

**IN THE SUPREME COURT OF GEORGIA**

**ROQUE “ROCKY” DE LA  
FUENTE,**

**Appellant,**

**VS.**

**BRIAN P. KEMP, in his official  
capacity as the Secretary of State of  
the State of Georgia,  
Appellee.**

**CASE NO.  
S17A0424**

---

**APPELLEE’S BRIEF**

---

SAMUEL S. OLENS                      551540  
Attorney General

DENNIS R. DUNN                      234098  
Deputy Attorney General

RUSSELL D. WILLARD                760280  
Senior Assistant Attorney General

CRISTINA M. CORREIA               188620  
Assistant Attorney General

JOSIAH B. HEIDT                      104183  
Assistant Attorney General

State Law Department  
40 Capitol Square, S.W.  
Atlanta, GA 30334-1300  
PH: (404) 656-3389  
FAX: (404) 657-9932  
Email: [jheidt@law.ga.gov](mailto:jheidt@law.ga.gov)

**IN THE SUPREME COURT OF GEORGIA**

**ROQUE “ROCKY” DE LA  
FUENTE,**

**Appellant,**

**VS.**

**BRIAN P. KEMP, in his official  
capacity as the Secretary of State of  
the State of Georgia,  
Appellee.**

**CASE NO.  
S17A0424**

---

**APPELLEE’S BRIEF**

---

## TABLE OF CONTENTS

Table of Citations.....	ii
I. Statement of the Case .....	1
A. Overview .....	1
B. Enumeration of Error .....	2
C. Jurisdictional Statement .....	2
D. Standard of Review .....	2
II. Statement of Facts and Procedural History.....	3
III. Argument and Citation of Authority.....	7
A. Dismissal of the Mandamus Petition Was Proper because De La Fuente Failed to Timely File his Notice of Candidacy.....	9
B. Secretary Kemp Owes No Legal Duty to De La Fuente to Verify the Signatures De La Fuente Submitted in Support of His Nomination Because he did not Qualify to Appear on the November 8, 2016, Ballot.....	11
C. The Mandamus Petition Also was Subject to Dismissal Because it Was Untimely .....	14
D. The Request for Declaratory Relief was Barred by the Doctrine of Sovereign Immunity .....	15
E. The Request for Injunctive Relief was Barred by the Doctrine of Sovereign Immunity .....	17
IV. Conclusion .....	17
Certificate of Service .....	19

## TABLE OF AUTHORITIES

<u>Cases</u>	Page
<i>Bland Farms, LLC v. Georgia Dep't of Agric.</i> , 281 Ga. 192 (2006).....	12, 13
<i>Charles H. Wesley Educ. Found., Inc. v. State Election Bd.</i> , 282 Ga. 707 (2008) .....	16, 17
<i>Ctr. for a Sustainable Coast v. Coastal Marshlands Prot. Comm.</i> , 294 Ga. 593 (2014) .....	8, 16
<i>De La Fuente v. Kemp</i> , CA NO. 1:16cv2937-MHC (N.D. Ga. 2016) .....	4
<i>De La Fuente v. Secretary of State</i> , No. 16-15880-G (11th Cir. 2016).....	4, 5
<i>Ga. Dept. of Human Resources v. Poss</i> , 263 Ga. 347 (1993) .....	16
<i>Gelfand v. Gelfand</i> , 281 Ga. 40 (2006).....	17
<i>Green Party of Georgia v. Kemp</i> , CA No. 1:12cv01822-RWS (N.D. Ga. 2016).....	3
<i>Hedquist v. Merrill Lynch, Pierce, Fenner &amp; Smith</i> , 272 Ga. 209 (2000) .....	16
<i>Northway v. Allen</i> , 291 Ga. 227 (2012) .....	2
<i>Olvera v. Bd. of Regents</i> , 298 Ga. 425 (2015) .....	8, 16
<i>Police Benevolent Assn. v. Brown</i> , 268 Ga. 26 (1997).....	7
<i>Tyson v. Bd. of Regents</i> , 212 Ga. App. 550 (1994).....	16
<i>Whitfield v. City of Atlanta</i> , 296 Ga. 641 (2015) .....	7, 8, 15
<i>Woodard v. Laurens County</i> , 265 Ga. 404 (1995).....	15

