

**SECOND DIVISION
MILLER, P. J.,
HODGES, J., and PIPKIN, J.**

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed.
<https://www.gaappeals.us/rules>

DEADLINES ARE NO LONGER TOLLED IN THIS COURT. ALL FILINGS MUST BE SUBMITTED WITHIN THE TIMES SET BY OUR COURT RULES.

January 2, 2021

**NOT TO BE OFFICIALLY
REPORTED**

In the Court of Appeals of Georgia

A21A0808. THE NEW GEORGIA PROJECT v. SHELTON, IN MI-034
HER OFFICIAL CAPACITY AS CHAIR OF THE
HOUSTON COUNTY BOARD OF ELECTIONS et al.

MILLER, Presiding Judge.

Appellant The New Georgia Project is a voting rights group that seeks a writ of mandamus and injunctive relief requiring Houston County to allow in person early voting on January 4, 2021, given that the final day of the normal statutory early voting period is January 1, 2021, a legal holiday.¹ A thorough review of the relevant Georgia law compels us to conclude that early voting on the day before an election, including a runoff election, is not allowed under Georgia law. We therefore affirm the trial court's denial of this petition for a writ of mandamus and injunctive relief.

¹ We GRANT The New Georgia Project's emergency motion to expedite this appeal.

“[M]andamus is an extraordinary remedy to compel a public officer to perform a required duty when there is no other adequate legal remedy. It is a discretionary remedy that courts may grant only when the petitioner has a clear legal right to the relief sought or the public official has committed a gross abuse of discretion.” (Citation omitted.) *Rigby v. Boatright*, 294 Ga. 253, 254 (751 SE2d 851) (2013). Additionally, “[t]he grant or denial of injunctive relief is a matter within the discretion of the trial court, and appellate review of the trial court’s decision is limited to a determination of whether the trial court abused its discretion.” (Citation omitted.) *City of Stockbridge v. Stuart*, 329 Ga. App. 323, 326 (2) (765 SE2d 16) (2014). “Entry of a permanent injunction is appropriate in clear and urgent cases where there is a vital necessity to prevent a party from being damaged and left without an adequate remedy at law.” (Citation omitted.) *Smith v. DeKalb County*, 288 Ga. App. 574, 576 (2) (654 SE2d 469) (2007).

In November 2020, the people of Georgia voted to fill multiple government positions, including both of Georgia’s United States Senate seats. According to the certified results of that election, no candidate received a majority of the vote in either Senate race, triggering two runoff elections on January 5, 2021, pursuant to OCGA § 21-2-501. The New Georgia Project filed this action against the members of

Houston County’s Board of Elections, seeking a writ of mandamus and an injunction ordering the County to open for in person early voting on January 4, 2021.² Following a hearing, the trial court denied the writ and the request for injunctive relief, and this appeal followed.

Under OCGA § 21-2-385 (d) (1), the time for early voting shall end on “the Friday immediately prior to” a runoff election. For the January 5, 2021 Senate runoff elections, the “Friday immediately prior” is New Year’s Day, a legal holiday under OCGA § 1-4-1. The Georgia Code provides generally that “[w]hen 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 shall be the last day for the exercise of such privilege or the discharge of such duty.” OCGA § 21-2-14. The New Georgia Project argues that this general time provision requires the County to open early voting on the next succeeding business day after New Year’s Day, which would be Monday, January 4, 2021.

The flaw in this argument is that the Georgia Code also specifically provides that “no absentee ballot shall be issued on the day prior to a primary or election,”

² The New Georgia Project also unsuccessfully sought to have Houston County open Early Voting on Saturday, December 19, 2020. As that date has since passed, they do not challenge that portion of the trial court’s order in this appeal.

OCGA § 21-2-384 (a) (2), and under Georgia law, an early voting ballot is legally considered an absentee ballot. See *Meade v. Williamson*, 293 Ga. 142, 146 (1) n.10 (745 SE2d 279) (2013) (“The definition of ‘absentee elector’ includes a voter who casts an absentee ballot in person in early voting.”). January 4, 2021, the next business day following January 1, 2021, would be the day prior to the runoff elections on January 5, 2021. “Where, as here, a statute contains both a general provision and a specific one, the particular provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision.” (Citation and punctuation omitted.) *Gibbs v. Bright*, 330 Ga. App. 851, 855 (1) (769 SE2d 590) (2015). OCGA § 21-2-384 (a) (2)’s prohibition on early voting on the day before an election is more specific than the general date statute, so it controls in the event of a conflict. Because early voting on the day before an election is not allowed under Georgia law, Houston County does not have to provide in person early voting on January 4, 2021.

We reject The New Georgia Project’s argument that OCGA § 21-2-384 (a) (2) does not apply here because the statute only forbids the casting of early votes before a “primary or election” without any specific mention of runoffs. After reviewing the

statutory framework, we conclude that the phrase “primary or election” in this particular provision does include runoff elections.

When faced with questions of statutory interpretation, we apply the fundamental rules of statutory construction that require us to construe the statute according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage. We must also seek to effectuate the intent of the Georgia legislature. In this regard, in construing language in any one part of a statute, a court should consider the entire scheme of the statute and attempt to gather the legislative intent from the statute as a whole.

(Citation omitted.) *Wilbur v. Floyd*, 353 Ga. App. 864, 867 (1) (839 SE2d 675) (2020).

