiguous language of the 2018 Law that is inconsistent with the Georgia Constitution, *the intended purpose* of the law is to cancel the constitutionally-required elections when the Governor makes a late-term appointment. Under well-settled Georgia case law directly on point, the 2018 Law is unconstitutional because it is a transparent attempt by the Legislature to "modify" or "diminish" the term established by the Georgia Constitution.[2]

[2] *Jones v. Forston*, 223 Ga. 7, 14 (1967) ("Where the constitution prescribes the manner in which a particular public functionary is to be elected, or prescribes the terms during which he shall hold office, the legislature is thereafter powerless to modify, enlarge, or diminish that which is established by the constitution."); *Morris v. Glover*, 121 Ga. 751, 754 ("where an office is created or guarded by express constitutional provision, its scope cannot be enlarged or lessened by statute, nor can the office be filled in any manner other than that prescribed by the Constitution").

Defendants have no textual argument for how the 2018 Law can be reconciled with the Georgia Constitution. That alone is sufficient to warrant a finding that Plaintiffs are likely to succeed on the merits. On the case law: Defendants do not even cite, much less distinguish, the cases relied upon by Plaintiffs, *see* note 2. Instead, Defendants misstate the holdings of *Perdue v. Palmour,* 278 Ga. 217 (2004), and *Barrow v. Raffensperger,* 2020 WL 2485188 (Ga., May 14, 2020), neither of which involved a legislative attempt to modify the term of a constitutional officer. Worse still, Defendants continually – and without explanation or apology – materially misquote both cases. (*See* Doc. 12 at 4-6, 6 n.3, 8, 17, 69). The only policy argument that Defendants muster – that the purpose of the 2018 Law is to give to district attorneys what Paragraph IV of Section VII of Article 6 gives to judges and justices – exposes the law's patent unconstitutionality. Even if abstention were otherwise appropriate, abstention would be unnecessary because the state law issue is not novel, difficult, or complex.

4. Plaintiffs' Motion Does Not Depend Upon the State Law Issue

Plaintiffs' Motion for Preliminary Injunction is not dependent upon a ruling that the 2018 Law is unconstitutional under state law, as difficult as such a holding may be to avoid. In addition to Plaintiffs' *Duncan* claim, Plaintiffs also assert meritorious claims based on *Anderson-Burdick* and the First Amendment:

a. *Anderson-Burdick*

Plaintiffs allege that, regardless of the constitutionality of the 2018 Law under the Georgia Consitution, the Defendants' actions have deprived their candidacy and voting rights under the U.S. Consitution under the well-established *Anderson-Burdick* test.[3] Under color of the 2018 Law, Defendants have taken from Plaintiffs their rights (granted by the Georgia Consitution) as voters and as a candidate with respect to the district attorney who will serve the Western Judicial Circuit for the years 2021 and 2022 without justiciation. The asserted interest of the law that Defendants use to justify their conduct is to give voters more of an opportunity to assess the actual performance of the appointee. This does not withstand scrutiny. Why should an appointee, as opposed to a candidate, get this opportunity? And the rule applies not only to "rookie" appointees, but to any appointee regardless of whether the appointee is a grizzled veteran or, even, the incumbent. Moreover, it makes no sense to deny voters their choice for district attorney just so they can make a more informed choice about only one of the candidates two years later (or four years, or six years). Even if the 2018 Law is not inconsistent with the Georgia Consitution, therefore, the Defendants conduct, under color of the 2018 Law, plainly violates the U.S. Consitution under the

[3] *See Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983); *Burdick v. Takushi*, 504 U.S. 428, 438 (1992).

Anderson-Burdick test. Thus, even if the Georgia Consitutional issue were certified, Plaintiffs would still be entitled to injunctive relief based on their likelihood of success on this claim.

b. First Amendment

Plaintiffs' claim under the First Amendment also is not dependent upon the state law issue of whether the 2018 Law conflicts with the Georgia Constitution. The Governor's delay in appointing a Western Circuit District Attorney, and the corresponding cancellation of the 2020 election, implicate the First Amendment's prohibition of viewpoint discrimination. The key provision of the 2018 Law here is the second change that the law makes to O.C.G.A. § 45-5-3 (the "Original Statute"): the triggering date is not the date of the vacancy, as the Original Statute provided, but the date the Governor makes the appointment. (*See* Doc. 5-1 at 21-22). The 2018 Law gives the governor unlimited discretion in deciding when the appointment will be made, thus allowing his decision to be influenced by viewpoints and political affiliation of the potential candidates and voters in the effected Judicial Circuit. There is no legitimate governmental interest in giving the Governor this unfettered discretion to make the timing of his decision – and the resulting potential cancellation of the election – based on the viewpoint of the candidates who have announced their candidacy and the voters. "Viewpoint-based restrictions on speech are among governments' most insidious methods of

eliminating unwelcome opinion." *Dana's R.R. Supply v. Attorney Gen*., 807 F.3d 1235, 1248 (11th Cir. 2015).

