

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FULTON COUNTY REPUBLICAN
PARTY ,

Plaintiff,

v.

FULTON COUNTY BOARD OF
COMMISSIONERS, ROBB PITTS,
BRIDGET THORNE, BOB ELLIS,
DANA BARRETT, NATALIE HALL,
MARVIN S. ARRINGTON, JR., and
KHADIJAH ABDUR-RAHMAN, in
their official and individual capacities

Defendants.

Case No. 2023CV382174

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING ORDER AND INTERLOCUTORY
INJUNCTION**

FACTS

1. Plaintiff incorporates by reference all of the allegations in its Complaint for Declaratory Judgment and Application for Writ of Mandamus and Injunctive Relief filed on June 30, 2023, and any amendments thereto.

2. Following filing of the case, Plaintiff immediately sought an injunction to preclude the Defendants from taking action to appoint a substitute member to the Board of Registration and Elections (the "Board of Elections") in the position which the Defendants had refused to appoint Plaintiff's nominee Jason Frazier.

3. Following that hearing this Court concluded that “[e]ven though Plaintiff asserts that the *possibility* exists that the Defendants may fill one of the positions on the Board of Elections, thereby depriving it of the opportunity to nominate a person of its choosing, as the case presently stands, the asserted harm cannot occur because there is no current vacancy on the Board of Elections. Mark Wingate, a Republican, continues to serve, until his successor is appointed, pursuant to the applicable local act. Thus, the status quo is maintained and there is no foreseeable harm.” See Order filed July 7, 2023 (emphasis supplied).

4. The Court continued that “[a]ccordingly, there is not a *substantial threat* that Plaintiff will suffer *irreparable injury* if the interlocutory injunction is not granted because there is no vacancy and Mr. Wingate shall continue to serve ‘until a successor is appointed and qualified.’” See Order filed July 7, 2023 (emphasis supplied).

5. Mere days after that order was issued, Mark Wingate emailed the new chairman of the Board of Elections, Patrise Perkins-Hooker that “My neurosurgeon has scheduled my next lower spine surgery for August 9. This will cause a recovery period of several weeks if not months. I will not be able to continue on the BRE going forward for this reason therefore this notice serves as my notification of discontinuing my placeholder services on the BRE.” See email of July 14, 2023 attached hereto as Exhibit “A”.

6. In response, Ms. Hooker-Perkins responded: “I understand that your health issues will not allow you to complete the term until a successor is appointed

and qualified. Your resignation should be sent to all of the members of the Board of Commissioners and the Clerk because they are the appointing authority. I have copied the others that you did not include on your previous email for that purpose.” Pursuant to Fulton County Code Section 14-37, the Board of Commissioners will have the power to appoint a successor for you as an interim appointment. See email of July 14, 2023 attached hereto as Exhibit “B”

7. The next scheduled meeting of the Board of Commissioners will be August 2, 2023.¹ In addition, the Board of Commissioners could schedule a meeting even before August 2, or hold an emergency meeting on one days’ notice. See O.C.G.A. § 50-14-1(d) (“due notice” defined as at least 24 hours’ notice).

8. As the result of this development, what was referenced by the Court as a “possibility” in its Order is now a planned event, what the Court referenced as not a likely “substantial threat” of “irreparable injury” is now palpable, and the Board of Commissioners could meet and appoint its own replacement at any time without affording this Court an opportunity to consider and protect the constitutional and statutory rights of the Plaintiff.² An emergency injunction is necessary in order to preserve the status quo from being irredeemably changed.

Injunctive Relief under O.C.G.A. § 9-11-65

1. Plaintiff seeks to maintain the status quo by restraining the Board of Commissioners from filling the vacancy on the Board of Elections

¹ <https://fulton.legistar.com/Calendar.aspx> Attached hereto as Exhibit “C”.

² Local Ordinance 14-37 is an exception from the normal term of office, and provides that “In the event a vacancy occurs in the office of any member before the expiration of his term by removal, death, resignation or otherwise, the appointing authority shall appoint a successor to serve the remainder of the unexpired term.”

reserved by law for nominations by the Plaintiff pending this Court's consideration of the request for relief outlined in Plaintiff's Complaint.

