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

DONNA CURLING, ET AL., :
 :
 :
 PLAINTIFFS, :
 :
 vs. : DOCKET NUMBER
 : 1:17-CV-2989-AT
 BRAD RAFFENSPERGER, ET AL., :
 :
 :
 DEFENDANTS. :

TRANSCRIPT OF TELEPHONE CONFERENCE PROCEEDINGS
BEFORE THE HONORABLE AMY TOTENBERG
UNITED STATES DISTRICT JUDGE

JUNE 12, 2020
3:37 P.M.

MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED
TRANSCRIPT PRODUCED BY:

OFFICIAL COURT REPORTER: SHANNON R. WELCH, RMR, CRR
2394 UNITED STATES COURTHOUSE
75 TED TURNER DRIVE, SOUTHWEST
ATLANTA, GEORGIA 30303
(404) 215-1383

A P P E A R A N C E S O F C O U N S E L

**FOR THE PLAINTIFFS DONNA CURLING, DONNA PRICE, JEFFREY
SCHOENBERG:**

DAVID D. CROSS
MARY G. KAISER
REEMA S. ALI
MORRISON & FOERSTER, LLP

HALSEY G. KNAPP, JR.
ADAM M. SPARKS
KREVOLIN & HORST, LLC

**FOR THE PLAINTIFFS COALITION FOR GOOD GOVERNANCE, LAURA DIGGES,
WILLIAM DIGGES, III, AND RICARDO DAVIS:**

BRUCE BROWN
BRUCE P. BROWN LAW

ROBERT ALEXANDER MCGUIRE, III
ROBERT MCGUIRE LAW FIRM

JOHN MICHAEL POWERS
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

FOR THE STATE OF GEORGIA DEFENDANTS:

VINCENT ROBERT RUSSO, JR.
CAREY A. MILLER
JOSH BELINFANTE
ROBBINS ROSS ALLOY BELINFANTE LITTLEFIELD, LLC

BRYAN P. TYSON
BRYAN JACOUTOT
LOREE ANNE PARADISE
TAYLOR ENGLISH DUMA

(...cont'd....)

1 (...cont'd....)

2

FOR THE FULTON COUNTY DEFENDANTS:

3

KAYE BURWELL
DAVID LOWMAN
OFFICE OF THE FULTON COUNTY ATTORNEY

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P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; June 12, 2020.)

THE COURT: Good afternoon. This is Judge Totenberg. Sorry to keep you-all waiting. Running between the court and the house was not what I had in mind quite as much.

All right. Ms. Welch, are we ready?

COURT REPORTER: Yes, ma'am. I think all parties are represented. I think we have about 18 or 19 people on the call.

THE COURT: All right. Can we just go through the names of counsel here for each -- for the parties?

MR. BROWN: Your Honor, this is Bruce Brown for the Coalition plaintiffs.

MR. McGUIRE: And Robert McGuire for Coalition as well.

MR. CROSS: Your Honor, this is David Cross for Curling plaintiffs.

MS. KAISER: Mary Kaiser is on for Curling plaintiffs as well.

MR. SPARKS: Adam Sparks for the Curling plaintiffs.

MR. POWERS: John Powers for the Coalition plaintiffs.

COURT REPORTER: Mr. Knapp, are you still on?

Judge, Mr. Knapp was on the call. He may have dropped off. But Mr. Sparks is on as well.

1 THE COURT: Okay.

2 COURT REPORTER: So he will probably call back in.

3 THE COURT: What about the State?

4 MR. TYSON: Your Honor, Bryan Tyson for State
5 defendants.

6 MR. RUSSO: Your Honor, Vincent Russo for the State
7 defendants.

8 MR. BELINFANTE: Good afternoon, Your Honor. This is
9 Josh Belinfante for the State defendants.

10 MS. BURWELL: Kaye Burwell and David Lowman for
11 Fulton County.

12 MR. MILLER: Your Honor, this is Carey Miller also
13 here for the State defendants.

14 MS. PARADISE: Your Honor, Loree Paradise here for
15 the State defendants.

16 MR. JACOUTOT: Bryan Jacoutot here for the State
17 defendants.

18 THE COURT: All right. I obviously would have
19 preferred if we didn't have to have this phone conference and
20 it didn't have to get to this point. Let me just ask really a
21 few basic questions.

22 First of all, to the plaintiff, why is it -- if there
23 are something like two-thirds of the DREs that you basically
24 know from just an overall number perspective you are not going
25 to use or need, why are you not just releasing those?

1 MR. CROSS: Your Honor, this is David Cross. We did.
2 I mean, to be honest, I guess we have been confused since
3 February 10 when we sent a letter identifying by machine ID the
4 machines that we thought needed to be preserved on a sample
5 basis. And it is actually a lot more than two-thirds because
6 the machine IDs get reused.

7 So even though I think it is roughly maybe 10,000 or
8 so machine IDs that are on our request, we think it is a small
9 fraction of that that actually corresponds to individual units.

10 But in any event, candidly, Your Honor, I think that
11 is a question for defendants. I don't understand why those
12 haven't been released.

13 One thing we have also learned is there are a variety
14 of ways for the State to match the machine IDs to individual
15 units, to serial numbers, whether it is the recap sheets that I
16 think Mr. Barnes points out in his declaration. I think
17 Mr. Barnes' declaration also suggests that you could do this
18 with the memory cards.

19 We have talked to Dr. Halderman and looked into this.
20 It looks like he could do it electronically fairly easily using
21 the memory cards. Because if the memory cards are plugged in
22 to the DRE machine, the serial number for that machine, as I
23 understand it, is imprinted on the card. So they have been
24 preserving or supposed to preserve the memory cards as well.
25 That would be another easy way to do this.

