

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GARLAND FAVORITO, *et al.*,)
)
 Petitioners,)
) Civil Action No.
 v.) 2020CV343938
)
 MARY CAROLE COONEY, *et al.*,)
)
 Respondents.)

**MOTION OF GEORGIA SECRETARY OF STATE BRAD RAFFENSPERGER TO FILE
AMICUS BRIEF IN RESPONSE TO PETITIONERS’ MOTION TO UNSEAL PAPER
BALLOTS AND COMPEL PRODUCTION OF BALLOTS**

Georgia Secretary of State Brad Raffensperger (“Secretary”) moves the Court to submit the Brief of Amicus Curiae in response to Petitioners’ Motion to Unseal Paper Ballots and Compel Production of Ballots (“Motion to Unseal”), attached as Exhibit A.

As the state’s chief elections official, the Secretary has an interest in protecting the confidentiality, security, and integrity of ballots and other elections reports that Petitioners request in their Motion to Unseal. While the Secretary takes no position on the merits of Petitioners’ underlying case, he requests permission to submit the attached amicus brief to advise the Court regarding (1) the requirements under the Georgia Elections Code for maintaining the confidentiality and security of ballots; and (2) recent updates to the Georgia Open Records Act that allows for the public disclosure for ballot images only (*not* ballots). The Secretary respectfully requests that the Court permit Petitioners to inspect ballot images only, and deny Petitioners’ request to inspect and scan ballots. This result is consistent with Georgia law, and appropriately balances Petitioners’ interests in inspecting ballot images with the State’s and the public’s interest in maintaining the security and integrity of confidential ballots.

The Secretary respectfully requests that the Court consider the attached amicus brief and the State's interests before entering any relief on Petitioners' Motion to Unseal.

Respectfully submitted, this 2nd day of April, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing **MOTION TO FILE BRIEF OF AMICUS CURIAE** with the Clerk of Court using the electronic filing system, which will send notification of such filing to all parties of record via electronic notification, as well as via email to the following counsel for the parties:

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Dated: April 2, 2021.

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EXHIBIT A

I N T H E S U P E R I O R C O U R T O F F U L T O N C O U N T Y
S T A T E O F G E O R G I A

GARLAND FAVORITO,)	
)	
P e t i t i o n e r s ,)	
)	C i v i l A c t i o n N o .
v .)	2 0 2 0 C V 3 4 3 9 3 8
)	
MARY CAROLE CONLEY,)	
)	
R e s p o n d e n t s .)	

B R I E F O F A M I C U S C U R I A E G E O R G I A S E C R E T A R Y O F
R A F F E N S P E R G E R I N R E S P O N S E T O P E T I T I O N E R S ' M O T I O N
T O U N S E A L P A P E R B A L L O T S A N D C O M P E L P R O D U C T I O N O F B A L L O T S

Georgia Secretary of State Brad Raffensperger (“Secretary”) submits the following Brief of Amicus Curiae in response to Petitioners’ Motion to Unseal Paper Ballots and Compel Production of Ballots (“Motion to Unseal”).

A . I n t e r e s t s o f A m i c u s C u r i a e .

As the state’s chief elections official, the Secretary has an interest in protecting the confidentiality, security, and integrity of ballots and other elections materials that Petitioners request in their Motion to Unseal. While the Secretary takes no position on the merits of Petitioners’ underlying case, he submits this brief to advise the Court regarding (1) the requirements under the Georgia Elections Code for maintaining the confidentiality and security of ballots; and (2) recent updates to the Georgia Open Records Act that allows for the public disclosure for ballot images only (n o b a l l o t s). The Secretary respectfully requests that the Court permit Petitioners to inspect ballot images only, and deny Petitioners’ request to inspect and scan ballots. This result is consistent with Georgia law, and appropriately balances Petitioners’ interests in inspecting ballot images with the State’s and the public’s interest in maintaining the security and integrity of confidential ballots.

