IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

DEKALB COUNTY REPUBLICAN PARTY, INC., Applicant, v. BRAD RAFFENSPERGER, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF STATE OF THE STATE OF GEORGIA, Respondent.	Civil Action No. 24CV011028

FINAL ORDER ON RESPONDENT'S MOTION TO DISMISS

Applicant Dekalb County Republican Party, Inc. seeks the extraordinary remedy of a writ of mandamus, asking this Court to compel the Georgia Secretary of State (the "Secretary") to comply with O.C.G.A. § 21-2-300(a) and other election-related regulations. (Doc. 2, 8/30/24). Specifically, the Applicant contends that the Secretary has committed a gross abuse of discretion and failed his ongoing duty to ensure that the Dominion voting systems used to conduct elections in Georgia comply with certifications issued by the Election Assistance Commission ("EAC"). These certifications direct, among many other things, that encryption keys used to secure the election systems be stored in compliance with the Voluntary Voting System Guidelines ("VVSG"). In violation of this requirement, Applicant alleges, multiple county systems store encryption keys in unprotected plain text.

The Court issued a mandamus nisi and set the matter for trial within 30 days. *See* O.C.G.A. § 9-6-27(a). The Secretary then answered and moved for dismissal, but pursuant to O.C.G.A. § 9-11-12(d), the Court declined to issue a pretrial ruling. (Docs. 13-14, 9/25/24); *see Dep't of Pub. Safety v. Johnson*, 343 Ga. App. 22, 25 (2017); *see also Thompson v. Hornsby*, 235 Ga. 561, 562 (1975)

("The Civil Practice Act is applicable to mandamus actions[.]"). The case proceeded to a bench trial after both parties waived their right to have a jury decide any factual disputes. *See* O.C.G.A. § 9-6-27(c). Following the complete presentation of the Applicant's case, the Secretary renewed his motion to dismiss.[1] After considering the evidence,[2] applicable law, and argument of counsel, the Court grants the motion in part.

The Secretary raises two preliminary defenses that would defeat the petition without addressing the substantive issues: 1) that the Applicant prejudicially delayed the filing of this petition, and 2) that another remedy exists at law. Considering the first, the undersigned finds no inexcusable delay on the part of the Applicant. As a quasi-equitable remedy, mandamus may be barred by "gross laches." *Cowen v. Clayton Cty.*, 306 Ga. 698, 699 (2019) (reversing finding of gross laches for back pay claims that fell within the two-year statute of limitations period predating the petition); O.C.G.A. § 9-3-3 ("[C]ourts of equity may interpose an equitable bar whenever, from the lapse of time and laches of the complainant, it would be inequitable to allow a party to enforce his legal rights."). Laches, also referred to as prejudicial delay, "depends on a consideration of the particular circumstances, including such factors as the length of the delay in the claimant's assertion of rights, the sufficiency of the excuse for the delay, the loss of evidence on disputed

[1] Although raised as a motion for directed verdict, the Court treats this as a motion for involuntary dismissal pursuant to O.C.G.A. § 9-11-41(b). *See Meacham v. Franklin-Heard Cty. Water Auth.*, 302 Ga. App. 69, 74 (2009) ("[B]ecause there is no verdict in a bench trial, it is procedurally incorrect to move for a directed verdict in a non-jury case.") (citation omitted).

[2] In supplemental briefing, Applicant moves for admission of Applicant's Exhibits 1-5. (Applicant's Supplemental Brief, Doc. 25, 10/3/24). Via email, the Secretary objects on grounds of untimeliness. Finding these exhibits do not affect the conclusions of this Order, and in the interest of completing the record, the Court reopens the evidence for the sole purpose of admitting these exhibits. The Applicant is directed to provide marked copies to the court reporter.

matters, and the opportunity for the claimant to have acted sooner." *Collier v. State*, 307 Ga. 363, 374 n.18 (2019) (quoting *Hall v. Trubey*, 269 Ga. 197, 199 (1998)); *Savannah v. State*, 4 Ga. 26, 37 (1848) (gross laches appropriate "after considerable delay on the part of the party applying for [mandamus], and especially, if other interests have sprung up, which would be affected by the proceeding"); *see also* O.C.G.A. § 23-1-25 ("Equity gives no relief to one whose long delay renders the ascertainment of the truth difficult, even when no legal limitation bars the right."); *West v. Fulton Cty.*, 267 Ga. 456, 458 (1997) (applying O.C.G.A. § 23-1-25 to mandamus). More than the mere passage of time should be considered, and the analysis is essentially a balancing of equities taking all relevant facts into account. *Collier*, 307 Ga. at 374.

