

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

**GEORGIA STATE CONFERENCE OF *
THE NAACP, et al., ***

Plaintiffs, *

v. *

**STATE OF GEORGIA and *
BRIAN KEMP, in his official capacity *
as Secretary of State for the State of *
Georgia, ***

Defendants. *

CA No. 1:17cv01397-TCB

**DEFENDANTS’ SUR-REPLY IN OPPOSITION TO
PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION**

Contrary to Plaintiffs’ assertions in their reply brief, Defendant does dispute that the terms of the NVRA require that registration for any federal election must remain open past Georgia’s lawfully set voter registration deadline for the June 20, 2017 federal runoff. This case presents the novel issue of whether state public policy can treat runoff elections as continuations of voting, as Georgia’s code and constitution do and have done for quite some time.

As pointed out in Defendants’ response brief, the applicable language of the NVRA’s 30-day requirement applies to “eligible applicant,” which raises the

question of who is an “eligible applicant.” Plaintiffs do not dispute that states retain the power to set voter qualifications. The question in this case is whether Georgia’s requirement that a voter must have been eligible to vote in the underlying election to be eligible to vote in the runoff is a “qualification” or a “time, place, and manner” regulation of elections. If it is a qualification, then it cannot be supplanted by the NVRA. Plaintiffs’ reply brief asserts that Defendants are challenging the constitutionality of the NVRA. Doc. 25 at 8. However, Defendants’ response brief sets out that, because state law declares voters that were not eligible to participate in the April 18, 2017, Special Election are ineligible to participate in the continuation of that contest, the NVRA is not violated.

The Georgia Constitution states: “[a] run-off shall be a continuation of the general election and only persons who were entitled to vote in the general election shall be entitled to vote therein.” Ga. Const. Art. II, § II, Para II. O.C.G.A. § 21-2-501(a)(10) enshrines the same principle for runoffs in a primary or special election, as is the case here. It is clear from the plain language of these provisions that the people of Georgia in adopting their Constitution and the legislature in codifying the same principle view the runoff eligibility requirement as a qualification. Because the NVRA provision at issue only applies to “eligible voters,” and Georgia substantive law makes clear that to be eligible to vote in the runoff, an

elector must have been registered for the underlying election, the plain language of the NVRA is consistent with Georgia's ability to set its own voter qualifications, including in runoff elections.

Defendants also submit a second declaration from Chris Harvey, Elections Director for the Secretary of State's Office. *See* Exhibit 5 attached hereto.

Director Harvey's second declaration is submitted to clarify some of the issues raised in the declaration of Helen Butler. Doc. 25-1. As Director Harvey makes clear, even the use of a supplemental list of registered voters for the June 20, 2017 run-off election will require a program change to the state's election database for absentee and advanced voting. Director Harvey further clarifies that the two instances of a "hot fix" from 2016 that Butler identifies were not actually "hot fixes." Instead, those fixes did not involve programming changes to the election database.

Respectfully submitted,

CHRISTOPHER M. CARR
Attorney General 112505

DENNIS R. DUNN 234098
Deputy Attorney General

RUSSELL D. WILLARD 760280
Senior Assistant Attorney General

CRISTINA CORREIA 188620

Assistant Attorney General

/s/Josiah B. Heidt

JOSIAH B. HEIDT 104183

Assistant Attorney General

Attorneys for Defendants

**Please address all
Communication to:**

JOSIAH B. HEIDT
Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-3389
jheidt@law.ga.gov

CERTIFICATE OF COMPLIANCE

I hereby certify that the forgoing Defendants' Sur-Reply was prepared in 14-point Times New Roman in compliance with Local Rules 5.1(C) and 7.1(D).