B. The Georgia Elections Code Provides that Ballots and Ballot Images are Not Subject to Public Disclosure under the Open Records Act

Petitioners filed this action as an enforcement action under the Open Records Act, O.C.G.A. § 50-18-73, and have asked that the Court order Respondents to produce for inspection all ballots, ballot images, and elections reports from the November 3, 2020, general election. See Motion to Unseal, at Exhibit A. These materials are currently under seal as required by O.C.G.A. § 21-2-500, and are currently being maintained by the Fulton County Superior Court Clerk. Because the underlying action was brought under the Open Records Act, there is no legal basis for Petitioners to obtain access to the requested materials beyond what the Open Records Act permits, subject to confidentiality provisions in the Elections Code.

Petitioners have submitted to the Court a proposed order granting their Motion to Unseal, which would grant Petitioners sweeping and unprecedented access to all ballots. Petitioners request that all ballots and ballot images be unsealed and Petitioners be permitted to remove the ballots from their legally required secure location within the Fulton County Clerk's office and move them to a third-party location of Petitioners' choosing. Petitioners also ask that ballots and ballot images be released to their custody and that the Court permit them to scan ballots with unauthorized equipment not intended for such use, and to conduct their own independent tabulation of votes. However, there is no basis under the Open Records Act or the Georgia Elections Code for such unfettered access to confidential ballots.

First, it is important to clarify the difference between "ballots" and "ballot images." "Ballots" include (1) paper ballots produced by ballot marking devices ("BMDs") used in in-

person advanced voting and election-day voting;¹ (2) absentee-by-mail paper ballots; and (3) UOCAVA paper ballots. Ballots are then scanned through optical voting scanners selected and furnished by the State of Georgia pursuant to O.C.G.A. § 21-2-300. Once scanned, an electronic ballot image is created and stored on a memory card (“ballot images”). Following the election, county officials must deliver all ballots and ballot images “in sealed containers to the clerk of the superior court,” and those ballots and ballot images are to be held by the clerk under seal for a period of 24 months. O.C.G.A. § 21-2-500(a).

The Open Records Act specifically exempts documents that “by law are prohibited or specifically exempted from being open to inspection by the general public.” O.C.G.A. § 50-18-70(b). The Georgia Court of Appeals has held that ballots and ballot images are not public records open to inspection by the general public under the Open Records Act because they must remain sealed under O.C.G.A. § 21-2-500(a). *Smith v. D. 288 Ga. App. 376 (2007)*. In *Smith*, the plaintiff sought production of ballot images maintained on a CD-ROM that were being maintained under seal by the clerk of superior court. The Court of Appeals held that “because the CD-ROM is statutorily designated to be kept under seal, it is by law prohibited or specifically exempted from being open to inspection by the general public and, therefore, is not an open record subject to disclosure.” *Id.* 577. Accordingly, “the trial court did not abuse its discretion in granting the Secretary of State’s petition for a permanent injunction prohibiting the custodian from opening the record in response to Smith’s Open Records Act request.” *Id.*

¹ See O.C.G.A. §§ 21-2-2(1) (defining a ballot as either “‘official ballot’ or ‘paper ballot’ and shall include the instrument, whether paper, mechanical, or electronic, by which an elector casts his or her vote”); 21-2-2(18) (defining an official ballot as “a ballot, whether paper, mechanical, or electronic, which is furnished by the superintendent or governing authority in accordance with Code Section 21-2-280, including paper ballots that are read by ballot scanners”); and 21-2-2(20) (defining paper ballot as “the forms described in Article 8 of this chapter”); Georgia Comp. R. & Regs. r. 183-1-12-.02 (defining ballot as “hav[ing] the meaning set forth in O.C.G.A. § 21-2-2”).

On March 25, 2021, Governor Kemp signed into law Senate Bill 202 (“SB 202”), which creates a limited exception for “scanned ballot images created by a voting system” and allows for public disclosure of b a l l o t, but ~~not b a l l o t~~, ~~under~~ the Open Records Act. In creating this limited exception, the General Assembly expressed its clear intent to only allow public disclosure of b a l l o t while ~~maintaining~~ the confidentiality of b a l l from public, and therefore ballots remain excluded to production under the Open Records Act.

