IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

MICHAEL J. DAUGHERTY, Contestant, v. FULTON COUNTY REGISTRATION AND ELECTION BOARD, DEKALB COUNTY REGISTRATION AND ELECTION BOARD, COFFEE COUNTY BOARD OF REGISTRATION AND ELECTIONS, GEORGIA STATE ELECTION BOARD, BRAD RAFFENSPERGER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE, RAPHAEL G. WARNOCK, AND THOMAS JONATHAN OSSOFF, Defendants.	CIVIL ACTION NO: 2021CV344953

SENATOR RAPHAEL WARNOCK'S
MOTION TO DISMISS ELECTION CONTEST WITH BRIEF IN SUPPORT[1]

INTRODUCTION

Raphael Warnock is a U.S. Senator. He was sworn in and seated by the U.S. Senate nearly three months ago, on January 20, 2021. The plain text of the Constitution and Supreme Court precedent both establish that the U.S. Senate is the only body that can unseat him, and as a result this Court no longer has the power to issue any meaningful relief. This case is moot and should be dismissed for that reason alone.

But even if the case were not moot, Contestant Michael J. Daugherty's failure to properly serve Senator Warnock and the equitable doctrine of laches would independently bar Mr.

[1] As explained herein, service of process in this case was untimely and improper. Accordingly, Senator Warnock was not obligated by any governing rule of Georgia law to file either an answer or motion to dismiss by today's date. Nevertheless, out of an abundance of caution (and particularly in light of Contestant's previous filings of motions for default judgments against other defendants in this matter), and without waiving his right to any of the defenses asserted herein concerning improper service or in the accompanying answer, Senator Warnock files the instant motion to dismiss Contestant's Petition and the accompanying answer.

Daugherty's claims. Mr. Daugherty has not complied with any of the rules of service governing an election contest, and his failure to serve documents with any diligence in a time-critical action such as this one requires dismissal. More fundamentally, his Petition is not based on facts that arose for the first time in connection with the runoff, but on allegations related to the *November 3, 2020* general election[2]—or even, in some cases, on elections administration decisions that were made *years* earlier. Mr. Daugherty could have pursued these claims well before the runoff election. In fact, nearly all of Mr. Daugherty's allegations are recycled from earlier, unsuccessful lawsuits by other litigants, who, unhappy with the results of the 2020 presidential election, repeatedly tried in vain to convince the judiciary to overturn Georgia voters' decision in cases filed after the general election. Several courts found those claims barred by laches even then. Mr. Daugherty's Petition provides no basis for finding these already stale claims timely.

Finally, even if the Court were to find the case neither moot nor barred by inadequate service and laches, dismissal would still be warranted because the Petition fails to state a claim under O.C.G.A. § 21-2-522. That statute sets forth only a handful of limited grounds upon which Georgia election results may be properly subject to an elections contest. Mr. Daugherty's Petition fails to state a claim under any of them. His problem is simple, but fatal: he has *no* evidence of quantifiable irregularities, illegal votes, or misconduct specific to the January 5 runoff, much less sufficient evidence to change or place in doubt the results of that election. Instead, his Petition concerns itself with allegations related to the general election, or generalized grievances about long-standing aspects of Georgia's elections administration, nearly all of which have been litigated

[2] For ease of comprehension, Senator Warnock generally will refer in this brief to the November 3, 2020 election as the "general election" and the January 5, 2021 election as the "runoff" or "runoff election," although he recognizes that his elections were under Georgia law a special election and a special election runoff, respectively.

before without success. Mr. Daugherty has failed to meet the high bar required to mount a successful election contest. This Court should promptly dismiss the Petition.