## TABLE OF AUTHORITIES

<u>Const. and Statutes</u>	Page
U.S. Const. art. II, § 1, cl. 2 .....	3, 9
U.S. Const. amend. XII .....	3, 9
Ga. Const. Art I, Sec. II, Para. IX(e).....	15
O.C.G.A. § 1-3-1(d)(3) .....	15
O.C.G.A. § 9-6-26.....	12, 14
O.C.G.A. § 9-11-12(b)(1) .....	6
O.C.G.A. § 9-11-12(b)(6) .....	6
O.C.G.A. § 21-2-10.....	3, 9
O.C.G.A. § 21-2-14.....	14
O.C.G.A. § 21-2-132.....	16, 17
O.C.G.A. § 21-2-132(d)(1) .....	3, 9, 10
O.C.G.A. § 21-2-132(e) .....	8, 10, 13
O.C.G.A. § 21-2-170.....	8, 10, 16, 17
O.C.G.A. § 21-2-171.....	13, 16, 17
O.C.G.A. § 21-2-171(a) .....	6, 7, 9, 12
O.C.G.A. § 21-2-171(c) .....	1, 2, 14, 15
O.C.G.A. § 24-2-201.....	4
O.C.G.A. § 21-2-234(a) .....	5, 7
O.C.G.A. § 21-2-235(a) .....	5, 7

## **I. STATEMENT OF THE CASE.**

### **A. Overview.**

This is an appeal from the Fulton County Superior Court's September 26, 2016, Final Order granting Secretary Kemp's Motion to Dismiss De La Fuente's Petition for Writ of Mandamus, pursuant to O.C.G.A. § 21-2-171(c), and Complaint for Declaratory and Injunctive Relief ("Mandamus Petition"). [R. 204]. The Superior Court correctly held that De La Fuente's Mandamus Petition was subject to dismissal because the nomination petition in support of his candidacy as an independent candidate for President did not meet the statutory requirements for such petitions. Specifically, that the nomination petition was deficient because it was not preceded with a timely notice of candidacy as required by statute. In addition, Secretary Kemp owed no legal duty to De La Fuente to accept and review his nomination petition because De La Fuente did not first file a valid notice of candidacy as required by Georgia law. Finally, De La Fuente's Mandamus Petition was untimely, and his claims for declaratory and injunction relief were barred by the doctrine of sovereign immunity. Secretary Kemp raised each of these grounds in his Motion to Dismiss filed in the Superior Court [R. 48-95], and this Court should affirm the lower court's dismissal of De La Fuente's claims.

## **B. Enumeration of Error.**

The Court has requested that the parties file their briefs simultaneously. As such, Secretary Kemp cannot identify the specific enumeration or enumerations of error that De La Fuente will raise.

## **C. Jurisdiction.**

The Supreme Court of Georgia, rather than the Court of Appeals of Georgia, has jurisdiction over this direct appeal because an appeal of a superior court ruling on a writ of mandamus filed pursuant to O.C.G.A. § 21-2-171(c) must be taken to the Supreme Court. O.C.G.A. § 21-2-171(c) (“From any decision of the superior court an appeal may be taken within five days after the entry thereof to the Supreme Court.”).<sup>1</sup>

## **D. Standard of Review.**

“A trial court’s ruling on a motion to dismiss for failure to state a claim for which relief may be granted is reviewed *de novo*.” *Northway v. Allen*, 291 Ga. 227, 229 (2012).