1 So the short answer is, Your Honor, I don't know why
2 the machines haven't been released.

3 THE COURT: So is the estimate of \$36,000 roughly a
4 month including every single machine? The question is to the
5 State. Or is it for a smaller segment of the case -- of the
6 machines?

7 MR. TYSON: Your Honor, this is Bryan Tyson. The
8 \$36,000 a month is the charge from the vendor to store the
9 entirety of the universe of machines. And I think it is an
10 important point to recognize that the list of machine IDs tells
11 us nothing about which machines we could release and which ones
12 we cannot release.

13 It is almost like if you had license plates or cards
14 and in each election you change the license plate for each
15 vehicle. A list of license plates numbers is not going to tell
16 you what the vehicle identification numbers are for particular
17 vehicles you are trying to locate.

18 And so while we have a list of 10,000 machine IDs,
19 there's additional steps that would have to be taken, as this
20 is the first I have heard of a memory card method. But even
21 using that would require inserting one memory card at a time
22 for each election to determine what serial numbers were used.

23 So we are at a point where we have no idea what
24 serial number units the plaintiffs wish to be preserved. So we
25 can't release 20,000 of the machines.

1 THE COURT: Is that how many you think you have is
2 20,000?

3 MR. TYSON: No, Your Honor. We have --

4 THE COURT: Or do you have 30?

5 MR. TYSON: No. We have roughly 30,000 DREs and
6 several thousand optical scanners as well. I think it is close
7 to 40,000 pieces of equipment in total, if I'm correct about
8 that.

9 THE COURT: You-all never talked about using a card
10 to determine before today?

11 MR. TYSON: No, Your Honor. But even if we did, the
12 card method would still require us to put one card at a time.

13 And, remember, these cards are with the counties.
14 These cards are not maintained by the State. So we still would
15 have to go county by county to locate this information, even
16 assuming a card method would work.

17 THE COURT: Okay. Did you give the numbers to the
18 plaintiff -- let's just clarify for me what exactly you have
19 given the plaintiffs in terms of information.

20 And what -- I understand the whole business that
21 every year that the number may have a different machine ID from
22 election to election because it is assigned based on when
23 information from the GEMS database on a particular memory card
24 is inserted.

25 MR. TYSON: Right.

1 THE COURT: But -- so what information did you give
2 to the -- precisely to the plaintiffs so that they could
3 attempt to do a meaningful statistical sample?

4 MR. TYSON: Yes, Your Honor. So this is Bryan Tyson
5 again. The first thing the plaintiffs received several years
6 ago in discovery -- it may have been last year. I don't want
7 to -- I'm not exactly certain when. But I know it was at least
8 a year ago the plaintiffs received a full list of all serial
9 numbers for the DREs and optical scan units that the State has.

10 In roughly December, the plaintiff said that was
11 not --

12 THE COURT: All right. Let's just stop there so I
13 can make -- so that I understand.

14 MR. TYSON: Certainly.

15 THE COURT: You would think I would understand by
16 now. But I want -- so you gave them a list of all machines and
17 you identified it by what?

18 MR. TYSON: By the serial number and by the county
19 where that machine would be used.

20 THE COURT: Okay.

21 MR. TYSON: And so in December after we first
22 discussed this topic in December of 2019, the plaintiffs
23 indicated that they were going to also have to have the usage
24 information. So for which election was each DRE used by serial
25 number.

1 And in order to determine that information, at our
2 January call that we had after some discussion, we reached the
3 conclusion that the plaintiff believed that -- the Coalition
4 plaintiffs were confident, the Curling plaintiffs were a little
5 less confident -- that the serial number information may be
6 stored in the GEMS databases.

7 So at the end of January, we provided an almost -- I
8 believe it was in the 750 to 800 GEMS database range of
9 databases for six elections that the plaintiff had identified.

10 The plaintiff then notified -- there were several
11 that we were not able to locate due to the county sending a
12 different post-election database than they should have. But
13 93 percent of the databases that the plaintiffs requested we
14 turned over to them.

15 They then proceeded to create -- basically to notify
16 us that the serial number -- they could not identify that in
17 the GEMS database, if I'm recalling the sequence correctly, and
18 instead sent us a sample based only on machine ID. That was in
19 the middle of February roughly.

20 And a list based on machine ID does nothing to help
21 us identify which DREs were -- which serial numbers we needed
22 to try to locate and maintain. And, frankly, at that point, we
23 had the preliminary injunction hearing with Your Honor at the
24 beginning of March. And then COVID took over most things and
25 especially for the Elections Office for the Secretary of

1 State's office. And this became a lower priority until the
2 Governor's instructions on May 1st that all agencies were to
3 propose 14 percent cuts, which was roughly \$800,000 for the
4 Elections Division of the Secretary of State's office. And the
5 Secretary's office immediately began asking again what the
6 status of this was, considering it was a
7 400-or-so-thousand-dollar-a-year expense to the State.

8 And our primary concern is that since we have -- we
9 have been working on this now on and off for six months. And
10 we still only have a list that would require an extensive
11 manual process of either going memory card by memory card. If
12 this is a method -- first I have heard of it. If this is a
13 method that works, it would still require one memory card at a
14 time.

15 Otherwise, it is a hand search through paper -- DRE
16 recap sheets and other methods to go try to reconcile machine
17 IDs to serial numbers and then remove duplicates from the list
18 and then try to locate those serial numbers in the machines
19 that are currently only stored in county order, not in any sort
20 of serial number order as we have explained.

21 THE COURT: Okay. So let me ask the plaintiff. I
22 know you say you only needed portions of these and it is a
23 small portion of these. So -- but you don't know precisely
24 what because of the challenges that are identified by all of
25 you.