BACKGROUND

Georgia law requires a winning candidate to receive "a majority of the votes cast." O.C.G.A. § 21-2-501(a)(1). If no candidate surpasses the 50 percent threshold, a runoff election is held between the two candidates that received the highest vote totals. *Id*. In the November 3, 2020 election, both of Georgia's U.S. Senate seats were on the ballot. Because no candidate for either seat won a majority of the vote, the top two vote-getters for each went on to a runoff. That election was subsequently held on January 5, 2021.[3] The following day, Rev. Raphael Warnock was declared the winner in the special election runoff between him and then-Senator Kelly Loeffler, and Jon Ossoff was declared the winner of his run-off election against then-Senator David Perdue. The Secretary of State officially certified both run-off election results on January 19, and both Senators Ossoff and Warnock were sworn in and seated in the U.S. Senate the next day.[4]

Mr. Daugherty did not file this Petition until five days later, on January 25. In it, he claims that a new runoff election is required. Pet. at 1. He requests that the Court (1) declare Senator Ossoff ineligible as a candidate, *id.* at 13–14; (2) declare the runoff election results invalid and order that two new elections be conducted by paper ballots, *id.* at 14; (3) permanently enjoin

[3] Also on the ballot on January 5 was a statewide run-off election for Public Service Commission District 4. There, Republican nominee Lauren Bubba McDonald, Jr. defeated Democratic nominee Daniel Blackman by a smaller margin than either Senator Ossoff or Senator Warnock's margin of victory. Notably, Contestant does not contest Commissioner McDonald's election or name him as a respondent to his Petition.

[4] *See* Georgia Secretary of State's Office, Secretary of State's Office Certifies Runoff Election Results (Jan. 19, 2021), https://sos.ga.gov/index.php/elections/secretary_of_states_office_certifies_runoff_election_results; *see also* Pet. ¶ 13; Emily Cochrane, The New York Times, *Democrats Officially Take Control of the Senate, as Jon Ossoff and Raphael Warnock are Sworn In* (Jan. 20, 2021), https://www.nytimes.com/2021/01/20/us/harris-swears-in-warnock-ossoff-padilla.html.

Dominion voting machines from being used in Georgia elections, *id.*; and (4) grant Mr. Daugherty access to all mail-in ballots, ballot images, and election reports from the November 3 general election, as well as permission to conduct a forensic review of the voting machines used in those elections and the January 5 runoff. *Id.*

Mr. Daugherty offers little to no support for this Contest. He supports most of his requests with a myriad of exhibits attached to the Petition itself, the bulk of which are recycled from cases that were filed in the weeks following the November 3 election.[5] Given the provenance of this "evidence," it is not surprising that its focus is almost entirely on events that predate the runoff elections, in some cases by many months, or even years. *See, e.g.*, Pet. Exs. 1-15, 16-24, 27, 29. Even more attenuated, the Petition also rests on outdated reports from other states about their voting systems. Pet Exs. 2, 3. The only exhibits even tangentially related to the January 5 runoff are three exhibits concerning a Fulton County Open Records Request made in January 2021, *see* Pet. Exs. 25, 26; a video of the Fulton County Election Board meeting on January 19, 2021, Pet. Ex. 28; and an election-day press release from the Secretary of State's Office titled "Runoff Election Running Smoothly Across the State," Pet. Ex. 30. But none of those exhibits provide any evidence of misconduct, fraud, or irregularities in the January 5 runoff, much less evidence sufficient to change or place in doubt those elections' results.

LEGAL STANDARD

O.C.G.A. § 21-2-522 sets forth the sole grounds upon which the results of a Georgia election may be contested. To state a claim under the statute, the petitioner must allege sufficient

[5] Exhibits 21 and 22, for example, were affidavits submitted in *Wood v. Raffensperger*, 1:20-cv-04651-SDG, 2020 WL 6817513 (N.D. Ga. Nov. 20, 2020), where the district court dismissed a challenge to Georgia's November election results under the doctrine of laches because the plaintiff "could have, and should have, filed his constitutional challenge much sooner than he did, and certainly not two weeks *after* the General Election." *Id.* at *7.

facts to establish that: (1) the winner of the election is ineligible for the office in dispute; (2) there was misconduct, fraud, irregularity, or errors in counting ballots (including, for example, in the counting of illegal votes, or the rejection of legal votes) "*sufficient to change or place in doubt* the result"; or (3) "which shows that another was the person *legally* . . . *elected* . . . ." O.C.G.A. § 21-2-522 (emphases added). Courts have "broad authority" in managing election contests, however, they must always "balance[] citizens' franchise against the need to finalize election results, which, in turn, facilitates the orderly and peaceful transition of power that is a hallmark of our government." *Martin v. Fulton Cty. Bd. of Registration & Elections*, 307 Ga. 193, 194 (2019).