---

<sup>1</sup> Effective January 1, 2017, in subsection (c), “to the Supreme Court” at the end of the sixth sentence in O.C.G.A. § 21-2-171(c) is deleted and “appellate court” is substituted for “Supreme Court” in the last sentence. Ga. L. 2016, p. 865, § 1-1/HB 927.

## II. STATEMENT OF FACTS AND PROCEDURAL HISTORY.

De La Fuente is a resident of Florida who seeks to gain access to the Georgia ballot for the November 8, 2016, General Election as an independent candidate for the Office of President of the United States. [R. 13 at ¶ 5]. He alleges that on July 12, 2016, he delivered a box containing his nomination petition to the Secretary of State. [R. 16 at ¶17]. The box allegedly contained over 14,500 elector signatures in support of his nomination. *Id.*<sup>2</sup> De La Fuente also attempted to file notices of candidacy for his slate of presidential electors<sup>3</sup> on July 12, 2016. *Id.* The 2016 statutory deadline for independent candidates to file their notices of candidacy was noon on July 1, 2016. *See* O.C.G.A. § 21-2-132(d)(1). Because De La Fuente filed his electors' notices eleven days after the statutory deadline, the Secretary of State rejected De La Fuente's notices of candidacy for his slate of presidential electors. [R. 16 at ¶ 16 n.1].

De La Fuente is currently challenging the Secretary's decision to reject his late-filed notices of candidacy in a separate action in the United States District

---

<sup>2</sup> Pursuant to an order issued in unrelated federal litigation on March 17, 2016, the valid signature threshold for a candidate for President is currently 7,500 signatures. *See Green Party of Georgia et al. v. Kemp*, Civil Action No. 1:12-cv-01822-RWS, Doc. 92 (N.D. Ga. Mar. 17, 2016).

<sup>3</sup> Because voters cast ballots for presidential electors as part of the Electoral College system of voting for President, the required notices of candidacy are for the candidate's slate of presidential electors. *See* U.S. Const. art. II, § 1, cl. 2; U.S. Const. amend. XII; O.C.G.A. § 21-2-10.



Court for the Northern District of Georgia. *See De La Fuente v. Kemp*, Civ. Action No. 1:16-cv-2937-MHC (N.D. Ga. 2016). In that suit, De La Fuente contends that the July 1, 2016, statutory deadline for independent candidates to file a notice of candidacy violates the First and Fourteenth Amendments of the United States Constitution. *Id.*, Compl., Doc. 1. On August 17, 2016, De La Fuente filed an emergency motion for mandamus and injunctive relief in the federal case in which he sought to require that the Secretary accept the untimely notices of candidacy. *Id.*, Pl.’s M. for Emergency Mandamus and Prelim. Inj., Doc. 9. After a hearing and oral argument held on August 26, 2016, the District Court denied De La Fuente’s motion. [R. 65].<sup>4</sup> De La Fuente has appealed the District Court’s order, and the appeal has been docketed at the Eleventh Circuit Court of Appeals. *De La Fuente v. Secretary, State of Georgia*, Appeal No. 16-15880-G (11th Cir. 2016). The Eleventh Circuit denied De La Fuente’s request for an injunction pending appeal. *Id.* at Order Denying Emergency/Time Sensitive Motion for an Injunction Pending Appeal (Oct. 7, 2016).

The legal status of De La Fuente’s independent candidacy remains that he is not qualified to appear on the November 8, 2016, General Election Ballot as an independent candidate for President because he failed to timely file notices of candidacy for his slate of presidential electors. *See* [R. 65]. Notably, the Eleventh

---

<sup>4</sup> This Court may take judicial notice of the existence of orders in federal court and of the fact that filings were made in federal court. *See* O.C.G.A. § 24-2-201.

