

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

GARLAND FAVORITO, MICHAEL)	
SCUPIN, TREVOR TERRIS, SEAN)	
DRAIME, CAROLINE JEFFORDS,)	
STACY DORAN, CHRISTOPHER PECK,)	
ROBIN SOTIR, and BRANDI TAYLOR,)	
Petitioners,)	
)	CIVIL ACTION NO.
v.)	
)	2020CV343938
FULTON COUNTY, FULTON COUNTY)	
BOARD OF REGISTRATION AND)	
ELECTIONS, and FULTON COUNTY)	
CLERK OF SUPERIOR AND)	
MAGISTRATE COURTS,)	
Respondents.)	

ORDER

On June 21, 2021, Respondents appeared before the Court and argued that sovereign immunity bars Petitioners' due process and equal protection claims under the Georgia Constitution. Without conceding the merits of Respondents' position, Petitioners asked the Court to add the members of the Fulton County Board of Registration and Elections in their individual capacities because these same claims may not be similarly barred.¹

Having considered the arguments of the parties and the record as a whole, the Court finds that Respondents are entitled to sovereign immunity on Petitioners' constitutional claims. Additionally, the Court exercises its discretion under OCGA § 9-11-21 and, in accordance with

¹ Although these claims against the members of the Fulton County Board of Registration and Elections in their individual capacities may be barred by official immunity, the record is not sufficiently developed to warrant such a conclusion. See generally *Lathrop v. Deal*, 301 Ga. 408, 434 (III) (B), 801 S.E.2d 867 (2017) ("the doctrine of sovereign immunity usually poses no bar to suits in which officers are sued in their individual capacities for official acts that are alleged to be unconstitutional.").

Petitioners' requests to add parties, hereby joins Alex Wan, Mark Wingate, Kathleen Ruth, Vernetta Nuriddin, and Aaron Johnson, as Respondents to this action.

No suit alleging violations of due process or equal protection rights under the Georgia Constitution, that seek declaratory or injunctive relief, may be initiated against either the state or county or any subsidiary department, bureau, or entity of the state or any county, unless there is a waiver of sovereign immunity. *Lathrop v. Deal*, 301 Ga. 408, 801 S.E.2d 867 (2017); *Gilbert v. Richardson*, 264 Ga. 744, 745-47 (1), (2), 452 S.E.2d 476 (1994) (sovereign immunity extends to counties).

Sovereign immunity may only be waived through the Georgia Constitution or by an act of the General Assembly. *Lathrop*, 301 Ga. at 425-26 (III), 801 S.E.2d 867 (2017). Further, “[s]overeign immunity is not an affirmative defense that must be established by the party seeking its protection. Instead, immunity from suit is a privilege, and the waiver must be established by the party seeking to benefit from the waiver.” *Athens-Clarke County v. Torres*, 246 Ga. App. 215, 216 (1), 540 S.E.2d 225 (2000) (citation and punctuation omitted). Accordingly, a claimant has failed to meet their burden if they point to no applicable portion of the Georgia Constitution, or the Code of Georgia, waiving sovereign immunity. See *Smith v. Chatham County*, 264 Ga. App. 566, 567-68 (1), 591 S.E.2d 388 (2003).

Petitioners contend that a recent amendment to the Georgia Constitution permits their claims where *Lathrop* prohibits them. The Court disagrees.

Ga. Const. Art. I, § 2, ¶ V (b) (1), provides that

Sovereign immunity is hereby waived for actions in the superior court seeking declaratory relief from acts of the state or any agency, authority, branch, board, bureau, commission, department, office, or public corporation of this state or officer or employee thereof or any county, consolidated government, or municipality of this state or officer or employee thereof outside the scope of lawful authority or in violation of the laws or the Constitution of this state or the

Constitution of the United States. Sovereign immunity is further waived so that a court awarding declaratory relief pursuant to this Paragraph may, *only after awarding declaratory relief*, enjoin such acts to enforce its judgment. *Such waiver of sovereign immunity under this Paragraph shall apply to past, current, and prospective acts which occur on or after January 1, 2021.* (emphasis added).

Here, Petitioners urge the Court to interpret the amendment to mean that Respondents' sovereign immunity is waived for actions alleging constitutional violations that seek declaratory and injunctive relief, no matter when the alleged violation(s) occurred. However, that reading would render the language "which occur on or after January 1, 2021" meaningless.

Accordingly, because Petitioners allege violations of their due process and equal protection rights under the Georgia Constitution – as a result of acts that occurred prior to January 1, 2021 – and seek declaratory and injunctive relief, Petitioners have failed to meet their burden to show an applicable waiver of sovereign immunity such that their constitutional claims may proceed against these governmental actors in the petition's current form.

However, misjoinder of parties is not a ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. OCGA § 9-11-21.

Therefore, **IT IS HEREBY ORDERED** that Fulton County's motion to dismiss is **GRANTED** on the basis of sovereign immunity and the remaining grounds are not reached as they are moot. Accordingly, Count I, II, III, IV, V, VI, and VII, are **DISMISSED** as it pertains to Fulton County. Further, Count XI of the second amended petition filed by Petitioners Favorito, Scupin, Terris, Draime, Doran, Peck, and Taylor, is **DISMISSED** as it pertains to Fulton County.

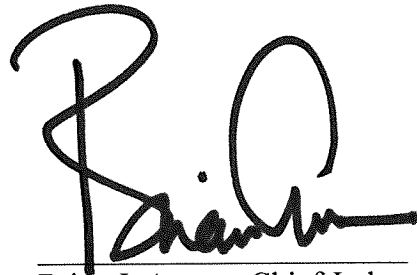
IT IS FURTHER ORDERED that the Fulton County Board of Registration and Elections' motion to dismiss is **GRANTED** on the basis of sovereign immunity and the

remaining grounds are not reached as they are moot. Accordingly, the Fulton County Board of Registration and Elections is **DISMISSED** as a party to this action.

IT IS FURTHER ORDERED that the Fulton County Clerk of Superior and Magistrate Courts' motion to dismiss is **GRANTED** on the basis of sovereign immunity and the remaining grounds are not reached as they are moot. Accordingly, the Fulton County Clerk of Superior and Magistrate Courts is **DISMISSED** as a party to this action.

IT IS FURTHER ORDERED that Petitioners' motions to add parties is **GRANTED**. Therefore, hereafter Alex Wan, Mark Wingate, Kathleen Ruth, Vernetta Nuriddin, and Aaron Johnson, are joined as Respondents to this action.

SO ORDERED this 24th day of June, 2021.



Brian J. Amero, Chief Judge
Superior Court of Henry County
Flint Judicial Circuit
By Designation, a Fulton County
Superior Court Judge