In an election contest (as in any other type of civil case), a court should grant a motion to dismiss when the petition fails to state a claim upon which relief can be granted. O.C.G.A. § 9-11-12(b); *see, e.g.*, *DeLeGal v. Burch*, 273 Ga. App. 825 (2005) (upholding dismissal of election contest for failure to state a claim). Election contests may also be dismissed under equitable doctrines, such as mootness or laches. Because the finality of election results is important, election contests are even more susceptible to dismissal than most other types of cases when there is a delay in seeking relief. *See, e.g.*, *Boland v. Raffensperger*, Civil Action No. 2020CV343018, Final Order at 4–5 (Fulton Cty. Sup. Ct. Dec. 8, 2020) (dismissing election contest for mootness, failure to state a claim, and "rest[ing] on speculation rather than duly pled facts").

ARGUMENT

I. The Court lacks jurisdiction to hear this contest.

A. This case is moot.

Because Senator Warnock has been seated by the U.S. Senate, this Court is foreclosed from issuing any meaningful relief related to the results of the January 5 runoff. As a result, this contest is moot, and the Petition should be dismissed.

Under Article I, Section 5 of the U.S. Constitution, the U.S. Senate is the only body with the power to adjudicate its members' qualifications: "[e]ach House [of Congress] shall be the judge of the elections, returns and qualifications of its own members . . . ." U.S. Const. art. I § 5 cl. 1; *see also* U.S. Const. art. I, § 5, cl. 2 (only manner of removing seated senator is by two-thirds majority vote of Senate). Consequently, the U.S. Supreme Court has described the question of "[w]hich candidate is entitled to be seated in the Senate" as "a nonjusticiable political question." *Roudebush v. Hartke*, 405 U.S. 15, 19 (1972); *see also, e.g.*, *Baker v. Carr*, 369 U.S. 186, 211 (1962) (explaining that "the exercise of a discretion demonstrably committed to the executive or legislature" by a court is a nonjusticiable political question). There is no place for judicial intrusion. Any such intrusion would "frustrate[] the Senate's ability to make an independent final judgment" about its membership, *Roudebush*, 405 U.S. at 25, and would be contrary to the "textually demonstrable constitutional commitment" of this question to the Senate. *Morgan v. United States*, 801 F.2d 445, 447 (D.C. Cir. 1986) (Scalia, J.) (quoting *Baker*, 369 U.S. at 217).

Senator Warnock was sworn in and seated as a U.S. Senator nearly three months ago for a term that is not set to expire until 2023. *See* 167 Cong. Rec. S63-64 (2021). No qualifications were placed on his seating. *See id*. Consequently, no court has the power to alter the Senate's judgment—including this one. *See Roudebush*, 405 U.S. at 18-19; *see also Reed v. Cty. Comm'rs*,

277 U.S. 376, 388 (1928) ("[The Senate] is the judge of the elections, returns, and qualifications of its members. It is fully empowered, and may determine such matters without the aid of the House of Representatives or the executive or judicial department.").

To find otherwise would be to ignore the Georgia Supreme Court's caution that the judiciary's role is to address "justiciable cases." *Thompson v. Talmadge*, 201 Ga. 867, 874 (1947). Such cases are "definite and concrete, touching the legal relations of parties having adverse legal interests," rather than "hypothetical, abstract, academic or moot" questions of law. *Allstate Ins. Co. v. Shuman*, 163 Ga. App. 313, 315 (1982). A "case is moot when its resolution would amount to the determination of an abstract question not arising upon existing facts or rights." *Collins v. Lombard Corp.*, 270 Ga. 120, 121 (1998) (citing *Chastain v. Baker*, 255 Ga. 432, 433 (1986)).

In election contests, "[t]he mootness doctrine applies . . . when the general election has already taken place," *Jordan v. Cook*, 277 Ga. 155, 156 (2003), as well as when the relief the contestant seeks "is no longer available," *Boland*, Civil Action No. 2020CV343018, Final Order at 6. This is because Georgia's contest provisions "are based on an underlying policy that election-related appeals must be timely considered" to ensure that election results are final and avoid the significant expense of holding multiple elections. *Jordan*, 277 Ga. at 156 (citation omitted). For that reason, where candidates have contested an election after the fact and failed to take diligent steps before the election to resolve known issues, instead "gambl[ing] on the outcome of the election," and only contesting "after the election results showed that he did not prevail," courts have found that election contests are moot. *Id.*; *see also id.* (cautioning that "every effort" to

resolve known issues before the election should be made "otherwise, the appeal is rendered moot by the election").