Circuit Court of Appeals has declined to hear De La Fuente's constitutional challenge to Georgia's notice of candidacy deadline on an expedited basis. As such, any decision from the federal courts that could alter the current legal status of De La Fuente's untimely notice of candidacy filing will not come until after the Eleventh Circuit has ruled on De La Fuente's pending appeal. The briefing schedule for that appeal will not end until after the election. *See De La Fuente v. Secretary, State of Georgia*, Appeal No. 16-15880-G at Sept. 28, 2016 Briefing Notice (11th Cir. 2016) (declaring that Appellant Roque De La Fuente's Appellant's Brief is due on October 17, 2016, making Appellee Secretary Kemp's Appellee's Brief due thirty-three days later, well after the November 8, 2016, General Election). Accordingly, De La Fuente will not have a valid notice of candidacy on file prior to the November 8, 2016, General Election.

The nominating petition was accepted by Secretary Kemp and reviewed, pursuant to O.C.G.A. § 21-2-234(a), for the purpose of ensuring that any registered voters who signed the petition were given credit for having had a contact with election officials and therefore would be eligible to either remain or be moved to the list of active registered voters. *See* O.C.G.A. § 21-2-235(a). The Secretary, through county registrars, verified only 2,964 of the signatures; significantly fewer than the required 7,500 registered voter signatures required for nomination. [R. 100]. During the course of the federal court challenge to the notice of

candidacy deadline De La Fuente received notice, on August 26, 2016, that his nomination petition did not have 7,500 valid signatures when he was informed at the District Court hearing and through a declaration filed with the District Court that only 2,964 of his submitted signatures were verified as valid signatures of registered Georgia voters. *See* [R. 67, 92 at ¶ 4]. On August 29, 2016, Elections Director Chris Harvey, again notified De La Fuente via correspondence that was mailed to De La Fuente on August 29, 2016 and emailed to De La Fuente and his counsel on August 31, 2016. [R. 100-101 n. 2]. De La Fuente filed this action on September 6, 2016, seeking mandamus, declaratory, and injunctive relief compelling “the Secretary of State to carry out his clear, non-discretionary duties and obligations to verify voter signatures submitted in support of the nomination and qualification of a presidential candidate under O.C.G.A. § 21-2-171(a).” [R. 1 at ¶ 1]. On September 14, 2016, Secretary Kemp moved to dismiss the Petition and Complaint in its entirety for lack of subject matter jurisdiction pursuant to O.C.G.A. § 9-11-12(b)(1), for failure to state a claim pursuant to O.C.G.A. § 9-11-12(b)(6), and because it was untimely. Secretary Kemp also argued that De La Fuente’s requests for declaratory and injunctive relief were barred by sovereign immunity.

After a hearing and oral argument held on September 26, 2016, the Superior Court granted Secretary Kemp's Motion to Dismiss. [R. 204]. De La Fuente now appeals that Order.

### **III. ARGUMENT AND CITATION OF AUTHORITY.**

This Court should affirm the judgment of the Superior Court, which concluded that De La Fuente's nomination petition did not comply with the law as contemplated under O.C.G.A. § 21-2-171(a) because De La Fuente failed to timely file a notice of candidacy. Under the "right for any reason" rule, this Court should also affirm the Superior Court's dismissal on the primary ground that Secretary Kemp raised in his motion to dismiss, namely that Secretary Kemp does not owe a legal duty to De La Fuente to verify the signatures he submitted in support of his nomination because he did not qualify to appear on the November 8, 2016, ballot as an independent candidate for President.<sup>5</sup> *See Whitfield v. City of Atlanta*, 296 Ga. 641, 642 (2015) (citing *Police Benevolent Assn. v. Brown*, 268 Ga. 26 (1997)) (A judgment that is right for any reason will be affirmed).

