IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

AMERICAN OVERSIGHT and JOHN DOE, Plaintiffs, v. THE GEORGIA STATE ELECTION BOARD; JANICE JOHNSTON, in her individual capacity and official capacity as a Member of the Georgia State Election Board; RICK JEFFARES, in his individual capacity and official capacity as a Member of the Georgia State Election Board; JANELLE KING, in her individual capacity and official capacity as a Member of the Georgia State Election Board; JOHN FERVIER, in his official capacity as the Chairman of the Georgia State Election Board; SARA TINDALL GHAZAL, in her official capacity as a Member of the Georgia State Election Board; Defendants, and THE GEORGIA REPUBLICAN PARTY, Defendant-Intervenor.	CIVIL ACTION FILE NO. 24CV009124

PLAINTIFFS' RESPONSE IN OPPOSITION TO THE GEORGIA REPUBLICAN PARTY'S MOTION TO DISMISS

Plaintiffs American Oversight and John Doe hereby file their response to Defendant-Intervenor the Georgia Republican Party's Motion to Dismiss (the "Motion").

INTRODUCTION

In its Motion to Dismiss, the Georgia Republican Party ("GRP") seeks to dismiss this entire case based on a host of incorrect assumptions and misreadings of Georgia law. The GRP argues that Plaintiffs' claim for declaratory and injunctive relief—a claim that is now moot and

Plaintiffs are requesting be dropped from this case—relies on the Georgia Constitution's waiver of sovereign immunity for constitutional claims (the "Paragraph V waiver") and that this waiver requires dismissal because Plaintiffs have named defendants other than the State of Georgia. But that claim is no longer a part of this action. And in any case, that claim did not raise a constitutional violation and did not rely on the Paragraph V waiver of sovereign immunity. Instead, the claim sought relief under the Open Meetings Act, which itself waives sovereign immunity for such claims. Where a party relies on a different jurisdictional hook, Paragraph V is irrelevant and its procedural requirements do not apply. Because Plaintiffs' claims arise under the Open Meetings Act and do not rely on Paragraph V, the GRP's Motion is baseless and should be denied.

BACKGROUND

This case arises from violations of the Open Meetings Act relating to an unlawfully convened meeting of the State Election Board on July 12, 2024. *See generally* Verified Complaint ("Compl."). While their various violations of the Open Meetings Act rendered their actions on July 12 infirm and without legal effect, the members of the Board present that day nonetheless purported to take official Board action, including voting to move two measures forward for rulemaking. *See id.* ¶¶ 61-70.

Plaintiffs filed this suit on July 19, 2024. Initially, they brought claims to (1) invalidate the actions taken at the Board's purported July 12 meeting under O.C.G.A. § 50-14-1(b)(2), and (2) impose civil fines on certain Board members (Rick Jeffares, Janice Johnston, and Janelle King) for their violations of the Open Meetings Act. After Plaintiffs filed this lawsuit, the Board held another meeting—this time, properly convened under the Open Meetings Act—in which the Board superseded the actions taken at the unlawful July 12 meeting. The Board's superseding

actions effectively granted Plaintiffs the relief they initially sought in Count I of their Verified Complaint. Plaintiffs have therefore moved for leave from this Court to file an amended complaint that removes that claim and "drops" the two nominal defendants associated solely with it (Board members John Fervier and Sarah Tindall Ghazal).[1]

Plaintiffs continue to pursue their claim for civil fines against Defendants Johnston, Jeffares, and King (along with the associated request for attorneys' fees) because those are the three Board members who violated the Open Meetings Act by holding the July 12 meeting. And while the full Board has since superseded the actions they took on July 12, the fact remains that Johnston, Jeffares, and King violated the law by purporting to hold a Board meeting and attempting to take official actions without following the requirements of the Open Meetings Act. Plaintiffs' civil fines claim seeks to hold Defendants accountable for their violations and, in the process, to discourage future violations of the Open Meetings Act. As the Georgia Supreme Court has explained,"[o]ne of the ways the General Assembly has provided to encourage compliance with the Act by *agencies* is by creating a mechanism for holding accountable the *individuals* who make decisions for the agency." *Williams v. DeKalb Cnty.*, 308 Ga. 265, 275 (2020) (discussing claim for civil fines). Further, "accountability includes being held *financially* liable personally for civil or criminal penalties" under O.C.G.A. § 50-14-6. *Id.* at 276.