Here, the bulk of Mr. Daugherty's allegations stem from the November 3 general election. Some even raise issues that were known months (if not years) prior. In fact, all but three of the exhibits that Mr. Daugherty attaches to his Petition either relate to the November 3 general election, *see, e.g.*, Pet. Exs. 1, 5-15, 16-24, 27, 29, or concern events that occurred prior to that, *see id.* 2-4.[6] *See also* Pet. at 7 (discussing water main break and "skirted table" in the tabulating room in Fulton County in November 3 general election); *id.* at 7-8 (discussing anomalies with ballot counting and processing taking place on November 3–4); *id.* at 9-10 (discussing purported anomalies with November ballot counts, not January ballot counts). The only allegations Mr. Daugherty makes about any purported irregularities in the January 5 runoff are related to technical errors that occurred with the voting system and poll books that caused short delays in voting in a single county on election day, Pet. at 13, which even the exhibits attached to Mr. Daugherty's Petition make clear did not cause voters to be unable to cast a ballot. *See* Pet. Ex. 30 ("The Senate runoff election in Georgia is running smoothly."). Mr. Daugherty makes no allegations establishing that misconduct, fraud, regulatory, or error occurred to any meaningful degree, much less sufficient to change or place in doubt the January 5 runoff results.

Most critically, as discussed *supra*, the U.S. Senate has seated Senator Warnock. As a result, this Court cannot grant relief on any of Contestant's claims. Accordingly, "the relief which

[6] Notably, the lawsuits brought in the weeks following the November general election that made these exact same allegations were uniformly dismissed, including for mootness. *See, e.g.*, *Wood v. Raffensperger*, Civil Action No. 2020-CV-342959 (Fulton Cty. Sup. Ct. Dec. 8, 2020) (dismissed for failure to name the proper defendants); *Boland*, Civil Action No. 2020CV343018, Final Order at 4–5 (dismissed, among other reasons, for mootness).

[Contestant] seeks . . . is not available," and Contestant's claims are moot. *Boland*, Civil Action No. 2020CV343018, Final Order at 6.

B. Senator Warnock has not been properly served.

This Court also lacks jurisdiction because Senator Warnock has not been timely or properly served. "Where there has been no legal service on the defendant and no waiver of service, the court has no jurisdiction to enter any judgment in the case unless it be one dismissing the case for lack of jurisdiction." *DeJarnette Supply Co. v. F.P. Plaza, Inc.*, 229 Ga. 625, 625 (1972); *see also Swain v. Thompson*, 281 Ga. 30, 31–32 (2006) (holding an unexcused delay in properly serving elections contest petition is grounds for dismissal). In an election contest, the duty of the party bringing the action to ensure proper and timely service is heightened. *See Swain*, 281 Ga. at 31-32. This is because the legislature has made clear that such actions should be swiftly resolved. *Id.* As a result, in circumstances like this one, where service has or will occur outside the five-day period for filing election contests, the contestant must demonstrate diligence in seeking to serve defendants. *Id.* at 32. Failure to exercise such diligence is grounds for dismissal. *Id.*

Election contests also require service of special process, which was not followed here. *First*, a contestant must serve the State Election Board with a copy of the Petition by either personally serving the chairperson, or by mailing a copy of the petition to the chairperson by certified or registered mail or overnight delivery and must file a certificate of such service with the Court. O.C.G.A § 21-2-524(b). *Second*, upon filing a petition the clerk must issue notice, in the form of special process directed to the sheriff of the County in which the election contest is filed, which shall be served by the sheriff upon the defendant and any other person named in the petition with a copy of the petition—including the candidates in an election contest. O.C.G.A § 21-2-524(f).