2. "The purpose of a temporary restraining order or interlocutory injunction is to preserve the status quo while a case is pending." *Slone v. Myers*, 288 Ga. App. 8, 14, 653 S.E.2d 323 (2007), *overruled on different grounds*, *Reeves v. Upson Med Ctr.*, 315 Ga. App. 582, 726 S.E.2d 544 (2012). When deciding whether to issue a temporary restraining order and/or interlocutory injunction, the trial court should consider whether: (1) there is a substantial threat that the moving party will suffer irreparable injury if the injunction is not granted; (2) the threatened injury to the moving party outweighs the threatened harm that the injunction may do to the party being enjoined; (3) there is a substantial likelihood that the moving party will prevail on the merits of her claims at trial; and (4) granting the [relief] will not disserve the public interest. *Bishop v. Patton*, 288 Ga. 600, 604, 706 S.E.2d 634 (2011) ("The first factor ... is the most important one, given that the main purpose of an interlocutory injunction is to preserve the status quo temporarily to allow the parties and the court time to try the case in an orderly manner"), *disapproved upon other grounds*, *SRB Inv. Servs. LLLP v. BB&T*, 289 Ga. 1,5 n.7, 709 S.E.2d 267 (2011) ("To the extent that our opinion in *Bishop* ... may be read as requiring the moving party to prove all four ... factors to obtain an interlocutory injunction, it is hereby disapproved").

3. All four of these factors are met, and Plaintiff is entitled to a temporary restraining order and interlocutory injunction.

A. There is a Substantial Threat that Plaintiff Will Suffer Irreparable Injury if Defendants are Not Restrained and Enjoined.

Absent temporary restraint, the vacancy on the Board of Elections is subject to being filled by a Board of Commissioners appointment, which could occur as early as the next meeting on August 2, 2023, and Plaintiff will be denied the appointment of its nominee Jason Frazier, which will be filled by another person not of Plaintiff's choosing. The right to nominate the individual who the Board of Commissioners "shall" appoint as the Plaintiff's representative on the board of election is a statutory right, reflecting both the associational rights of a political party and the plenary authority of the State Legislature in enacting laws relating to the "Times, Places, and Manners" of conducting elections. U.S. CONST., Art. 1, Sec. 4. In such cases, "[w]hen constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). See also *Am. Civil Liberties Union of Kentucky v. McCreary Cnty., Ky.*, 354 F.3d 438, 445 (6th Cir. 2003) *aff'd sub nom., McCreary Cnty., Ky., v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005) (where a plaintiff's constitutional rights are at issue, the movant need only show that his rights are "threatened," from which showing "a finding of irreparable injury is mandated.").

B. The Balance of the Equities Favor Plaintiff.

Issuing a temporary restraining order while the present request is considered does not irreparably harm the Board of Commissioners. A missing member reduces the size of the Board of Elections but does not cause a quorum failure or prevent said Board of Elections from functioning. However, if Defendants exercise their authority under Georgia law as codified in Section 14-37 of the Fulton County Code³ to appoint another individual, Plaintiff's right to have its selected nominee approved for the open board seat is lost for this election cycle and there is no clear path to unwind such an appointment.

C. There is a Substantial Probability that Plaintiff Will Prevail on the Merits.

The likelihood of the plaintiff's ultimate success is not the determinative factor for the purposes of the instant motion. *See Garden Hills Civic Assoc., Inc. v. MARTA*, 273 Ga. 280, 281, 539 S.E.2d 811 (2000) ("[T]he possibility that a party obtaining a preliminary injunction may not win on the merits does not determine the propriety or validity of a trial court's [decision to grant] a preliminary injunction") (citation and punctuation omitted). However, Plaintiff is very likely to prevail on the merits of his claims. As evidenced by this Petition, supporting affidavit and exhibits attached hereto, Plaintiff has a clear legal right under Section 14-33 of the Fulton County Code to have its nominee appointed to the Board of Elections and Defendants have no legitimate objection.

³ The Fulton County Code is a duplicate of the act of the State Legislature. As noted in the original complaint, the Georgia Legislature enacted the mandatory procedures governing appointment of the Fulton County Board of Elections and Registration. See Act of Feb. 10, 1989, No. 250, 1989 Ga. Laws 4,577, codified as amended at Fulton Cnty. Code §§ 14-31 to -44; Act of Feb. 10, 2013, No. 322, 2013 Ga. Laws 4,503. [Complaint, para. 49.] References to these sections of the Fulton County Code incorporate the act of the state legislature adopting those sections.

The code is phrased as a command, not a mere directive, and it should be interpreted so.⁴ The code section provides that the Board of Commissioners “shall” appoint the Republican Party nominee. It does not prescribe nor permit an alternate method of appointment. It is not merely a direction as to time, or a procedural requirement, without effect to the rights of the parties, as in *Collins v. Nix*.⁵ Failure to comply with the dictate of the statute would wreak substantial injury on the Plaintiff, who would be deprived on its vested statutory right to have its nominee appointed. See Section 14-33 of the Fulton County Code. An interpretation that permits the Board of Commissioners to deny the Plaintiff’s nominee turns the statute on its head, effectively making the Board of Commissioners the *de facto* party with the right to nominate, and would render meaningless the statutory text granting that choice to the Republican Party.