[1] As Plaintiffs explained at the September 20, 2024 hearing in this matter, O.C.G.A. § 9-11-15 permits them to amend their complaint and dismiss claims without the Court's permission, but O.C.G.A § 9-11-21 requires Plaintiffs to seek the Court's permission to dismiss *parties*. *Compare* O.C.G.A. § 9-11-15(a) ("A party may amend his pleading as a matter of course and *without leave of court* at any time before the entry of a pretrial order." (emphasis added)), *with* O.C.G.A. § 9-11-21 ("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." (emphasis added)).

On July 25, 2024, the GRP moved to intervene in this case. Nearly a month later—before the Court granted it permission to intervene—the GRP filed its Motion to Dismiss Plaintiffs' Verified Complaint. On September 5, 2024, this Court granted the GRP's motion to intervene, and the GRP is now a Defendant-Intervenor.

ARGUMENT AND CITATION TO AUTHORITY

I. Plaintiffs do not rely on Paragraph V's waiver of sovereign immunity, so its requirements do not apply here.

In its Motion, the GRP asserts that "[t]he claims in the instant action have been brought, at least in part, pursuant to Ga. Const. Art. I, Sec. II, Par. V(b)(2)," and that this case must be dismissed because any action relying on that provision can only be brought solely against the State of Georgia. GRP Mot. at 3–4. The GRP's Motion fails because the fundamental premise of their argument is wrong. Plaintiffs do not rely on Paragraph V's waiver of sovereign immunity at all. As the Georgia Supreme Court has recently explained, "Article I, Section II, Paragraph V of the State Constitution waives sovereign immunity for certain 'actions' ***seeking declaratory relief for alleged constitutional violations*** by state entities, officials, and employees specifically listed therein." *State v. SASS Grp., LLC*, 315 Ga. 893, 896 (2023) (emphasis added). Here, Plaintiffs no longer seek declaratory relief and their claims are for violations of the Open Meetings Act, not constitutional violations. As a result, Paragraph V is irrelevant here, and the GRP's Motion must be denied.

A. The GRP's argument does not apply to the remaining claims in this case.

Because the Board has superseded the official actions taken at the unlawful July 12 meeting, Plaintiffs' proposed Amended Complaint removes the claim for injunctive and

declaratory relief to invalidate the Board's actions.[2] The remaining claims seek only the imposition of civil fines and reimbursement of attorneys' fees. *See generally* Ex. A to Pls.' Mot. for Leave to Drop (Plaintiffs' proposed Amended Complaint). Those claims do not implicate Paragraph V at all because they do not seek declaratory relief. Even the GRP's Motion acknowledges that these claims are not brought pursuant to Paragraph V. GRP Mot. at 3–4. Because the only claim for declaratory relief is now moot and Plaintiffs are not pursuing it, this Court need not engage further with the GRP's Paragraph V argument and should deny the Motion.

B. None of Plaintiffs' claims rely on Paragraph V's waiver of sovereign immunity.

Even if Plaintiffs were not dismissing their request for declaratory relief, the GRP's Motion would still fail because that claim does not rely on Paragraph V, either. It is true, so far as it goes, that an action relying on Paragraph V's waiver must comply with the provision's strict exclusivity requirement and can name only the State itself as a defendant. But where a plaintiff relies on *another* waiver of sovereign immunity, Paragraph V's procedural peculiarities do not apply. *See Adams v. Fulton Cnty. Bd. of Registration and Elections*, Case No. 24CV006566, Order at 3 n.3 (Sept. 9, 2024) (dismissing an action under Paragraph V and noting that a related case, *Abhiraman et al. v. State Board of Elections*, was not subject to dismissal under the same rules because "in that case, in which Petitioners did not name the State of Georgia as

[2] Plaintiffs have moved for leave to drop two defendants that are party only to the voluntarily dismissed claim for injunctive and declaratory relief. Regardless of the outcome of that motion, Plaintiffs are no longer pursuing declaratory relief, and Plaintiffs will file an amended pleading to remove that claim, even if the nominal defendants remain in this suit.