1 But why not just take a -- kind of a somewhat more
2 generous group than you would have normally -- why is that --
3 from different counties? It is imperfect. But it at least
4 could -- it would release a large number even of the DREs
5 for -- because I'm assuming you are not really offering to take
6 responsibility for all of the DREs.

7 I have seen you saying that you are willing to pay
8 the cost for -- I don't know -- some. But I don't -- I'm not
9 sure -- it seems like a very difficult place to go right now to
10 have everyone chasing after -- looking for the right serial
11 number. And, you know, right now -- I mean, you thought -- and
12 I don't say anything negative about it.

13 But obviously your folks thought that they were going
14 to be able to tell this from the GEMS database, and they
15 couldn't. And maybe they will be based on the card. But you
16 don't know really whether it got wiped or what has happened
17 with it.

18 So -- and maybe you'll be able to get that and be
19 able to determine that. But my recollection of the origin of
20 this all, which sort of kind of goes back to both sides, is
21 that one of the principal reasons you thought it was necessary
22 was because the defendants might appeal on the merits and you
23 wanted to be able not to be deprived of your evidence, which I
24 understood, and no one would agree to having the -- on the
25 defendants' side to having the last preliminary injunction

1 ruling be a decision on the merits.

2 But at the same time, you know, there is a reality of
3 the budget and of utility of this and the fact that we are
4 dealing with a lot of counties. So I mean -- it looks like the
5 perfect -- it could be the enemy of getting this done.

6 MR. CROSS: Your Honor, this is David Cross. I guess
7 a few thoughts to answer your question a bit. The original
8 thinking with the sampling was to get to as small a number as
9 we could based on the information we had.

10 THE COURT: Yeah.

11 MR. CROSS: With all due respect to Mr. Tyson, it is
12 not really accurate to say the machine IDs do nothing to help
13 move this forward. Again, Mr. Barnes' own declaration talks
14 about ways to match up, as I recall his declaration, using
15 recap sheets or other things to match up the machine IDs to
16 serial numbers.

17 We think there is a way to do that with the memory
18 cards. We think the memory cards -- our understanding is they
19 match also with the vendor, not be distributed across the
20 counties --

21 THE COURT: Go slower. Because I'm not catching it.
22 And if I'm not, then Ms. Welch isn't.

23 Go ahead.

24 MR. CROSS: So with respect to doing it by the memory
25 cards, we have not had that discussion because the defendants

1 decided that they would only communicate with us through a
2 briefing with the Court, which is what Mr. Tyson --

3 THE COURT: All right. All right. We're not going
4 to spend time on all of that. Here we are.

5 MR. CROSS: I understand. Yeah, I understand. But
6 the question was raised on why we haven't talked about it.
7 That is why.

8 THE COURT: Okay.

9 MR. CROSS: As to whether -- as to whether it can be
10 done, Dr. Halderman thinks it can be done. There are a couple
11 of ways to do that. They could give us the -- give us access
12 to the memory cards and let us do the work. He has written a
13 script that he thinks will pull the serial numbers
14 automatically.

15 So this is the type of discussion we would love to
16 have with them to try to work that out. We think there may be
17 a way to do it.

18 Another possibility would be: If the machines are
19 all sitting in a single vendor in a single location, then it
20 could be that we could just take a random sampling from that --
21 that room.

22 The challenge for us is we do want to make sure we're
23 getting a representative sample from each of the relevant
24 elections, like the midterm elections in 2018. And so if you
25 just take a random sampling from any given county, for example,

1 you could end up with machines that were used, say, in 2019 but
2 not 2018. Or you might miss entire precincts that might be
3 significant.

4 And so if they are all now grouped together in one
5 place, depending on how they are organized in the room, it may
6 be there is a simpler way to do this. We just don't really
7 have the information to figure that out.

8 The last point I'll make on the cost piece is, you
9 know, one of the key reasons we wanted more time -- part of
10 that was to try to figure out other ideas to make this work.
11 But it is also to try to understand the cost. Because that is
12 the principal, if not the only, basis on which the State seems
13 to be seeking the relief.

14 And we don't have any information on where that
15 number is coming from. We have sent out an Open Records
16 request beginning over a week ago. We are told it would take
17 time to get responses. But one county, Cobb, has responded.
18 And according to Cobb County from the election director there,
19 with respect to preserving DREs, what they conveyed to us
20 today -- and I quote -- there is no cost associated with
21 storage. And so I imagine --

22 THE COURT: Well, is it all being stored though at
23 one facility though? That is what --

24 MR. CROSS: That is what we don't know. What the
25 Cobb County director conveyed to us was she identified a

1 location where DREs were being stored. It looks like it is
2 maybe a county fire department from what we can tell. She said
3 there is no cost associated with that.

4 So the challenge we have is the defendants will
5 communicate with us only through you. And so we can't really
6 get the information we need to figure out where are the
7 machines. That influences what type of methodology we might be
8 able to use. If they are all in one location together, that is
9 one thing. If they are spread out across counties, that is
10 another.

11 We don't really understand what the cost actually is.
12 So we can't respond to whether we can cover that cost. We
13 can't evaluate whether we could reduce that cost. We just
14 don't know. And so we would really like to work this out.
15 With some additional time to respond to the motion and maybe a
16 bit more information at least from the folks who are willing to
17 give it to us from the counties or the State would put us in a
18 better position to maybe resolve this.

19 MR. TYSON: Your Honor, this is Bryan Tyson. I think
20 I can answer some of Mr. Cross' questions with the discussion
21 we had in January on this point. There are three counties that
22 are storing DREs under separate preservation orders from the
23 Court. And as we discussed in January, Cobb, Dekalb, and
24 Fulton all have DREs that the county is still maintaining, the
25 State has not picked up, because they are subject to the

1 preservation orders this Court entered shortly after this case
2 arrived in your courtroom several years ago.