Mr. Daugherty has not complied with any of these requirements, purporting to have effectuated service of Senator Warnock with an incorrect form of service and doing so well outside of any reasonably diligent timeframe. As an initial matter, the affidavit of purported service on Senator Warnock filed by Mr. Daugherty states that a process server—not the sheriff—served ordinary process on an aide to Senator Warnock on March 15 at the Senator's Atlanta office. *See* Aff. of Service on Raphael G. Warnock ¶¶ 1-2. This does not comply with any of the requirements for special process required under O.C.G.A. § 21-2-524(f)—it does not include the required special process form, nor was it served by the sheriff. Mr. Daugherty's attempt at service is also well outside any diligent service period, which is also fatal to his Petition. Mr. Daugherty filed his contest on the last possible day that he could—the fifth day after certification of the runoff results. O.C.G.A. § 21-2-524(a). Nonetheless, he waited nearly two months to even attempt to serve Senator Warnock, and then did so improperly. Mr. Daugherty's actions are "inexcusable" in this context and warrant dismissal. *Swain*, 281 Ga. at 32.

Finally, Mr. Daugherty's attempt at service would not even be sufficient in an ordinary case, as the person who was actually served is not an agent authorized to accept service on the Senator's behalf (nor was he asked as much by the process server). Aff. of Gene Autry Morris ¶¶ 2, 4 (Exhibit 1); *see also* O.C.G.A. § 9-11-4(e)(7) (requiring service of ordinary process to be made by serving a defendant personally, by leaving it at the defendant's "dwelling house," or by serving process upon "an agent authorized by appointment or by law to receive service of process"). Accordingly, service was improper in all respects, further warranting dismissal of this action.

II. This contest is barred by laches.

This election contest—which is based almost exclusively on allegations stemming from or preceding the November 3 general election—is also separately and independently barred by laches.

Laches may bar a claim when (1) the lapse of time and (2) the claimant's neglect in asserting rights (3) prejudiced the adverse party. *Waller v. Golden*, 288 Ga. 595, 597 (2011). All three elements are satisfied here.

First, Mr. Daugherty's delay in filing his Petition is both considerable and objectively unreasonable. Though Mr. Daugherty purports to challenge the validity of the January 5 runoff, his allegations are based almost entirely on events that occurred *at the latest* during the week immediately following the November 3 general election.[7] *Supra* at 4. And many of the issues he purports to raise—such as his allegations concerning the Dominion voting machines, *see* Pet. Exs. 2, 3, 4—could have been raised even earlier. In fact, issues related to Georgia's voting machines have been heavily litigated for years, including well before the November 3 general election, much less the January 5 runoff. *See, e.g.*, *Curling v. Raffensperger*, No. 1:17-CV-2989-AT, 2020 WL 5994029 (N.D. Ga. Oct. 11, 2020). Mr. Daugherty waited far too long to challenge the processes he now complains about, easily satisfying the first two prongs of the laches test. *See, e.g.*, *Wood*, 2020 WL 6817513, at *7 (finding laches barred a challenge to the November 3 presidential election where the plaintiff "could have, and should have, filed his constitutional challenge much sooner than he did, and certainly not two weeks after the General Election").

There is also no question that Mr. Daugherty's unjustifiable delay is prejudicial. Senator Warnock has been seated by the U.S. Senate. He is actively engaged in the representation of Georgia's citizens in that legislative body and have been for over two months now. At least four million voters cast their votes in the January 5 runoff election, in which Senator Warnock won his

[7] Mr. Daugherty's sole allegation concerning any issues in the January 5 runoff involves a minor issue concerning Columbia County's voting system and poll books on the morning of January 5 which, according to Mr. Daugherty's own exhibits, was resolved by 10 a.m. that morning and neither prevented anyone from voting nor caused any illegal votes to be cast. *See* Pet. Ex. 30.

race with over 93,000 votes. Even assuming it were within the judiciary's power to do (which it is not), invalidating the certified results of that election, unseating Senator Warnock, and re-running the entire runoff election would cause severe prejudice to the named Defendants as well as millions of Georgia voters. It would also do serious (and, likely, permanent) damage to the integrity of the state's elections system, and would, undoubtedly, cost the State and its taxpayers millions of dollars. In the meantime, Georgians would likely be left without full representation in the U.S. Senate. There is no precedent for this, and it is antithetical to the very fabric of our system of representative government.