Respondent, there is a jurisdictional hook other than Paragraph V: O.C.G.A. § 50-13-10") (attached hereto as Exhibit A).[3]

Just as in *Abhiraman*, Plaintiffs' claims have another jurisdictional hook—the Open Meetings Act—and do not rely on Paragraph V's waiver of sovereign immunity at all. As noted above, Plaintiffs are not seeking "declaratory relief for alleged constitutional violations" by the State Election Board. *SASS Grp., LLC*, 315 Ga. at 896. All of Plaintiffs' claims (in both the original Verified Complaint and the proposed Amended Complaint) arise under the Open Meetings Act, not the Constitution. That Act is itself a waiver of sovereign immunity because it authorizes suits against state agencies and government officials to "enforce compliance with provisions of" the Act. O.C.G.A. §§ 50-14-5(a); *see also Georgia Dep't of Nat. Res. v. Ctr. for a Sustainable Coast, Inc.*, 294 Ga. 593, 597 (2014) (General Assembly may waive sovereign immunity).[4] The Open Meetings Act's authorization encompasses both (i) "action[s] contesting a resolution, rule, regulation, ordinance, or other formal action of an agency based on an alleged violation" of the Act—*i.e.*, Count I of the Verified Complaint, and (ii) "civil action[s] . . . against any person who negligently violates the terms of this chapter" seeking imposition of civil fines up to $1,000 per violation—*i.e.*, Count II of the Verified Complaint. O.C.G.A. §§ 50-14-1(b)(2) & 50-14-6. Because the Open Meetings Act itself authorizes each of Plaintiffs' claims against the State Election Board and its members, Plaintiffs are not relying on Paragraph V's waiver of sovereign immunity.

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[3] At the September 20 hearing held in the instant case, the GRP relied on the ruling in *Adams* to support its Motion. But this case is not like *Adams*, where the plaintiffs initially relied on Paragraph V and tried to amend their complaint to change that. By contrast, Plaintiffs' claims (like those in *Abhiraman*) have never relied on Paragraph V.

[4] Also at the September 20 hearing, counsel for Defendants agreed that the Open Meetings Act is an independent waiver of sovereign immunity.

The GRP's Motion relies principally on *Lovell v. Raffensperger*, 318 Ga. 48 (2024), and implies that *every* request for declaratory relief against the State is automatically subject to Paragraph V's exclusivity requirement. But that is not at all what *Lovell* holds; to the contrary, the opinion notes up front that the plaintiffs in that case relied on Paragraph V for at least one of their claims. *Id.* at 50. The GRP cites no authority to suggest that Paragraph V supersedes any other waiver of sovereign immunity that allows parties to seek declarations against state authorities. And Judge Robert McBurney found the opposite in his recent opinion in *Adams*, which expressly notes that the request for declaratory relief in *Abhiraman* is authorized by a statute that acts as a separate waiver of sovereign immunity. The Open Meetings Act is the same.

This point is re-enforced by the fact that neither the Georgia Court of Appeals nor the Georgia Supreme Court has ever questioned sovereign immunity in any of the cases involving claims seeking to invalidate a state action under O.C.G.A. § 50-14-1(b)(2). *E.g.*, *City of Coll. Park v. Martin*, 304 Ga. 488, 490 (2018); *Sweet City Landfill, LLC v. Lyon*, 352 Ga. App. 824 (2019)[5]; *Tisdale v. City of Cumming*, 326 Ga. App. 19 (2014). Because sovereign immunity is jurisdictional, the appellate courts have an independent obligation to address any sovereign immunity concerns before reaching the merits of an appeal, regardless of the parties' arguments. *McConnell v. Dept. of Labor,* 302 Ga. 18, 19 (2017) ("[T]he applicability of sovereign immunity is a threshold determination, and, if it does apply, a court lacks jurisdiction over the case and,

[5] Both *Martin* and *Sweet City Landfill* are particularly persuasive on this point because they were decided in the interim between *Lathrop v. Deal*, 301 Ga. 408 (2017), which clarified that sovereign immunity barred claims for injunctive or declaratory relief for constitutional violations, and the enactment in 2022 of Paragraph V, which was intended to fill the jurisdictional gap identified by *Lathrop*. If the GRP were correct that Open Meetings Act claims must rely on the waiver in Paragraph V, then cases decided before the enactment of Paragraph V would surely have addressed sovereign immunity—which would have barred such claims—before engaging in the merits of the appeal. They did not because the GRP is wrong.