In the context of mandamus, few examples exist that apply these factors. *See*, *e.g.*, *Morris v. Hartsfield*, 186 Ga. 171, 173-74 (1938) (mandamus demanding reinstatement as city policeman barred by gross laches due to six-year delay in filing). None have explained the distinction of what constitutes a "gross" delay, as opposed to the ordinary standard. In the absence of direction, the undersigned simply takes this to mean that the factors justifying a finding of laches must be particularly egregious to bar an action for mandamus. *See also* Black's Law Dictionary 847 (11th ed. 2019) (defining "gross" in part as "[b]eyond all reasonable measure; flagrant").

Regardless, even under a non-heightened standard, the evidence established that laches should not apply here. The Chair of the Dekalb Republican Party credibly testified that while she possessed a general awareness of the Georgia voting system's encryption keys as early as June 2023, she did not make a connection to EAC certification standards and the Secretary's alleged ongoing legal duty to remain compliant with those standards until conducting further personal research shortly before the filing of this petition. Nor did the Applicant retain counsel or consult

any expert witnesses about the merits of this petition until recently, and the Court cannot impute these individuals' knowledge to the Applicant without some proven connection. While the Applicant may have acted sooner, this would be a question of weeks or months — not years.[3]

In addition, there is no allegation of lost evidence, only that the delay has prejudiced the Secretary as election project files for each county have already been created for the impending November 2024 election and any last-minute mandated changes would be impracticable — if not impossible. These grave concerns of prejudice should the petition be granted, especially as the next election day is 30 or so days away, are not unmerited. But also not controlling. The Secretary did not establish that this potential prejudice would be any different had the petition been filed earlier this year. Further, the relief sought would apply to every election cycle hereafter, and the Court could obviate any immediate harms by delaying the remedy. Because the proven length of delay on the part of the Applicant was minimal, and any resulting prejudicial delay remedial, laches does not bar this petition.

The undersigned also disagrees with the Secretary's additional defense that the Applicant possesses an adequate, alternative remedy at law under O.C.G.A. § 21-2-520 *et seq*. via a post-election challenge. *See* O.C.G.A. § 9-6-20 ("the writ of mandamus may issue to compel a due performance if there is no other specific legal remedy for the legal rights"); *Rabun Cty. v. Mt. Creek Estates, LLC*, 280 Ga. 855, 858 (2006) ("The law simply does not allow [the] stacking of remedies. [I]f another legal remedy is available, mandamus is not.") (citation omitted). An alternative legal

[3] Were the Court to find that Georgia law imposes an ongoing and periodic obligation on the Secretary, as asserted by the Applicant, this failure to act may well continually "reset" the laches clock. As subsequently noted, one need not travel down that analytical path given the statute's plain language.

remedy is only adequate if "equally convenient, complete and beneficial." *See Bibb Cty. v. Monroe Cty.*, 294 Ga. 730, 734 (2014) (mandamus not barred when it is "the only practicable mechanism" to obtain relief) (citation omitted). Applicant first points out that election contests may only be raised by "any person who was a candidate" or "any aggrieved elector." O.C.G.A. § 21-2-521. The Applicant being neither, this door would appear to forever remain shut, and the Secretary did not rebut this argument.

Even if the Applicant (or one of its members in an individual capacity) had standing to file an election challenge, such an option is not an equivalent remedy. In addition to the significant procedural difficulties inherent in the post-election process, there is no guarantee that a successful election challenge will cause the Secretary to change his handling of encryption keys. *See*, *e.g.*, *S. LNG, Inc. v. MacGinnitie*, 294 Ga. 657, 664 (2014) (finding no adequate alternative where proposed "convolut[ed]" remedy would not provide the applicant with binding relief). Moreover, the peace of mind that may come from a more secure election process is a separate relief than that achieved by an election challenge, which cleans up a mess already made. *See N. Fulton Medical Ctr. v. Roach*, 265 Ga. 125, 128 (1995) ("The appropriate inquiry is whether the legal remedy existed at the time mandamus relief was sought."). While a successful contest can result in a new election, the do-over will always be clouded by a proverbial asterisk. The consequences of the Applicant's security concerns are — at this point — purely hypothetical, but this alone does not defeat its claim. If the Secretary is neglecting a legal duty compellable by mandamus, the undersigned believes that the Applicant has every right to insist on its performance in advance of an election, regardless of whether the potential harm will ever be realized.