De La Fuente missed the deadline to file his electors' notices of candidacy, and his federal lawsuit challenging the constitutionality of that deadline has so far

---

<sup>5</sup> As noted above, the Secretary must verify signatures on a nominating petition for purposes of recording the "contact" between a registered voter and election officials. O.C.G.A. § 21-2-234(a) and § 21-2-235(a). Therefore, despite the lack of duty owed to De La Fuente, the signatures were submitted to the counties for verification.

been unsuccessful in changing the status of his qualification for office. Unless and until De La Fuente is able to successfully qualify as an independent candidate for President, Secretary Kemp does not have a clear legal duty to consider or attempt to verify the signatures he submitted in support of his nomination petition. “Each candidate . . . shall . . . file with the same official with whom he or she filed his or her notice of candidacy a nomination petition in the form prescribed in Code Section 21-2-170.” O.C.G.A. § 21-2-132(e). Here, De La Fuente never successfully filed the notice of candidacy, and, therefore, Secretary Kemp owes De La Fuente no legal duty to review his nomination petition. Thus, this Court should affirm the Superior Court’s dismissal of De La Fuente’s Mandamus Petition.

Furthermore, while the Superior Court found that De La Fuente timely filed his Mandamus Petition, that finding was incorrect. As Secretary Kemp argued below, the Mandamus Petition was time barred because it was six (6) days late: the deadline for filing a challenge to Secretary Kemp’s determination that De La Fuente did not submit a sufficient number of valid signatures was August 31, 2016, and the Mandamus Petition was not filed until September 6, 2016. This Court should uphold the dismissal on that ground as well. *See Whitfield*, 296 Ga. at 642.

Finally, De La Fuente’s requests for declaratory and injunctive relief were barred by the doctrine of sovereign immunity. *Olvera v. Bd. of Regents*, 298 Ga. 425, 427 (2015); *Ctr. for a Sustainable Coast v. Coastal Marshlands Prot. Comm.*,

294 Ga. 593 (2014). De La Fuente did not identify a waiver that would permit him to bring those claims, which would have been cognizable in other forms in any event, had he brought them properly.

**A. Dismissal of the Mandamus Petition Was Proper Because De La Fuente Failed to Timely File His Notice of Candidacy.**

The Secretary of State's only legal duty upon receipt of a candidate's nomination petition is to determine whether the petition complies with the law. *See* [R. 204]. O.C.G.A. § 21-2-171(a) is clear:

When any nomination petition is presented in the office of the Secretary of State or of any superintendent for filing within the period limited by this chapter, it shall be the duty of such officer to examine the same to the extent necessary to determine if it complies with the law.

De La Fuente's nomination petition was facially invalid because he failed to first qualify as a candidate for office by successfully filing a notice of candidacy pursuant to O.C.G.A. § 21-2-132(d)(1). [R. 204].

Independent candidates in Georgia must follow a two-step process before they can appear on a general election ballot. First, the independent candidate must qualify for the office by filing a notice of candidacy as provided in O.C.G.A. § 21-2-132(d).<sup>6</sup> State law provides candidates with two five day windows during which they can file a notice of candidacy: (1) starting at 9:00 A.M. on the Monday

---

<sup>6</sup> As noted above, for presidential candidates the notice is actually filed for the candidate's slate of presidential electors. *See* U.S. Const. art. II, § 1, cl. 2; U.S. Const. amend. XII; O.C.G.A. § 21-2-10.

thirty-five weeks prior to a general election and ending the following Friday at 12:00 Noon; or (2) starting at 9:00 A.M. on the fourth Monday in June and ending the following Friday at 12:00 Noon. O.C.G.A. § 21-2-132(d)(1). For 2016, the last day that an independent candidate for President could file the notices of candidacy for his or her presidential electors was July 1, 2016, at 12:00 Noon.

After an independent candidate files a notice of candidacy, he or she must file a nomination petition pursuant to O.C.G.A. § 21-2-170. O.C.G.A. § 21-2-132(e) (“Each candidate required to file a notice of candidacy by this Code section shall, no earlier than 9:00 A.M. on the fourth Monday in June immediately prior to the election and no later than 12:00 Noon on the second Tuesday in July immediately prior to the election, file with the same official with whom he or she filed his or her notice of candidacy a nomination petition in the form prescribed in Section 21-2-170.”). For 2016, the nomination petition filing deadline was July 12, 2016, at 12:00 Noon.