concomitantly, lacks authority to decide the merits of a claim that is barred."). In fact, in the only opinion to even mention sovereign immunity for an Open Meetings Act claim, the Georgia Supreme Court affirmed the trial court's denial of a motion to dismiss that had argued sovereign immunity barred the suit. *Lue v. Eady*, 297 Ga. 321, 333 (2015). The fact that no Georgia court has found that sovereign immunity bars a § 50-14-1(b)(2) claim—even before the enactment of Paragraph V—further demonstrates that Paragraph V is irrelevant and the Open Meetings Act itself waives sovereign immunity for Plaintiffs' claims. *See City of Coll. Park v. Clayton Cnty.*, 306 Ga. 301, 312 (2019) (noting that prior decisions involving similar claims that do not discuss sovereign immunity "provide some evidence that" sovereign immunity presents no bar to such claims).

In short, the Open Meetings Act expressly permits claims against state agencies and actors to invalidate official actions taken in violation of the Open Meetings Act. Plaintiffs therefore have an independent jurisdictional hook for their claims and are not relying on Paragraph V's sovereign immunity waiver, even in the Verified Complaint that seeks declaratory relief. Paragraph V is therefore irrelevant, and its dismissal provision does not apply.

CONCLUSION

For the reasons described above, Plaintiffs respectfully request that the Court deny Defendant-Intervenor Georgia Republican Party's Motion to Dismiss.

Respectfully submitted this 23rd day of September, 2024.

[signature on following page]

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and correct copy of the foregoing to be filed with the Clerk of Court using the eFileGA system, which will serve a true and correct copy of the same upon all counsel of record.

This 23rd day of September, 2024.

/s/ Sarah Brewerton-Palmer
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Counsel for Plaintiffs American Oversight and John Doe

Exhibit A

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JULIE ADAMS, Plaintiff	*	CIVIL ACTION
v.	*	24CV006566
FULTON COUNTY BOARD OF REGISTRATION AND ELECTIONS *et al.*, Defendants	*	Judge McBurney

ORDER ON PLAINTIFF'S MOTION TO CORRECT MISNOMER *ET AL.*

On 22 August 2024, Plaintiff filed a motion seeking to correct a misnomer in the style of the case, to drop a party (without prejudice), and to amend the caption of this case. Given the time-sensitive nature of the legal questions presented in this litigation, the Court directed Defendants to file a response by 3 September 2024, which they did. In their response, Defendants opposed all requested relief and obliquely renewed their still-pending call for dismissal. For the reasons discussed below, the Court DENIES Plaintiff's motion and DISMISSES Plaintiff's amended complaint.

In both her original and amended complaint, Plaintiff seeks declaratory relief concerning the nature of her statutorily defined role as an "election superintendent" on the Fulton County Board of Registration and Elections. Several years ago, our Supreme Court determined that such claims were barred by the sovereign immunity our local and state governments enjoy. *Lathrop v. Deal*, 301 Ga. 408 (2017). In November 2020 -- a momentous election on many legal fronts -- the people of Georgia approved an amendment to the Georgia Constitution that created a limited waiver of sovereign immunity for claims such as Plaintiff's, in which an aggrieved party seeks a judicial declaration of the meaning (or constitutionality) of some statutory provision. Ga. Const. of

1983, Art. I, Sec. II, Para. V(b) ("Paragraph V"). With that waiver came several draconian (but very plainly stated) pleading requirements: any complaint seeking relief pursuant to Paragraph V must be brought against the State (or local government) *only* and no other claims for any other form of relief can be included in that complaint. Failure to comply with either requirement is fatal: the non-compliant complaint "shall be dismissed." Ga. Const. of 1983, Art. I, Sec. II, Para. V(b)(2); *Lovell v. Raffensperger*, 318 Ga. 48 (2024) (affirming dismissal of complaint brought pursuant to Paragraph V because it named agency head instead of State of Georgia); *State v. SASS Grp., LLC*, 315 Ga. 893, 894 (2023) (reversing trial court for failing to dismiss suit that brought Paragraph V claim against both the State of Georgia and a local District Attorney and which had non-Paragraph V claims).