Despite the limited exemption created by SB 202, the Georgia Elections Code is clear that all b a l l ~~are~~ remain secret and under the secure possession of elections officials or the clerk of court under O.C.G.A. § 21-2-500, and are not available for public review or inspection, and there is certainly no precedent for allowing the general public to copy or electronically scan confidential ballots. Indeed, it is a felony offense for anyone “other than an officer charged by law with the care of ballots” to be in possession of any ballots. O.C.G.A. § 21-2-574. Thus, the legislature has made it quite clear that the security and confidentiality of ballots is to be strictly maintained, and the Court should be cautious in granting Petitioners’ access to ballots that Georgia law requires to remain under seal, which makes it a felony as soon as Petitioners were to lay hands on them even if the Court were to grant the order that they seek, and for which the plain language of the Open Records Act and binding precedent make clear is n o p e r m i t t e d under the Open Records Act.

C . P e t i t i o n e r s h a v e n o l e g a l a u t h o r i t y t o c o n
a n d t a b u l a t i o n o f b a l l o t s .

The Elections Code is furthermore clear that it is only authorized elections officials who are legally permitted to verify and tabulate ballots in an election. S e e , O . C . G . A . § § , 21-2-386 (authorizing board of registrars or absentee ballot clerks to validate and authenticate signatures

on mailed absentee ballots and securely maintain absentee ballots); 21-2-493 (authorizing county elections superintendents to tabulate election returns); 21-2-495 (procedures for recount or recanvass of votes); 21-2-498 (authorizing elections superintendents and the Secretary of State to conduct tabulation audits); 21-2-499 (granting the Secretary of State the sole authority to certify final elections results).

Moreover, the scanning and tabulation of ballots is only permitted under Georgia law to be conducted on the equipment selected and furnished by the State of Georgia. The Elections Code provides that county elections officials shall use only the “uniform system of electronic ballot markers and ballot scanners” furnished by the State. O.C.G.A. § 21-2-300. There is simply no legal basis for unauthorized third parties such as Petitioners to electronically scan ballots using their own equipment in order to conduct their own independent tabulation of ballots. This is not permissible under the Georgia Elections Code, the Open Records Act, or any other statute. The official scanners that were furnished by the State and used to tabulate the ballots in Georgia have been certified by the Election Assistance Commission, tested by independent voting system review labs accredited by the Election Assistance Commission, certified by the Secretary of State, acceptance tested by the Secretary of State’s office, and, finally, logic and accuracy tested by the county elections office prior to use. Allowing Petitioners to conduct their own scan on uncertified and unknown equipment is contrary to law and would set a new and dangerous precedent going forward.

There are serious privacy and security risks with allowing Petitioners access to scan and reproduce the original, sealed ballots because they can easily be altered and manipulated and shared with the public to spread misinformation. This risk is not merely hypothetical—there has already been a great deal of misinformation regarding the 2020 general election that was

disseminated through social media and other internet media, and which forms the basis for Petitioners' allegations in their action. Just as one example, Petitioners cite to security footage from the Fulton County tabulation center at State Farm Arena to falsely claim that tabulators brought out bins of unlawful ballots they had hidden under tables and unlawfully counted them. See Petition at ¶¶ 46-55. This misinformation was generated by plaintiffs in a separate election challenge, who obtained the security camera footage of the Fulton County tabulation center at State Farm Arena through a subpoena, and then selectively edited nearly 24-hours of that video footage into a few minutes to suggest that unlawful activity had occurred, when it had not. There is an obvious and real risk that, if electronic ballot images are disseminated on the internet, that bad actors will attempt to alter or manipulate them as a means to spread similar misinformation.