3 Those are separate and distinct from the DREs that
4 were picked up from the vendor as the BMDs were deployed to
5 each county. And as we talked about in January, they were
6 loaded into essentially units per county and brought to a
7 central storage place that the vendor maintains.

8 This is a vendor, as we explained in January, that
9 takes care of electronic disposal for the State. And they bill
10 the State a flat \$36,000 a month for the warehouse space to
11 store the DREs that they collected as part of the preservation
12 process. And as soon as the DREs are released from the Court's
13 preservation orders, those DREs can then be disposed of using
14 the existing electronic disposal process the State uses.

15 I understand Ms. Kaiser sent an Open Records request
16 to Cobb County today. But the reality is that is not the DREs
17 we're talking about.

18 That we think is actually an excellent subset of a
19 sample. If we could dispose of the ones that are being stored
20 centrally by the State and just proceed with the sample of the
21 units that was already being maintained by Cobb, Fulton, and
22 Dekalb, that is already an identified subsample that has not
23 been used in subsequent elections and could be the ideal
24 sample.

25 So in our minds, that is the ideal solution here

1 rather than having the State maintain all 30,000 units.

2 THE COURT: So what is wrong with that proposal?
3 This is to the -- this is to plaintiffs' counsel.

4 MR. CROSS: Your Honor, this is David Cross. I'm not
5 sure what is in that sample. If it is -- if it is -- if it
6 includes the machines that were sequestered beginning in, I
7 think, 2017 or 2018, what would pop out to me is I don't think
8 that would include any of the recent elections, like the 2018
9 midterm, which is a key election.

10 Again, I don't know what is in that. This is the
11 first I recall hearing that there are still machines that are
12 at the counties. I mean, the filing that just came in
13 certainly read to us to indicate that all of the machines were
14 collected by the State.

15 And so, again, this is part of what we're trying to
16 figure out is where are the machines. It is not clear to us
17 why the State collected them and is incurring a lot of money
18 when it looks like the counties were storing them for free.

19 And there is no indication whether the State has
20 explored other means of preserving some of these things as
21 opposed to paying this vendor which looks to be quite
22 exorbitant fees.

23 But in any event, I think if we could have a
24 discussion and exchange information, we could probably work
25 this out. And Your Honor doesn't want to hear it. But we

1 haven't been able to do that. So I'm not sure how to go
2 forward.

3 THE COURT: Well --

4 **(Unintelligible cross-talk)**

5 THE COURT: Right. Let me just say this. I mean,
6 you want until the 29th. Or on the practical litigation
7 perspective, you want until June 29. And there are
8 approximately ten days left in the legislative session. I
9 don't know how they are going to space those. They only count
10 the days they actually have proceedings. I don't -- you know,
11 the way the legislature works is not necessarily always
12 100 percent, let me say, transparent about what days they are
13 going to be counting or not.

14 But it is one thing to actually -- certain sorts of
15 meetings are held and committee meetings don't count
16 necessarily and -- but -- but I'm sure no matter what they are
17 aiming to be out by July 2nd, if not beforehand.

18 And so, you know, it doesn't really do us much good
19 for you to -- unless you can resolve this, it doesn't do us
20 much good to resolve this on the Friday before the July 4th
21 week because -- or the 30th because then basically the budget
22 is about to be approved. That is why they are hot to trot.

23 MR. CROSS: Your Honor, I understand that.

24 There's --

25 THE COURT: So I don't -- I mean, I don't know what

1 you are looking for further. I mean, to me, I wasn't clear
2 whether there were more Open Records Act requests that you were
3 wanting to make in the -- or you were trying to hold -- or you
4 were waiting for the responses still pending the Open Records
5 Act requests or both.

6 MR. CROSS: So we have Open Records requests that
7 went out last week. We're waiting for the responses. What has
8 been indicated so far is that it will take more than the three
9 days. We don't know exactly when that will come.

10 We have some additional ones that we sent out this
11 week. And so we are trying to build in a window to get those
12 responses. We also need to work with our experts in trying to
13 figure out things like, you know, whether the memory card piece
14 works. So that's why we were building in the time.

15 Again, we are sensitive to the situation the State is
16 in. But as Mr. Tyson began this call, he said this was not --
17 his words are low priority for the State. So just to say that
18 we're going to get crunched because they decided not to address
19 this for three months, that doesn't -- that doesn't seem
20 like --

21 THE COURT: Well, you didn't address it either for a
22 while, I mean, it looks like. I mean, it wasn't like you sent
23 out Open Records requests a month ago.

24 MR. CROSS: We --

25 THE COURT: I mean, I --

1 MR. CROSS: We did what we were supposed to do, and
2 we sent samples. I'm not sure what more we could have done.
3 They could have released lots of machines. In those three
4 months, they could have matched up the machine IDs and the
5 serial numbers probably for less than they are paying per
6 month.

7 They could have worked their best to figure that out.
8 But they didn't. So now they want to say it is a time crunch
9 of their making. We -- respectfully, Your Honor, I think we're
10 entitled to enough time to get the information we need to
11 respond and not be squeezed just because they made it a low
12 priority for half a year.

13 THE COURT: Well, it is a complicated thing about the
14 low priority let me just say.

15 But did I correctly summarize why you want them, or
16 is there some other reason you want them beyond what I said?
17 I'm not trying to diminish the importance of that. I'm just
18 trying to make sure I understand.

19 Is that what you want so far? How much -- what is
20 the -- I mean, it does seem like real work to be able to -- to
21 trace all of this down. It seems like, you know, it is at
22 least a pain in the neck at a time when there is not a lot of
23 extra resources. And I don't mean money. I mean people in
24 some ways.