Plaintiff's first complaint seeking Paragraph V relief was brought against the Fulton County Board of Registration and Elections (FCBRE) and its Director. Neither is a proper party for such a suit and the original complaint should have been dismissed -- as Defendants argued in their 22 July 2024 motion to dismiss.[1] In response to the motion to dismiss, Plaintiff amended her complaint and began the process of trying to recast her claims as ones being brought exclusively against Fulton County. That was too little, too late; the fatal pleading flaw cannot be undone.[2]

Lest this outcome be deemed harsh, two things should be considered. First, the pleading requirements for seeking relief pursuant to Paragraph V are both simple and

[1] The original complaint (as well as the amended complaint) also commingles non-Paragraph V claims with the declaratory relief claim against the government. This, too, is fatal to Plaintiff's efforts, as Paragraph V claims must stand alone. *SASS Grp.*, 315 Ga. at 904.

[2] It is an open question, presently before the Supreme Court, whether a party that recognizes that it has failed to comply with Paragraph V's simple pleading requirements can amend its complaint and avoid an early demise to its declaratory relief claim. *See Cobb County et al. v. Ray Murphy*, S24A1297. (In the *Murphy* case, there was not the additional pleading deficiency of a non-Paragraph V claim, distinguishing it from the current case, which would still suffer from a fatal pleading error even if Plaintiff were permitted to swap in Fulton County for the Board of Registration and Elections.) Until the Supreme Court provides additional guidance, this Court will take that Court at its word in *SASS Grp.*

very public. The plain language of Paragraph V tells us what (and what not) to do. Moreover, in case that plain language was not clear (and it is), the Supreme Court over a year before Plaintiff filed her initial complaint confirmed that the constitutional language meant what it said: a claim for relief against the State or a local government that seeks to have a judge declare that a law (or rule or ordinance) is unconstitutional, that a law (or rule or ordinance) means this or that, that a statutorily defined role is ministerial or discretionary, or that products containing Delta-8-THC and Delta-10-THC are "hemp products" can be brought *only* against the government, be it the State, a county, or a municipality. *SASS Grp.*, 315 Ga. at 897. What this Court is enforcing today is not new law in Georgia.

Second, Plaintiff's claims are not forfeited; they are merely dismissed -- for now. This action is done, but there can be another. Plaintiff can refile, name the correct party, and we will pick up where we left off, likely with all the same lawyers and certainly with the same substantive arguments. If Plaintiff moves with alacrity, the merits of her claim that the role of an election superintendent -- in particular when certifying the results of an election -- is discretionary rather than ministerial can still be considered alongside the related claims set forth in *Abhiraman et al. v. State Board of Elections*, 24CV010786.[3] This may seem like an unnecessary drill, but it was also an entirely unavoidable one.

[3] In the *Abhiraman* case, Petitioners seek declaratory relief concerning various rules promulgated by a state agency, the State Election Board. However, in that case, in which Petitioners did *not* name the State of Georgia as Respondent, there is a jurisdictional hook other than Paragraph V: O.C.G.A. § 50-13-10. That statute is a waiver of sovereign immunity for actions "alleging necessity of a declaratory judgment on [the] validity of rules of state agencies." *Burton v. Composite State Bd. of Med. Examiners*, 245 Ga. App. 587, 589 (2000).

Plaintiff's case is DISMISSED without prejudice.[4]

SO ORDERED this 9th day of September 2024.

Judge Robert C.I. McBurney
Superior Court of Fulton County
Atlanta Judicial Circuit

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[4] Plaintiff failed to comply with the constitutionally prescribed requirements to establish a waiver of sovereign immunity to seek declaratory relief against a local government. If sovereign immunity was not waived, this Court lacks jurisdiction over this matter. *2200 Atlanta Inv'rs, LLC v. DeKalb Cnty.*, 369 Ga. App. 537, 539 (2023). Dismissal on the grounds of lack of jurisdiction is always without prejudice. *Murray v. Lexington Park of Fulton Cnty. Cmty. Ass'n, Inc.*, --- Ga. App. ---, 904 S.E.2d 119, 125 (2024); *Pinnacle Benning, LLC v. Clark Realty Capital, LLC*, 314 Ga. App. 609, 614-615 (2012). Defendants' request that Director Williams (or this case) be dismissed *with* prejudice is therefore DENIED.