The language of Section 21-2-132(e) makes it clear that candidates must file their nomination petitions *after* successfully filing a notice of candidacy. First, the statute places the notice of candidacy deadline approximately eleven days prior to the nomination petition deadline (July 1st and 12th, respectively, for 2016). Second, the language in Section 21-2-132(e) covering nomination petitions refers to the notice of candidacy deadline in the past tense: “Each candidate required to

file a notice of candidacy by this Code section shall . . . file with the same official with whom he or she filed his or her notice of candidacy a nomination petition.” If an individual attempts to file a nomination petition without first filing a notice of candidacy, the nomination petition will necessarily be legally deficient because the statute contemplates that a candidate must file a notice of candidacy before filing a nomination petition.

Here, De La Fuente failed to successfully file notices of candidacy; because his attempt to file the notices was eleven days after the deadline, that attempt was rejected as a nullity. Thus, De La Fuente’s nomination petition was legally deficient because De La Fuente had not first filed valid notices of candidacy for his slate of electors. Once that conclusion was reached, Secretary Kemp’s duties on the nomination petition were at an end. Because De La Fuente did not file a valid notice of candidacy, his nomination petition did not comply with the law and this Court should affirm the Superior Court’s dismissal of the Mandamus Petition on these grounds.

**B. Secretary Kemp Owes No Legal Duty to De La Fuente to Verify the Signatures De La Fuente Submitted in Support of His Nomination Because he did not Qualify to Appear on the November 8, 2016, Ballot.**

As described above, Georgia law establishes a clear two-step process that an independent candidate must follow to be able to appear on a general election ballot—first, file a timely notice of candidacy, second file a timely nomination



petition with a sufficient number of signatures. Secretary Kemp’s duty under O.C.G.A. § 21-2-171(a) to examine a nomination petition is only a duty to examine “to the extent necessary to determine if it complies with the law.” O.C.G.A. § 21-2-171(a).<sup>7</sup> Because De La Fuente did not file a timely notice of candidacy, his nomination petition was a dead letter. Once Secretary Kemp determined that the nomination petition did not comply with the law, his duties were at an end. He had no responsibility to attempt to verify De La Fuente’s signatures, because the nomination petition would not be lawful no matter how many signatures it contained.

An act cannot be compelled by mandamus unless the public official has a clear legal duty to perform the act or the public official has committed a gross abuse of discretion. *See Bland Farms, LLC v. Georgia Dep’t of Agric.*, 281 Ga. 192, 193 (2006). Further, courts may grant mandamus “only when the petitioner has a clear legal right to the relief sought . . . .” *Id.* at 193. The extraordinary writ of mandamus “will not be granted when it is manifest that the writ would, for any cause, be nugatory or fruitless, nor will it be granted on a mere suspicion or fear, before a refusal to act or the doing of a wrongful act.” O.C.G.A. § 9-6-26. “The

---

<sup>7</sup> As described above, De La Fuente is currently challenging, concurrently with this case, the constitutionality of the July 1, 2016, notice of candidacy deadline in federal court. However, because De La Fuente lost his challenge in the district court, and the Eleventh Circuit Court of Appeals has declined to expedite his appeal, De La Fuente is disqualified from having his name placed on the general election ballot regardless of the outcome of this appeal.

duty which a mandamus complainant seeks to have enforced must be a duty arising by law, either expressly or by necessary implication; and the law must not only authorize the act to be done, but must require its performance.” *Bland Farms*, 281 Ga. at 193.