25 MR. CROSS: And we're happy to do that. I mean, if

1 we could get, for example, the recap sheets or the memory
2 cards, we're happy to do the tedious work of matching. It is
3 just a matter of collecting on their part and providing it.

4 THE COURT: Well, you are willing to do that work and
5 not bill for that work?

6 MR. CROSS: You mean not seek fees later? Sure.
7 Absolutely. We would absolutely do that.

8 THE COURT: What is wrong with that proposal,
9 Mr. Tyson?

10 MR. TYSON: Your Honor, certainly I'll refer us back
11 to our January conversation about how the DRE recap sheets are
12 stored by the Secretary's office. All the post-election
13 information is stored in a folder for each county after each
14 election. And there is a variety of documents that is more
15 than just the DRE recap sheet.

16 And a county may range from a half inch thick up to a
17 foot or two thick of paper documents for that particular
18 election. The DRE recap sheets aren't in any particular point
19 in that folder.

20 And so in order for us to even begin to give
21 documents to the plaintiffs to start this process, if they were
22 going to conduct this analysis, we would have to engage
23 Elections Office staff, which frankly is already stretched very
24 thin trying to run the elections in the midst of COVID, to go
25 pull out all that information and then turn it over to the

1 plaintiff and have them, I guess, do a manual entry of all the
2 DREs -- all the DREs used in a particular election.

3 So I mean, I appreciate Mr. Cross' willingness to
4 take on a Herculean task. But it would require a lot of work
5 on the front end. And we would also for past elections have to
6 go back to the archives, get all the election documents out.

7 And I'm still struggling to understand from a
8 mootness and relevance standpoint why we're engaging in all of
9 this activity. We have-- I feel like we have been very, very
10 clear from the January call, from our filings, from the
11 documents.

12 On Page 5 of our filing about this, we talked about
13 the fact that there were machines sequestered with the counties
14 that we have not collected and those are different than the
15 machines that we have collected.

16 So the reality for us is we're now six months down
17 the road here. We're now in a budget crisis that no one
18 anticipated. And we're trying to do the best we can to free up
19 resources to allow the elections process to be funded for
20 people to have it function in Georgia. And this is an expense
21 that obviously -- these are about machines that are -- the
22 claims are moot. There is no relevance to going through this
23 process and digging these out at this point.

24 THE COURT: Well, obviously, they dispute that the
25 claims are moot. And I guess to the -- on that point, I'm more

1 likely to agree with them. Whether, you know -- whether this
2 volume of work at this juncture is worth it is another matter.
3 But, of course, it depends on if -- you know, what we went
4 round and round about before, which is, you know, is the State
5 going to appeal on the -- on the preliminary injunction and
6 what -- where do we go from here. Because if you are saying
7 that they -- if I were to rule that they are not moot, you seek
8 an interlocutory appeal on that or something else, you know, we
9 are just -- and then I'm in a position where I wouldn't have
10 allowed them to do this -- I didn't allow them to do discovery.
11 So, you know, it is sort of a rock and a hard place.

12 That is why the first part of this was originally,
13 well, is the State willing to agree to judgment on -- at least
14 partial judgment, which I never -- you know, no one ever
15 indicated you were. So that is why we are -- partly why we are
16 here.

17 MR. BROWN: Your Honor, this is Bruce Brown with the
18 Coalition. Just a couple of very quick points.

19 First, the State, you know, continues to not address
20 the federal law that requires them to keep the DREs anyway for
21 22 months after the 2018 election. And we keep on like -- I
22 know we're like a broken record. We keep on citing that law
23 and the state law that requires these DREs to be maintained for
24 two years.

25 And in response to that, we get crickets. Just

1 nothing. And so what they are asking is to violate federal and
2 state law by -- and I don't want to get into sort of a
3 scrimmage over that issue. But it has never been addressed by
4 the State.

5 And so we have -- we briefed that in Document 699,
6 which was our response back in January. And they have never
7 explained why they have any federal authority to be destroying
8 these election records. That is part of, I think, the 1960
9 Civil Rights Act or Voting Rights Act. And it is so that the
10 Justice Department can do an investigation of a federal
11 election up to two years after the election.

12 So that, I think, should sort of decimate their claim
13 that they should be able to destroy these records or, as they
14 have done in the media, blame this litigation for these costs.
15 It is just not -- that is just not so.

16 And, also, they can't have it both ways. They can't
17 complain about the costs to narrow the discovery because it
18 takes them a long time with all the records and complain about
19 the cost of keeping all of them. They have got to make -- and
20 the other -- other claim they are making is that, although they
21 are not going to consent to a final judgment, they want to
22 pretend that it is.

23 So they have got to make some choices here. But we
24 are behind -- with the Curling plaintiffs, we're behind
25 narrowing the load for everybody. And we'll do what we can to

1 work with the State to do that.

2 Thank you, Your Honor.

3 THE COURT: So at 699, which of the documents is it
4 that you are --

5 MR. BROWN: It is Document 699. I'm trying to get
6 the page number.

7 THE COURT: I mean, there are a variety of documents
8 in there.

9 MR. BROWN: I'm sorry. Page --

10 THE COURT: No. It is just that there are some
11 exhibits. But that is all right.

12 MR. BROWN: Document 699, that is the pleading
13 number.

14 THE COURT: Right. Yeah. I've got it.

15 MR. BROWN: We cite in there on Page 14 the federal
16 law and the two state laws that control.

17 MR. TYSON: Your Honor, this is Bryan Tyson. Just to
18 quickly dispose of that, I believe that we addressed that in
19 our reply. I don't have the reply in front of me. But the
20 State maintains for the two-year period all of the electronic
21 records on CDs that are held under seal with the Clerk of
22 Superior Court.