We first note that Georgia law specifically provides that a “run-off election[] or special election runoff shall be a continuation of the . . . election[] or special election for the particular office concerned.” OCGA § 21-2-501 (a) (10); see also Ga. Const. of 1983, Art. II, Sec. II, Par. II; *Public Citizen, Inc. v. Miller*, 813 F.Supp. 821, 829 (V) (A) (N.D. Ga.), aff’d 992 F2d 1548 (11th Cir. 1993) (“Because the manner by which Georgia conducts elections is to require the winner to receive a majority of the vote, when none of the candidates accomplished this, the state-proscribed manner

of electing Senators required that the general election be continued with a run-off on a later date.”). Thus, Georgia law essentially treats a runoff election as part and parcel of the “election” from which it initiated.³

Further, Georgia’s Election Code (and OCGA § 21-2-384 specifically) uses the phrase “primary or election” in a plethora of contexts where it is obvious that the phrase is generally meant to include primary runoffs and election runoffs as well. For instance, if we were to adopt the plaintiff’s reading of the phrase “primary or election” to exclude primary runoffs and election runoffs, it would mean that, in runoffs, (1) it would not be a crime to tamper with voting machines,⁴ intimidate

³ We are aware that the Georgia Code refers to runoffs separately from “primaries” and “elections” in multiple places, including earlier in OCGA § 21-2-384 (a) (2). See OCGA § 21-2-384 (a) (2); see also, e.g., OCGA § 21-2-385 (b). As noted in the next paragraph, however, this particular point is not conclusive as to whether runoffs should be considered part of the phrase “primary or election.”

⁴ OCGA § 21-2-580 (1) (“Any person who [u]nlawfully opens, tampers with, or damages any voting machine or electronic ballot marker or tabulating machine to be used or being used at any *primary or election* . . . is guilty of a felony.” (emphasis supplied)).

voters,⁵ or fraudulently vote;⁶ (2) voters would not be entitled to cast a provisional ballot;⁷ (3) election officials would not be required to secure or keep absentee ballots safe before the closing of the polls;⁸ (4) voters would not be entitled to take time off work to vote;⁹ (5) election officials would not be able to order envelopes or other

⁵ OCGA § 21-2-567 (a) (1) (“Any person who uses or threatens to use force and violence, or acts in any other manner to intimidate any other person, to [v]ote or refrain from voting at any *primary or election* . . . shall be guilty of a felony[.]”) (emphasis supplied).

⁶ OCGA § 21-2-571 (“Any person who votes or attempts to vote at any *primary or election*, knowing that such person does not possess all the qualifications of an elector at such *primary or election* . . . or who knowingly gives false information to poll officers in an attempt to vote in any *primary or election* shall be guilty of a felony[.]”) (emphasis supplied).

⁷ OCGA § 21-2-418 (a) (“If a person presents himself or herself at a polling place . . . for the purpose of casting a ballot in a *primary or election* stating a good faith belief that he or she has timely registered to vote in such county of residence in such *primary or election* and the person’s name does not appear on the list of registered electors, the person shall be entitled to cast a provisional ballot in his or her county of residence in this state as provided in this Code section.”) (emphasis supplied).

⁸ OCGA § 21-2-386 (a) (1) (A) (“The board of registrars or absentee ballot clerk shall keep safely, unopened, and stored in a manner that will prevent tampering and unauthorized access all official absentee ballots received from absentee electors prior to the closing of the polls on the day of the *primary or election* . . .”) (emphasis supplied).

⁹ OCGA § 21-2-404 (“Each employee in this state shall, upon reasonable notice to his or her employer, be permitted by his or her employer to take any necessary time off from his or her employment to vote in any municipal, county, state, or federal

supplies;¹⁰ (6) voters may potentially be unable to dispute whether they voted absentee or not;¹¹ and (7) the special provisions assisting elderly or disabled voters and voters confined in a hospital would not apply.¹²

To conclude that the Legislature meant for the phrase “primary or election” to always and automatically exclude primary runoffs or election runoffs would result in radically and fundamentally different rules in place for runoffs than for regular primaries and elections. See *LFR Investments v. Van Sant*, 355 Ga. App. 101, 103 (1) (842 SE2d 574) (2020) (“Our construction of a statute also must square with common

political party *primary or election* . . .”) (emphasis supplied).

¹⁰ OCGA § 21-2-384 (a) (1) (“Envelopes and other supplies as required by this article may be ordered by the superintendent, the board of registrars, or the absentee ballot clerk for use in the *primary or election*.”) (emphasis supplied).

¹¹ OCGA § 21-2-384 (d) (“Absentee electors whose names appear on the master list may be challenged by any elector prior to 5:00 P.M. on the day before the *primary or election*.”) (emphasis supplied).

¹² OCGA § 21-2-384 (a) (4) (“The delivery of an absentee ballot to a person confined in a hospital may be made by the registrar or clerk on the day of a *primary or election* or during a five-day period immediately preceding the day of such *primary or election*.”) (emphasis supplied); OCGA § 21-2-409.1 (“[E]ach elector who is 75 years of age or older or who is disabled and requires assistance in voting . . . [shall] be authorized at any *primary or election* to vote immediately at the next available voting compartment or booth without having to wait in line.”) (emphasis supplied).

sense and sound reasoning, and we must avoid unreasonable or absurd consequences not contemplated by the legislature.”) (citation and punctuation omitted). Having reviewed the entire statutory context within which the relevant portion of OCGA § 21-2-384 (a) (2) appears, we cannot find any evidence that the Legislature intended to use the phrase “primary or election” in this specific section so as to exclude runoff primaries or runoff elections from its purview. We therefore conclude that OCGA § 21-2-384 (a) (2)’s prohibition against casting early votes on the day before an election also applies to runoff elections.

We thus conclude that the trial court did not abuse its discretion in denying The New Georgia Project’s petition for a writ of mandamus and injunctive relief because Houston County does not have a clear legal duty to provide in person early voting on January 4, 2021. We therefore affirm.

Judgment affirmed. Hodges and Pipkin, JJ., concur.