De La Fuente identifies no part of O.C.G.A. § 21-2-171 or any other law that demonstrates that Secretary Kemp had a *clear* legal duty to verify his petition signatures when De La Fuente had not even qualified to appear on the ballot by timely filing a notice of candidacy. *See Bland Farms*, 281 Ga. at 193. Instead, De La Fuente simply ignored the first step and asserted that he was “denied nomination as a presidential candidate on the Georgia ballot” as a result of “Appellee’s failures to perform his non-discretionary duties.” [R. ¶ 3]. De La Fuente ignored the fact that O.C.G.A. § 21-2-132(e) limits those filing nominating petitions to candidates who have previously “filed his or her notice of candidacy” with the same official. Because De La Fuente never successfully filed the notice of candidacy for his slate of presidential electors, his nominating petition was not proper for purposes of his candidacy. O.C.G.A. § 21-2-132(e). De La Fuente was therefore not eligible to have his “nomination petition granted” by the Superior Court. [R. 17, 19–20 at ¶¶ 21, 31, 35].

In sum, Secretary Kemp owed no clear legal duty to De La Fuente to verify petition signatures he submitted in support of his independent candidacy after De

La Fuente failed to qualify to appear on the ballot in the first place. Thus, the Superior Court correctly denied De La Fuente's request for a writ of mandamus that would have been "nugatory or fruitless" if issued before De La Fuente qualified to appear on the ballot. *See* O.C.G.A. § 9-6-26. A writ of mandamus requiring Secretary Kemp to take some action concerning the nomination petitions would not change the status of De La Fuente's failure to qualify. Accordingly, this Court should affirm the Superior Court's dismissal of De La Fuente's Mandamus Petition.

**C. The Mandamus Petition Also was Subject to Dismissal Because it was Untimely.**

Any application for a writ of mandamus to compel the granting of a nomination petition "shall be made within five days of the time when the petitioner is notified" of the decision to reject the petition. O.C.G.A. § 21-2-171(c). O.C.G.A. § 21-2-14 provides for the method of computing the five days:

Unless otherwise stated in a specific Code section of this chapter, time periods under this chapter include Saturdays, Sundays, and legal holidays. When the last day for the exercise of any privilege or the discharge of any duty prescribed or required by this chapter shall fall on a Saturday, Sunday, or legal holiday, the next succeeding business day for the exercise of such privilege or the discharge of such duty.

Here, De La Fuente received both written and oral notice on Friday, August 26, 2016, that in addition to being invalid because he did not timely file his notices of candidacy, his nomination petition did not have 7,500 valid signatures.

See [R. 67, 92 ¶ 4]. Thus, the last day for De La Fuente to file a challenge pursuant to O.C.G.A. § 21-2-171(c) was Wednesday, August 31, 2016.<sup>8</sup> De La Fuente did not file this action until a week later on September 6, 2016. *Id.* De La Fuente's application was therefore untimely, and this Court should uphold the dismissal on that ground in addition to the Superior Court's rationale. See *Whitfield*, 296 Ga. at 642.

**D. The Request for Declaratory Relief was Barred by the Doctrine of Sovereign Immunity.**

The Georgia Constitution extends sovereign immunity to the State and all of its departments and agencies except as specifically provided in paragraph IX of article I, § II, which provides for legislative waiver:

Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.

Ga. Const. Art. I, Sec. II, Para. IX(e). Thus, the State is immune from suit except as specifically waived in the Georgia Constitution or except as provided by an act of the General Assembly specifically providing that sovereign immunity has been waived and the extent thereof. *Woodard v. Laurens County*, 265 Ga. 404, 405 (1995). Absent an express legislative or constitutional waiver of sovereign

---

<sup>8</sup> The mandamus petition would also be untimely even if the time were computed pursuant to O.C.G.A. § 1-3-1(d)(3).

immunity, a claim against the State seeking declaratory relief is barred by the doctrine of sovereign immunity. *Olvera*, 298 Ga. at 427. “Where the sovereign has sovereign immunity from a cause of action, and has not waived that immunity, the immunity rises to a constitutional right and cannot be abrogated by any court.” *Tyson v. Bd. of Regents*, 212 Ga. App. 550, 551 (1994). The burden of demonstrating a waiver of sovereign immunity rests with the plaintiff. *Ga. Dept. of Human Resources v. Poss*, 263 Ga. 347, 348 (1993) overruled on other grounds in *Hedquist v. Merrill Lynch, Pierce, Fenner & Smith*, 272 Ga. 209, 211 (2000).