23 There's not -- I have never seen a case where there
24 is an independent obligation to preserve voting machines for
25 the two-year period. And if Mr. Brown believes that is

1 correct, I'm sure he can try to persuade the U.S. Attorney to
2 bring an action against us. But none of that is relevant to a
3 discovery dispute here about these machines that are right now
4 only being maintained because of the Court's orders to maintain
5 them right now.

6 And that is what we've tried to do for six months
7 now, find a resolution that was workable for everybody. And
8 we're still here. So --

9 MR. BROWN: I mean, it is just like with any
10 discovery dispute or any obligation to preserve evidence. The
11 law says records. Those DREs are records. And yeah, there may
12 be some copy or supposed copy or rendition or printout from
13 those DREs.

14 But absent any guidance from the Justice Department
15 that it doesn't apply to these electronic records, I think it
16 is a very scary position to take that the internal DRE memory,
17 which contains this information, is somehow exempt from an act
18 that says it applies to all records.

19 MR. CROSS: Your Honor, this is David Cross. One
20 suggestion, if I may. Mr. Tyson said that part of what they
21 would have to do with the recap sheets is to go through
22 files -- I think he said it was half an inch to a foot thick.
23 It sounds like there would be 159 of those, one for each
24 county.

25 However many there are, if all they opine to do is

1 just literally pull the files and stick them in a room
2 somewhere where we can have people go in and go through all the
3 recap sheets, we're happy to absorb that cost as well.

4 THE COURT: What if you did that and we're just
5 interested in whatever -- some sample of the counties? Why
6 would they have to pull them for every single county? Why do
7 you need that?

8 MR. CROSS: So that is a good question. And it is
9 literally the same question I asked Dr. Halderman. The concern
10 is that if you don't get a representative sample for each
11 relevant election in each county and trying at least to give a
12 representative sample of the precincts across the county you
13 run the risk of missing something, if there was, for example,
14 hacking that was done.

15 One of the things that Dr. Halderman and others have
16 shown is you can hack the system by getting access to a single
17 machine because of the way the data moves between the one
18 machine and the GEMS database or the GEMS server.

19 So what we were looking to do was to get a
20 representative sample across the state. I'm not sure how you
21 pick counties. We talked about that. You know, Dr. Halderman
22 explained, you know, how might you hack it. You might say,
23 well, let's flip a small number of votes at a single precinct
24 or a few machines in one precinct in Fulton and we'll switch
25 the Republican instead of Democrat. Or, vice versa, you may go

1 to a county that traditionally votes heavily Republican and
2 just switch a small number of votes.

3 So you don't know how it happens. So that is why we
4 wanted a representative sample. And, again, I mean, pulling
5 the file folders doesn't seem like it should be a difficult
6 task.

7 We're happy --

8 THE COURT: Then there is an extra step after that
9 though, as I understood it. I mean, are you going --

10 **(Unintelligible cross-talk)**

11 MR. CROSS: And the matching we would do. The first
12 step would be pulling the folders. The second step is going
13 through the folders to identify the recap sheets. It sounds
14 like they are included with some other documents.

15 We would -- we would ask them to do step one, pull
16 the folders. We would send people in to identify the recap
17 sheets, get them copied. And then we would take it from there.

18 We would match the machine IDs per election to the
19 corresponding serial numbers. Again, we think this could
20 actually be done much easier with the memory cards. But we'll
21 take either route. We could deal with the recap sheets.

22 We could do the matching. Then we could come back to
23 them and say, here are the serial numbers for these machines.
24 And so we will narrow it down to specifically identified units.
25 We anticipate that would be a relatively small percentage of

1 what we're talking about.

2 And then it is a matter of identifying those
3 machines. And we're happy to do that too. If they are sitting
4 in a big warehouse, we're more than happy to send a team in.
5 They can be supervised to track down the serial numbers in the
6 warehouse.

7 Literally, the only thing we would be asking the
8 State to do is to just pull those folders. We would take
9 everything from there, and we would absorb the cost.

10 THE COURT: What happens for the other counties -- I
11 mean, the large counties of Fulton, Dekalb, and Cobb, which are
12 considerable?

13 **(Unintelligible cross-talk)**

14 MR. CROSS: They are all in the same location is what
15 I understood from Mr. Tyson. Except for the ones that are
16 sequestered specifically for this litigation separately, all of
17 those other machines are sitting in a single location.

18 So that's why if we can get the serial numbers we can
19 walk in to that one big warehouse, identify each machine by
20 serial number, say these are the ones we would like you to
21 keep, do what you want with the rest.

22 If there are any serial numbers that pop up in what
23 just Cobb, Dekalb, and Fulton are preserving, then we could
24 work with the counties to identify those machines. Although,
25 again, Cobb tells us they are not incurring any costs.

1 So we are prepared to do every single step, other
2 than them just pulling the folders. Frankly, we'll do that too
3 if there is a way for us to do it. But we're trying to absorb
4 everything.

5 MR. MCGUIRE: Your Honor -- I'm sorry, David. I
6 didn't mean to interrupt you.

7 MR. TYSON: No. Go ahead. This is Bryan. You can
8 proceed.

9 MR. MCGUIRE: This is Robert McGuire for the
10 Coalition plaintiffs. I just wanted to add: We fully support
11 everything Mr. Cross just said. But I do just want to make
12 sure our unique, distinct position doesn't get lost in this.

13 We're not looking for a representative sample. We
14 are looking for particular machines that we have identified
15 based on criteria, such as known aberrant behavior, known
16 malfunctions.

17 And we believe that we have a different approach that
18 is aimed at getting the same results. But ours is based on
19 looking at specific machines that we have identified, not based
20 on getting a representative sample.

21 So I don't think a solution that looks to pulling a
22 representative sample will serve us.

23 MR. TYSON: This is Bryan -- I'm sorry.

24 MR. CROSS: One quick question.

25 Rob, you can identify those machines in a way that I

1 said though; right? It is a similar process?