Petitioners have not articulated a legal justification for why they are entitled to conduct their own independent tabulation of ballots separate and apart from the legal tabulation conducted by authorized elections officials as required by law. If they wished to contest the legality of certain ballots or the results of the general election, Petitioners could have timely filed an election contest under Article 13 of the Elections Code, O.C.G.A. § 21-2-520, et seq. Many parties, including former President Trump, did file election contests making the same baseless claims Petitioners raise in this action, and none of them were successful.² But in any event,

² At least four election contests challenging the general election results were filed by other parties, including former President Trump, in addition to federal lawsuits seeking stop or undo certification of the general election results. In all of these cases, injunctive relief was denied and/or the case was dismissed. See, e.g., *Nelson v. Osig*, No. 1:20-cv-05310-MHK, 2021 U.S. Dist. LEXIS 4185 (N.D. Ga. Jan. 5, 2021) (motion for injunction denied); *Trump v. Raffensperger*, No. 2020cv343255 (Fulton Superior Court) (election contest voluntarily dismissed by plaintiff on the day before trial); *Texas v. United States*, No. 15 (Osig) 2020 WL 7296814 (U.S. Dec. 11, 2020) (denying petition to file original action challenging Georgia's general election results); *Wood v. Raffensperger*, No. 1:20-cv-03071 (11th Cir. 2020) (affirming denial of motion to enjoin certification of general election results); *Pearson v. Kvech*, No. 1:20-cv-4809 (N.D. Ga.) (dismissed); *Wisconsin Voters Alliance v. Allina*, No. 20-3701 (U.S. Dist. LEXIS 27 (D.D.C. Jan. 4, 2021)

Petitioners did not file an election contest, and the current Petition filed pursuant to the Open Records Act cannot be construed as an election contest because it was not properly filed within five days of the certification of the election results and fails to meet the other requirements of O.C.G.A. § 21-2-524. To the extent that Petitioners are using this open records act enforcement action as a pretext for challenging the legality of ballots cast in the general election, it is too late for them to assert such a challenge now, and any request for relief would be barred by the applicable statute of limitations. See O.C.G.A. § 21-2-524.

Moreover, any legal challenges to the results of the 2020 general election are also moot, as the results of that election have already been tabulated, audited by hand count, recounted by machine tabulation, and were certified by the Secretary of State on November 20, 2020, who has the sole authority to certify elections results under O.C.G.A. § 21-2-499. The list of presidential electors was certified again on December 7, 2020, by the Secretary of State and the Governor, who transmitted the Certificate of Ascertainment to the Archivist of the United States pursuant to 3 U.S.C. § 6. All officials elected in the general election have been sworn into office. The public interest would not be served by allowing Petitioners to undergo an unlawful fishing expedition into sealed ballots in their attempt to undermine the results of the general election, when the ballots have already been tabulated, audited, and recounted as provided by law.

(S u a s p e n s i o n o f a c h a l l e n g e t o G e o r g i a ' s g e n e r a l e l e c t i o n r e s u l t s , i n w h i c h t h e d i s t r i c t c o u r t r e f e r r e d p l a i n t i f f s ' c o u n s e l t o t h e c o u r t ' s g r i e v a n c e c o m m i s s i o n f o r d i s c i p l i n e f o r f i l i n g a f r i v o l u s a c t i o n) ; W o o d v . R a n o f 2 0 2 0 c s 3 4 2 5 9 (e l e c t i o n c o n t e s t i n F u l t o n C o u n t y S u p e r i o r C o u r t t h a t w a s d i s m i s s e d b y t h e c o u r t) ; D e l l a P o l l a , N o . 2 0 - R - 7 4 9 0 4 6 e n s p e r g (e l e c t i o n c o n t e s t i n C o b b C o u n t y S u p e r i o r C o u r t t h a t w a s d i s m i s s e d b y t h e c o u r t) ; B o l a n d v . R a f f e n , N p . 2 0 2 0 g e 3 4 0 1 8 (e l e c t i o n c o n t e s t i n F u l t o n C o u n t y S u p e r i o r C o u r t t h a t w a s d i s m i s s e d b y t h e C o u r t) .

C E R T I F I C A T E O F S E R V I C E

I hereby certify that I have this day electronically filed the foregoing **B R I E F O F A M I C U S**
C U R I A with the Clerk of Court using the electronic filing system, which will send notification
of such filing to all parties of record via electronic notification, as well as via email to the following
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Dated: April 2, 2021.

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