The statutes that De La Fuente alleged Secretary Kemp violated (O.C.G.A. §§ 21-2-132, 21-2-170, and 21-2-171) do not contain an express waiver of sovereign immunity for actions seeking declaratory relief, as opposed to the mandamus relief contemplated under O.C.G.A. § 21-2-171, and De La Fuente has not identified any such waiver. Thus, De La Fuente’s claim for declaratory relief against Secretary Kemp was barred under *Olvera*. 298 Ga. at 427.

Even if De La Fuente’s claim for declaratory relief were not barred by sovereign immunity, he has failed to state a cognizable claim for declaratory relief because it is clear that he seeks an order compelling the Secretary to take some action. “The distinctive characteristic of a declaratory judgment is that the declaration stands by itself and does not seek execution or performance by the defendant.” *Charles H. Wesley Educ. Found., Inc. v. State Election Bd.*, 282 Ga.

707, 711 (2008) (quoting *Gelfand v. Gelfand*, 281 Ga. 40 (2006)) (emphasis added). Because a declaratory judgment action cannot be used to compel a public official to take any specific action, *Charles Wesley*, 282 Ga. at 711, De La Fuente's claim for declaratory relief was subject to dismissal.

**E. The Request for Injunctive Relief was Barred by the Doctrine of Sovereign Immunity.**

Sovereign immunity also bars any claim against the State seeking injunctive relief, absent an express legislative or constitutional waiver of immunity. *Ctr. for a Sustainable Coast*, 294 Ga. 593. Again, the statutes that De La Fuente alleged Secretary Kemp violated (O.C.G.A. §§ 21-2-132, 21-2-170, and 21-2-171) do not contain an express waiver of sovereign immunity, and De La Fuente did not identify any such waiver. Thus, De La Fuente's claim for injunctive relief against Secretary Kemp was barred under *Sustainable Coast*. 294 Ga. at 596–97.

**IV. CONCLUSION.**

For the foregoing reasons, the dismissal by the trial court of De La Fuente's action was proper, and Secretary Kemp respectfully requests that this Court affirm the ruling below.

Respectfully submitted,

SAMUEL S. OLENS            551540  
Attorney General

DENNIS R. DUNN            234098  
Deputy Attorney General

RUSSELL D. WILLARD 760280  
Senior Assistant Attorney General

/s/Cristina M. Correia  
CRISTINA M. CORREIA 188620  
Assistant Attorney General  
ccorreia@law.ga.gov

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

Please address all  
Communication to:  
JOSIAH B. HEIDT  
Assistant Attorney General  
40 Capitol Square, S.W.  
Atlanta, GA 30334-1300  
PH: (404) 656-3389  
FAX: (404) 657-9932  
Email: jheidt@law.ga.gov

**CERTIFICATE OF SERVICE**

I do hereby certify that I have this day served the within and foregoing document, entitled Appellees' Brief, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed to Appellant's counsel:

Bryan Sells  
Law Offices of Bryan Sells, LLC  
P.O. Box 5493  
Atlanta, GA 31107

Gerald Weber  
Law Offices of Gerry Weber, LLC  
Post Office Box 5391  
Atlanta, GA 31107

Nora Benavidez  
Law Office of Nora Benevidez  
869 Briarcliff Road, #B-12  
Atlanta, GA 30306

This 24th day of October 2016.

/s/Cristina M. Correia  
CRISTINA M. CORREIA      188620  
Assistant Attorney General