2 MR. McGUIRE: Yes, of course. And we could pull data
3 into what David is proposing.

4 MR. CROSS: That is what I was going to clarify.
5 Thanks.

6 MR. TYSON: Your Honor, this is Bryan Tyson. Is part
7 of this proposal also that the plaintiffs are going to absorb
8 the storage costs of the entirety of DREs in the meantime?
9 Because this is an incredibly laborious process.

10 MR. CROSS: No.

11 MR. TYSON: And I am sure the plaintiffs are
12 incredibly efficient.

13 MR. CROSS: No.

14 THE COURT: How long do you think it will take? I
15 mean, if we're talking about -- what sort of numbers are you
16 envisioning? Because basically Mr. Brown might be right or
17 wrong, but I'm not going to likely rule on that.

18 So, you know, if you are saying, all right, the
19 State, you're going to have to have this for another 30 -- for
20 another month, but we're going -- it is going to be off your --
21 it will be off your back basically or the vast majority of
22 these after that, they can look at what that is going to be for
23 budgetary purposes.

24 MR. CROSS: So, Your Honor, I'm not sure who you were
25 asking. This is David Cross.

1 What I would say is my guess is they have already
2 paid for the month of June. Mr. Tyson can tell me if that is
3 wrong. The sooner that they can get us in with the information
4 we're happy to knock it out. It is hard for me to say in the
5 abstract how fast we can do it. Maybe we could do it in a
6 week, maybe two weeks. It just depends on how quickly we get
7 the information.

8 But we may be able -- I mean, it is only -- what? --
9 June 12th? It is at least theoretically possible if they get
10 the stuff to us really quickly, like early next week or at
11 least get our folks in to look at the documents, we could
12 probably have this done by the end of the month. And they are
13 not incurring any additional costs, depending on how they are
14 being billed.

15 MR. TYSON: David, this is Bryan. You think you will
16 be able to get in and pull over 200,000 pieces of paper and
17 then put it all in databases and be able to use it in three
18 weeks?

19 MR. CROSS: I don't know. I have got to see the
20 paper and then sit down with our folks and figure out what is
21 doable. We will certainly move heaven and earth to do what we
22 can.

23 MR. TYSON: The other --

24 THE COURT: Go ahead.

25 MR. TYSON: I was just going to say: The other thing

1 that the State has been trying to figure out too is is there a
2 lower cost method of storage. And we had identified a lower
3 cost state facility we could move these to. But the cost of
4 moving them was such that it wouldn't be worth doing unless it
5 was going -- the machines had to be preserved for at least
6 three more months.

7 So there are those considerations we have to figure
8 out with our client too depending on the time line. Because if
9 this is a four-month process, we want to go ahead and get them
10 into a cheaper storage facility and accede the cost of moving.
11 If this is a one-month process, then maybe that looks
12 different.

13 But, again, I just keep coming back to: We have
14 raised this issue in the first of December. These machines
15 have been decommissioned since December 31st. And we are still
16 at this point.

17 So it is difficult for our client, especially with
18 the legislature asking what is going on.

19 THE COURT: Well, listen, you know, it seems to me
20 the plaintiffs are willing to look at all the paper. I mean,
21 they could -- you could send them some cards. They could
22 actually verify is there -- is Dr. Halderman's theory correct
23 that he is going to be able to run the cards and it is going to
24 be simpler that way. I don't know if it is true.

25 I assume that you-all looked at that. But maybe you

1 don't want them to have the cards. I don't know what the
2 answer is to that. So that is sort of -- you know, that would
3 obviously be -- if it was available with the cards, that would
4 be potentially the simplest thing to do. But I don't know that
5 that is so.

6 What if you were to give them a range of the cards
7 and they could run them to see so we know by Monday evening?

8 MR. TYSON: I mean, Your Honor, I honestly don't
9 know. I know the cards are somewhere. I have been focused on
10 DREs and optical scanners.

11 I think if we were going to do any sort of electronic
12 component, we're going to have to have clear boundaries in the
13 protective order that the plaintiffs aren't conducting
14 unlimited discovery of everything on the memory card, that it
15 is for the sole purpose of drawing this out. Because, again,
16 we are not -- we are passed discovery on these units. So --

17 THE COURT: So why does Dr. Halderman -- does he have
18 some concrete basis for believing that they record this
19 information in a way that is going to be ascertainable --

20 MR. CROSS: He does, Your Honor.

21 THE COURT: -- and not erased?

22 MR. CROSS: Well, that is the question. What we
23 don't know is -- well, let me take a step back.

24 Our understanding is that the memory cards from the
25 elections since this lawsuit was filed and whatever memory

1 cards they had when it was filed -- that those have all been
2 subject to preservation. And so the memory cards for the
3 elections that we're concerned about should all be preserved.

4 If that is accurate, then -- I was just looking at
5 what Dr. Halderman said -- yeah. So he thinks -- he says an
6 alternative way to identify which AccuVote DREs were used in
7 each precinct would be to use data from the DREs' removable
8 memory cards. The memory cards store digital records of each
9 vote, which are later uploaded to GEMS. They also store an
10 audit log file containing time stamped entries for each
11 election event, such as polls being opened or closed and
12 individual ballots being cast.

13 An example audit log from an election -- let's see --
14 when the memory card is inserted into the DRE, it writes -- the
15 DRE writes its serial number to the audit log.

16 So his understanding is that if the memory cards are
17 preserved we should be -- he should be able -- he has written a
18 script to do this, having tested it. He can pull the audit log
19 from the memory card, which will give him the serial number
20 that corresponds to the machine IDs. And then we can match up
21 the machine ID in a particular election to the serial number
22 for the DRE that was used. And then that gets us to what
23 should be a relatively small universe of machines.