Forcing the Plaintiff to go back and “pick another nominee” does not eliminate the harm. Plaintiff would be deprived of a significant associational right to the nominee of its choice. A political party’s associational rights have been repeatedly recognized by the United States Constitution as protected by the 1st

⁴ “[I]n its ordinary signification, “shall” is a word of command, and the context ought to be very strongly persuasive before that word is softened into a mere permission.” *Garrison v. Perkins*, 137 Ga. 744, 74 S.E. 541, 547 (1912). See also *State v. Henderson*, 263 Ga. 508, 510, 436 S.E.2d 209 (1993) (“must” and “shall” are synonymous) and *In the Interest of R.D.F.*, 266 Ga. 294, 295, 466 S.E.2d 572 (1996) (construing OCGA § 15-11-26, which included the word “shall,” to be mandatory) and *Van Schallern v. Stanco*, 132 Ga. App. 794, 795, 209 S.E.2d 243 (1974) (Code Ann. § 61-302 containing word “shall” described as “mandatory statutory provision”).

⁵ ‘Generally, statutes, directing the mode of proceeding by public officers, designated to promote method, system uniformity, and dispatch in such proceeding, will be regarded as directory if a disregard thereof will not injure the rights of parties, and the statute does not declare what result shall follow noncompliance therewith, nor contain negative words importing a prohibition of any other mode of proceeding than that prescribed.’ *Collins v. Nix*, 125 Ga. App. 520, 524, 188 S.E.2d 235, 237 (1972)

Amendment. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000); *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 224, 109 S. Ct. 1013, 1020, 103 L. Ed. 2d 271 (1989); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986)

D. The Requested Relief Would Not Disserve the Public Interest.

The public interest is served by upholding the intention of the Georgia Legislature with respect to the “Times, Places, and Manner” of elections involving national elections. The public interest is also served by upholding the intent of the Framers in depositing the power over national elections in the State Legislatures. See A. Hamilton, THE FEDERALIST NO. 59 (“[I]t will therefore not be denied, that a discretionary power over elections ought to exist *somewhere*. It will, I presume, be as readily conceded, that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former. The last mode has, with reason, been preferred by the [Constitutional] convention.” (Emphasis supplied.) Accord, *McPherson v. Blacker*, 146 U. S. 1, 27 (1892) (Elections Clause “leaves it to the legislature exclusively to define the method of effecting the object.”), cited with approval in *Moore v. Harper*, Sup. Ct. No. 21–1271, slip op. 17-18 (June 27, 2023) (affirming the plenary power of the State Legislature over national elections where no conflict with the state constitution exists). Accord, *Smiley v. Holm*, 285 U. S. 355 (1932), *Bush v. Gore*, 531 U. S. 98 (2000) (state court cannot “impermissibly distort” the

legislature's enactments "beyond what a fair reading required" (Rehnquist, C. J., concurring)).

The public interest will be served by assuring that the intention of Georgia Legislature is implemented, and restoring faith in the equal application of the laws enacted by the Georgia Legislature. In this case, the Defendants have advanced no rational justification for a refusal to appoint the Plaintiff's nominee, much less a compelling basis for a denial of a constitutional right of association. Rather, it is their obvious intention to circumvent state law by manufacturing non-existent conditions to justify an arbitrary decision. The public interest is not served by allowing a public board to act in an irrational and arbitrary fashion.

III. Conclusion.

For these reasons, and pursuant to O.C.G.A. § 9-11-65 and all other applicable law, Plaintiff seeks immediate entry of the temporary restraining order attached as Exhibit 1 to Plaintiff's *Motion for a Temporary Restraining Order and Interlocutory Injunction*, and, after an opportunity for a hearing, an interlocutory injunction in a form substantially similar.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in favor of Plaintiff and against Defendants and provide the following relief:

- A. A Rule Nisi issue commanding Defendants to appear and show cause why the relief demanded herein should not be granted.
- B. A preliminary injunction prohibiting the Defendants from appointing someone other than Jason Frazier to the Fulton County Board of Elections and Registration in place of retiring member Mark Wingate.
- C. Plaintiff's reasonable costs and expenses of this action, including attorneys' fees; and
- D. All other, further relief that Plaintiff may be entitled to.

Respectfully submitted on July 26, 2023.