At the Hearing, this Court asked Plaintiffs for their best case supporting their First Amendment claims. Plaintiffs refer this Court to *United States v. Alvarez*, 567 U.S. 709 (2012). In *Alvarez*, the Supreme Court considered the constitutionality of the Stolen Valor Act, a federal law that criminalizes an individual's falsely representing that they "have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States." *Alvarez*, 567 U.S. at 713-714. In finding the law unconstitutional, the Court focused on the government's full discretion to determine which specific acts are punishable. *Id.* at 723. The import of this holding is the Court's rejection of "governmental power [that] has no clear limiting principle." *Id.* Allowing the "government a broad censorial power [is] unprecedented in this Court's cases or in our constitutional tradition." *Id*. "The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *Id*. The 2018 Law chills free speech, thought, and discourse by giving the Governor the power to consider the candidates' and voters' viewpoints in making the decision whether to cancel the election. Irrespective of the constitutionality of the 2018 Law, therefore, Plaintiffs are likely to prevail on their First Amendment claim.

B. Applicability of *Duncan v. Poythress*

At the Hearing, the Court asked whether *Duncan v. Poythress,* which addressed state officials' violation of a state statute, applied to this case, which features state officials' violation of the Georgia Constitution. The holding in *Duncan* applies to this case for several reasons.

First, there is no suggestion in any part of the *Duncan* opinion that the "state law" referenced in *Duncan* is limited to state *statutory* law, as opposed to state *constitutional* law. The focus in *Duncan* was not on the particular source of the state officials' legal duty, but the harm that a violation of that duty would cause. The Court distinguished cases challenging mere "garden variety election challenges," which the U.S. Constitution "leaves to the states broad power to regulate." 657 F.2d at 701, 702. In *Duncan,* however, the "Georgia voters are not asking the federal courts to count ballots or otherwise 'enter into the details of the administration of (an) election.'" *Id.* at 703 (citation omitted). Instead, "[t]heir request is far simpler and more basic: they ask for the election itself, as required by state law." *Id.* The Georgia voters in this case make the same simple and basic request: "they ask for the election itself, as required by state law." The *Duncan* holding is unusually on point and controlling.

Second, if anything, the facts of this case present a stronger argument for U.S. Constitutional protection than *Duncan.* In *Duncan,* the source of the legal

right was a "mere" state statute; here, the source of Plaintiffs' right to vote or run as a candidate for district attorney is the Georgia Constitution. If the violation of rights created by the Legislature in a state election statute constitutes a violation of the U.S. Constitutional protection, *a fortiori* the violation of rights found in the state constitution violates the U.S. Consitution.

Third, the fact that the Defendants in this case complied with a state election statute (the 2018 Law) does not change the analysis. *Duncan* holds that a state official's violation of a clear legal duty under state election law is actionable under Section 1983. In Georgia, the source of an election official's clear legal duty is the Georgia Consitution, even if there is a state statute providing to the contrary. *Morris v. Glover*, 121 Ga. 751 (1905). The fact pattern in *Morris* is the same as this case: a Georgia election official cancelled an election in compliance with a state statute but in contravention of the Georgia Consitution. The Georgia Supreme Court reversed the denial of mandamus relief. The *Morris* case is discussed at length in Plaintiffs' Opening Brief (Doc. 5-1 at 14-15, 28 n. 15). In their Response Brief, Defendants do not cite the case, much less distinguish its holding.

In sum, Plaintiffs have a clear likelihood of success on their *Duncan* claim.

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The discussion of *Morris* in connection with *Duncan* reveals, again, the independent strength of Plaintiffs' freestanding mandamus claim under Georgia law. Plaintiffs have shown that there is no procedural or jurisdictional[4] defense to the granting of mandamus relief. Under *Morris,* mandamus is the proper remedy when an election official cancels an election pursuant to an unconsitutinal state statute. Plaintiffs are therefore likely to be successful on their mandamus claim.

For the foregoing reasons, Plaintiffs Motion for a Preliminary Injunction should be granted.

Respectfully submitted this 29th day of June, 2020.

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[4] Mandamus "is a remedy for improper government inaction—the failure of a public official to perform a clear legal duty." *S. LNG, Inc. v. MacGinnitie*, 294 Ga. 657, 661 (2014). This Court has subject matter jurisdiction under 28 U.S.C. § 1367 because the mandamus claim is so "related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing pleading has been prepared in accordance with the font type and margin requirements of LR 5.1, using font type of Times New Roman and a point size of 14.

/s/ Bruce P. Brown
Bruce P. Brown

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2020, a copy of the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send notification of such filing to all attorneys of record.

/s/ Bruce P. Brown
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