24 THE COURT: But he thought that about the GEMS data
25 he was going to get too.

1 MR. CROSS: Yeah. And in fairness, Your Honor, we
2 did make clear that we just didn't know, that we were happy to
3 explore that. And Mr. Tyson was kind enough to say at the
4 start of this that we did not know whether we would make that
5 work. It did not work unfortunately.

6 All we could get was the machine IDs. Dr. Halderman
7 thinks this will work because he has tested it. But one of the
8 reasons we're happy to get a recap sheet and just get that
9 going is we -- in fairness to the State, we don't want to waste
10 more time. We don't want them to incur more costs than they
11 have to.

12 So we also could run these in parallel. They could
13 send us the sample of the memory cards while getting us set up
14 to go to the recap sheets. Dr. Halderman can look at those.
15 If it works, great, we go that route.

16 THE COURT: Well, I guess the question really is:
17 What sample of memory cards would he need to have in order to
18 actually see this was going to work? Because, you know, maybe
19 some other memory cards have it and some of them don't.

20 MR. CROSS: Unless the memory card is, you know,
21 erased or overwritten, it will have an audit log and the audit
22 log will have the serial number is my understanding. But,
23 again, we're happy to do the recap sheet route. I mean, it
24 doesn't -- and we would absorb, it sounds like, 95 percent of
25 the work.

1 THE COURT: Well, here is my view. They can make
2 their budget and know what they are doing if you're able to
3 give them -- if you're obligated basically to give them the
4 information about what you want so that they can basically move
5 on the machines by the end of July.

6 I mean, that gets -- that seems to me -- allows them
7 to do what they see fit, despite what Mr. Brown says, which I'm
8 not saying he is wrong, it is just simply not really ultimately
9 mine to deal with. If you think you're able to do it so that
10 you can give it to them and they can basically get this done by
11 the end of July, then they know what is in -- they reduce their
12 budget accordingly.

13 MR. CROSS: Right.

14 THE COURT: Why doesn't that --

15 MR. CROSS: I think that is fair. Again, if we can
16 get access to the recap sheets early next week or as soon as
17 they can do it, I don't see why we couldn't do this by the end
18 of July.

19 MR. BROWN: Your Honor, this is Bruce Brown.

20 THE COURT: Well, I don't mean that you are just
21 giving it to them the end of July.

22 MR. CROSS: Oh, I understand. No. No. But --
23 sorry. I understood, Your Honor. They would be in a position
24 to release the machines by the end of July.

25 Could I ask one quick question?

1 Bryan, what was the transportation cost to move it to
2 another facility?

3 MR. TYSON: I don't recall exactly, David. I think
4 it was in the 80-something-thousand-dollar range. But I
5 don't -- I have not seen any specifics on that at all. So I
6 can't tell you what the different -- I don't have the cost
7 breakdown. I just know that the office was working on other
8 options trying to figure out a way to save money.

9 MR. CROSS: Okay. Thank you.

10 THE COURT: So, Mr. Tyson, what about that?

11 MR. TYSON: Your Honor, I think we can -- we can take
12 that to our client. I know that there is a lag time to get
13 documents out of archives. And these are pretty voluminous
14 obviously records.

15 So why don't we do this? We can discuss this with
16 our client, and then can we get -- I mean, our clients are
17 literally still -- everybody is working on trying to get
18 towards certification of the June 9th election right now.

19 THE COURT: I know.

20 MR. TYSON: So would Monday -- Monday -- Monday
21 afternoon be acceptable to get an answer back to everybody?

22 THE COURT: Sure. I mean, I'm going to extend the
23 time for them to file their response until we can get through
24 the end of this discussion in any event.

25 So I don't remember what the due date was that -- you

1 were saying you wanted a response by the -- I think it was
2 Monday. So I'm going to extend it at least -- at least through
3 the end of -- basically until Thursday of next week. But I'm
4 presuming that not everything -- not every single day of the
5 week is going to end up being used for the legislative session.

6 I would like you to be able to be talking together on
7 Monday. If you -- I have a sentencing that is at 2:30. So if
8 you needed me, I would have to be available more like at the
9 very end of the -- at 4:30.

10 I could not find today when I went to the office the
11 sentencing documents. And Mr. Martin is away. So I sort of
12 don't know what is involved exactly. He will be back on Monday
13 morning.

14 All right. If you're able to talk first yourselves
15 and agree, that is great. Let me know. We'll save 4:30 for
16 you otherwise. That might end up slipping depending on how the
17 sentencing goes because I don't know what is involved.

18 MR. CROSS: Thank you, Your Honor.

19 THE COURT: Hopefully, you can do this without me and
20 come to a written agreement.

21 All right?

22 Okay. Thank you very much.

23 MR. BROWN: Thank you very much, Your Honor.

24 THE COURT: All right. Very good. Take care.

25 MR. CROSS: Thank you, Judge.

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MR. RUSSO: Thank you.

**(The proceedings were thereby concluded at 4:32
P.M.)**

C E R T I F I C A T E

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3 UNITED STATES OF AMERICA
4 NORTHERN DISTRICT OF GEORGIA
5

6 I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of
7 the United States District Court, for the Northern District of
8 Georgia, Atlanta Division, do hereby certify that the foregoing
9 41 pages constitute a true transcript of proceedings had before
10 the said Court, held in the City of Atlanta, Georgia, in the
11 matter therein stated.

12 In testimony whereof, I hereunto set my hand on this, the
13 15th day of June, 2020.
14
15
16

17 *Shannon R. Welch*

18 _____
19 SHANNON R. WELCH, RMR, CRR
20 OFFICIAL COURT REPORTER
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