/s/ David E Oles
DAVID E OLES, SR.
Attorney for Plaintiff
Georgia State Bar No.: 551544

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EXHIBIT A

770-415-1026 (Main)
770-769-1578 (Direct)
404-254-2387 (Fax)

From: Mark Wingate <wingate01md@gmail.com>

Sent: Friday, July 14, 2023 10:43 AM

To: Patrise Perkins-Hooker <pperkins-hooker@jflc.com>

Cc: Bob Ellis <bob.ellis@fultoncountyga.gov>; Thorne, Bridget <Bridget.Thorne@fultoncountyga.gov>;
sendres@fultongop.org <sendres@fultongop.org>

Subject: BRE seat

Patrise:

My neurosurgeon has scheduled my next lower spine surgery for August 9. This will cause a recovery period of several weeks if not months.

I will not be able to continue on the BRE going forward for this reason therefore this notice serves as my notification of discontinuing my placeholder services on the BRE.

I wish you and the Board as well as the department much success.

--

Mark Wingate

EXHIBIT B

David Oles, Sr

From: sendres@fultongop.org
Sent: Friday, July 14, 2023 5:39 PM
To: David Oles, Sr
Cc: sendres@fultongop.org
Subject: FW: Re: BRE seat of Mark Wingate
Attachments: Outlook-Firm Logo .png

And here is Patrise's response.

-----Original Message-----

From: "Patrie Perkins-Hooker" <pperkins-hooker@jflc.com>
Sent: Friday, July 14, 2023 5:20pm
To: "Mark Wingate" <wingate01md@gmail.com>
Cc: "Bob Ellis" <bob.ellis@fultoncountyga.gov>, "Thorne, Bridget" <Bridget.Thorne@fultoncountyga.gov>, "sendres@fultongop.org" <sendres@fultongop.org>, "Arrington, Marvin S" <Marvin.arrington@fultoncountyga.gov>, "Pitts, Robb" <robb.pitts@fultoncountyga.gov>, "Hall, Natalie" <natalie.hall@fultoncountyga.gov>, "Abdur-Rahman, Khadijah" <khadijah.abdur-rahman@fultoncountyga.gov>, "dana.barrett@fultoncountyga.gov" <dana.barrett@fultoncountyga.gov>, "Grier, Tonya" <Tonya.Grier@fultoncountyga.gov>
Subject: Re: BRE seat of Mark Wingate

Mr. Wingate,

I am very sorry that you have to undergo yet another surgery on your lower back. I know that these issues with your back have been inconveniencing you for a while and I had hoped that you would not have to have any more surgeries. I hope that this one is successful and ends the needs for any further surgery.

Thank you for confirming previously that your tenure with the BRE would continue as required under the County Code Section 14-36 until "a successor is appointed and qualified". You were not a placeholder but a valuable member of the board trying to hold out until a new Republican representative was appointed. I understand that your health issues will not allow you to complete the term until a successor is appointed and qualified. Your resignation should be sent to all of the members of the Board of Commissioners and the Clerk because they are the appointing authority. I have copied the others that you did not include on your previous email for that purpose.

Pursuant to Fulton County Code Section 14-37, the Board of Commissioners will have the power to appoint a successor for you as an interim appointment.

Thank you for your service to the BRE. I wish you the best of luck.

Patrie Perkins-Hooker

Administrative Partner
pperkins-hooker@jflc.com



3915 Cascade Rd.
Suite 205
Atlanta, Georgia 30331-8522

EXHIBIT C

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Name	Meeting Date		Meeting Time	Meeting Location	Meeting Details	Agenda Packet	Agenda	Minutes	Post Agenda	Video	eComment
Board of Commissioners	8/16/2023		10:00 AM	Assembly Hall	Meeting details	Not available	Not available	Not available	Not available		Not available
Board of Commissioners	8/2/2023		6:00 PM	Assembly Hall	Meeting details	Not available	Not available	Not available	Not available		Not available
Board of Commissioners	8/2/2023		10:00 AM	Assembly Hall	Meeting details	Not available	Not available	Not available	Not available		Not available

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FULTON COUNTY REPUBLICAN
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MARVIN S. ARRINGTON, JR., and
KHADIJAH ABDUR-RAHMAN,

Defendants.

Case No. 2023CV382174

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed and served
MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING ORDER AND INTERLOCUTORY INJUNCTION using
the Odyssey e-File GA system, which automatically sends email notification of such
filing to all attorneys of record, and which constitutes effective service upon all attorneys
of record, including:

Kaye Woodard Burwell
Kaye.burwell@fultoncountyga.gov
Office of the Fulton County Attorney
141 Pryor Street, S.W.
Suite 4038
Atlanta, Georgia 30303

THIS 26th day of July, 2023

OLES LAW GROUP

By: /s/ David E Oles
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Georgia Bar No. 551544
Counsel for Defendant

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