Having concluded that neither laches nor an alternative legal remedy is present here, the Court turns to the heart of the petition. Mandamus may only be issued if the applicant has a "clear legal right to such relief." *Hall Cty. Bd. of Tax Assessors v. Westrec Props.*, 303 Ga. 69, 77 (2018) (citation omitted). A clear legal right only arises where an official or agency is required — not simply authorized — by law to perform an act, "either expressly or by necessary implication." *Cowen v. Clayton Cty.*, 306 Ga. 698, 701 (2019) (citation omitted). Here, the Applicant contends that O.C.G.A. § 21-2-300(a) imposes an ongoing legal duty on the Secretary to maintain EAC certification of its voting equipment. The applicable provisions state:

> (1) The equipment used for casting and counting votes in county, state, and federal elections shall be the same in each county in this state and shall be provided to each county by the state, as determined by the Secretary of State.
>
> (2) *As soon as possible, once such equipment is certified by the Secretary of State as safe and practicable for use*, all federal, state, and county general primaries and general elections as well as special primaries and special elections in the State of Georgia shall be conducted with the use of scanning ballots marked by electronic ballot markers and tabulated by using ballot scanners for voting at the polls and for absentee ballots cast in person, unless otherwise authorized by law; provided, however, that such electronic ballot markers shall produce paper ballots which are marked with the elector's choices in a format readable by the elector.
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> (3) The state shall furnish a uniform system of electronic ballot markers and ballot scanners for use in each county as soon as possible. *Such equipment shall be certified by the United States Election Assistance Commission prior to purchase, lease, or acquisition.* At its own expense, the governing authority of a county may purchase, lease, or otherwise acquire additional electronic ballot markers and ballot scanners of the type furnished by the state, if the governing authority so desires. Additionally, at its own expense, the governing authority of a municipality may choose to acquire its own electronic ballot markers and ballot scanners by purchase, lease, or other procurement process.

O.C.G.A. § 21-2-300(a)(1)-(3) (emphasis added). In plain language, this statute imposes a temporal limitation that only requires EAC certification "prior to [the] purchase, lease, or acquisition" of election equipment. Similarly, the Secretary's "safe and practicable" certification is a one-time

occurrence. Nothing in this statute indicates the imposition of a continuing duty, and the undersigned finds no ambiguity on this point. The VVSG may require ongoing compliance, but this statute does not.

Deploying the tool bag of statutory interpretative canons does not lead to a different conclusion. For example, the Applicant does not point to any other statute modifying or clarifying these provisions that should be read *in pari materia*.[4] Nor is there an enacted statement of legislative purpose. Although the General Assembly recently amended this section in 2024, it left these specific provisions untouched. *See* 2024 Ga. Laws 697 (eff. Jan. 1, 2025).

The Applicant primarily relies on a policy-grounded conclusion that the absence of an ongoing duty renders this provision "an empty gesture." (Resp. to MTD, Doc. 16 at 8, 9/30/24). It is true that a court should "consider the results and consequences of any proposed construction and not to so construe a statute as will result in unreasonable or absurd consequences not contemplated by the legislature." *Lamad Ministries, Inc. v. Dougherty Cty. Bd. of Tax Assessors*, 268 Ga. App. 798, 802 (2004) (citation omitted). But this interpretative principle cannot be used to change the text and substitute judicial preferences for that of the legislature, and nothing tells us that the legislature intended to include a specific "ongoing" requirement. The alleged absurdity here is not one that no reasonable person could intend. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 37, at 237 ("Absurdity Doctrine") (2012) ("Something that may seem odd is not absurd.") (cleaned up). Nor is it one that could meet the Applicant's standards by "changing or supplying a particular word or phrase whose inclusion or omission was obviously a

[4] The submitted and accepted amicus curiae briefs, while welcomed by the Court, do not provide alternative arguments on this core point.

technical or ministerial error." *Id.* at 238. In essence, this is not a statute that does not make sense. It is simply one that draws the line of election equipment security at a point where the Applicant vehemently disagrees.

Having concluded that this statute — the sole statutory basis underlying the petition — does not impose on ongoing duty on the Secretary, the Applicant's position unravels. The election equipment was certified by the EAC in 2019 and remains certified to this day. The Applicant did not present any evidence concerning the storage of encryption keys at the time that the Secretary certified the equipment as "safe and practicable for use." Although Applicant may firmly believe that the Secretary's current processes are "nonsensical" and "appalling," and good-faith concerns over how to better secure our elections should be taken seriously, this matter is currently one that must be deferred to the policymaking branches.

In the face of contentions that a public officer has committed a gross abuse of discretion and neglected his legal duty, the Court is especially mindful of its own. There is no clear legal right to the Applicant's demanded relief. The petition must be dismissed.

SO ORDERED, this 4th day of October, 2024.

Judge Scott McAfee
Superior Court of Fulton County
Atlanta Judicial Circuit

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