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2017, I electronically filed this Sur-reply using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

Julie Houk
John Powers
Ezra Rosenberg
Lawyers' Committee for Civil Rights
Under Law
1401 New York Avenue, Suite 400
Washington, DC 20005

Bryan Sells
Law Office of Bryan Sells, LLC
P.O. Box 5493
Atlanta, GA 31107-0493

I hereby certify that I have e-mailed the document to the following non-CM/ECF participants:

Emily Goldman
Jonathan Lynwood Abram
Paul Wiley
Hogan Lovells, US LLP-DC
555 Thirteenth Street, NW
Washington, DC 20004

Ira Martin Feinberg
Hogan Lovells, US LLP-NY
875 Third Avenue
New York, NY 10022

This 3rd day of May, 2017.

/s/Josiah B. Heidt
JOSIAH B. HEIDT 104183
Assistant Attorney General
jheidt@law.ga.gov

EXHIBIT 5

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

GEORGIA STATE CONFERENCE)	
OF THE NAACP, et al.,)	
)	
Plaintiffs,)	CIVIL ACTION FILE
)	
v.)	NUMBER 1:17-cv-1397-TCB
)	
STATE OF GEORGIA and BRIAN)	
P. KEMP, in his official capacity as)	
Secretary of State for the State of)	
Georgia,)	
)	
Defendants.)	

SECOND DECLARATION OF CHRIS HARVEY

1.

My name is Chris Harvey. I am over the age of 21 and legally competent to testify. I give this declaration as evidence in the above-styled action and for any other lawful purpose. This is my second declaration in this matter and I make this declaration based upon my personal knowledge of its contents.

2.

I have reviewed the declaration of Helen Butler (Doc. 25-1) and file this second declaration in direct response to a couple of matters raised in the Butler declaration.

3.

Paragraph 31 of the Butler declaration asserts that “no ‘hot fix’ to eNet would be required” if elections officials simply used a supplemental list for the June 20, 2017 runoff election. A supplemental list is not a complete solution to this complicated problem. Supplemental lists are not normally utilized for absentee or advance in-person voting, and using a supplemental list would still require system changes to keep people from voting multiple times. Poll workers have no training in using supplemental lists for advance voting, and using them in this fashion could increase error rates. During advance voting, election officials use GVRS (referred to as the eNet system in the Butler declaration) to determine who is eligible to cast a ballot. GVRS is programmed to determine eligibility in a runoff by the registration cut-off of thirty days prior to the election that led to the runoff. Issuing ballots outside of GVRS means that the system notifications that tell a poll worker that the voter has already cast a ballot would not be in place and nothing would stop a voter from voting again in another early voting location in the county.

4.

Paragraph 35 of the Butler declaration asserts that a supplemental list can be used for absentee ballot requests. This statement ignores that using a

supplemental list for absentee and advance voting would not allow GVRs to track voter activity that protects from a voter casting multiple votes, as discussed in paragraph 3 above.

5.

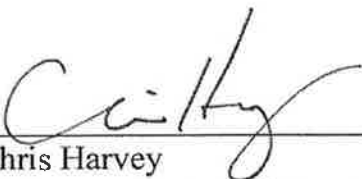
Paragraphs 36-42 of the Butler declaration asserts that the Secretary of State's office "made at least two major 'hot fixes' to the eNet system" prior to the November, 2016, general election. Neither of the examples cited in the Butler declaration were accomplished through a program change or "hot fix." The first example cited, the extension of the voter registration deadline in Chatham County, was accomplished via a supplemental list, manual updates to the express poll out files, manual tracking of issuance of absentee ballots, manually checking that late registrants had not previously voted by calling the registrar's office and utilizing a manually updated spreadsheet, and manually entering credit for voting after the election. Doing all this manually increases the possibility of human error. The system was not changed because it was impossible to update the voter registration deadline for just one county.

6.

The second example cited in the Butler declaration, a change to the status of a group of voters, was also not a system update or "hot fix."

Instead, this group of voters was run through the system as new voter registration applicants, precisely to *avoid* any need for a “hot fix.” The only “hot fix” associated with the case cited in paragraph 39 of the Butler declaration was a change to form letters sent to voters that had no effect on their ability to cast a ballot.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 3rd day of May, 2017.


Chris Harvey
Director, Division of Elections
Office of the Secretary of State