That these claims are brought in the context of an election contest does not shield them from laches. Typically, an election contest is brought to challenge some alleged error or impropriety that could not reasonably have been predicted before the election. *See, e.g.*, *McIntosh Cty. Bd. of Elections v. Deverger*, 282 Ga. 566 (2007) (successful contest where original election was decided by four votes and challenger identified four votes that were erroneously rejected); *Whittington v. Mathis*, 253 Ga. 653 (1985) (successful contest where original election was decided by two votes and challenger identified four voters wrongfully turned away from voting because of poll worker error). Here, however, Senators Warnock was elected over his opponent by nearly 100,000 votes, and Mr. Daugherty's Petition fails to identify *any* basis to doubt the integrity of those results. Instead, he focuses on actions and systems that were well-known—many of which were the subject of prior *pre-election challenges* that were firmly rejected by courts—long before the January 5 runoff took place.

For good reason, "the law imposes the duty on parties having grievances . . . to bring the grievances forward for pre-election adjudication." *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973). Courts have long recognized that

> the failure to require prompt pre-election action in such circumstances as a prerequisite to post-election relief . . . may permit, if not encourage, parties who could raise a claim 'to lay by and gamble upon receiving a favorable decision of the electorate' and then, upon losing, seek to undo the ballot results in a court action.

Id. The Supreme Court of Georgia has "wholly reject[ed] the notion that the laws of this State allow a candidate to sit on his rights hoping for the best." *Jordan*, 277 Ga. at 156. It has also cautioned that challengers like Mr. Daugherty "should make every effort to dispose of election disputes with dispatch" and that courts must not interfere with the "orderly process of elections" after one has been held. *Payne v. Chatman*, 267 Ga. 873, 876 (1997). Georgia's precedent is similarly in line with the formidable weight of authority in the federal courts, as well as in other states that have likewise denied extraordinary relief in election-related cases due to laches or similar considerations.[8] This Court should not hesitate to do the same.

III. The Petition fails to state a claim upon which relief can be granted.

Finally, even if Mr. Daugherty's Petition could overcome the substantial hurdles discussed above, it would nevertheless be subject to dismissal because it fails to state a claim upon which

[8] *See, e.g.*, *Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004) ("It would be inequitable to order preliminary relief in a suit filed so gratuitously late in the campaign season."); *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990) (denying relief where plaintiffs' delay risked "interfer[ing] with the rights of other Indiana citizens, in particular the absentee voters"); *Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980) (laches barred claims where candidate waited two weeks to file suit and preliminary election preparations were complete); *McCarthy v. Briscoe*, 539 F.2d 1353, 1354-1355 (5th Cir. 1976) (denying emergency injunctive relief where election would be disrupted by lawsuit filed in July seeking ballot access in November election); *Navarro v. Neal*, 904 F. Supp. 2d 812, 816 (N.D. Ill. 2012) ("By waiting so long to bring this action, plaintiffs 'created a situation in which any remedial order would throw the state's preparations for the election into turmoil.'"), *aff'd*, 716 F.3d 425 (7th Cir. 2013); *Clark v. Reddick*, 791 N.W.2d 292, 294-296 (Minn. 2010) (stressing "the need for diligence and expeditious action by parties bringing ballot challenges"); *State ex rel. Schwartz v. Brown*, 197 N.E.2d 801 (Ohio 1964) (dismissing mandamus complaint to place candidate on ballot after ballot form was certified). Georgia courts have long looked to other jurisdictions for guidance. *See, e.g.*, *Stubbs v. Hall*, 308 Ga. 354, 358 (2020) (identifying occasions when Georgia courts seek federal case guidance); *Slade v. Rudman Res., Inc.*, 237 Ga. 848, 850 (1976) (surveying authority from other jurisdictions for guidance).

relief can be granted. All of Mr. Daugherty's claims suffer the same fundamental flaws. Most notably the Petition fails to quantify the specific number of votes that it contends were illegally cast in the January 5 runoff, making it impossible to determine whether the allegations, if proven, would establish that the results of the election are at all likely to change. In fact, Mr. Daugherty fails to plausibly allege that misconduct, fraud, irregularity, or errors occurred in the January 5 runoff. Instead, his Petition seeks to support its claims based on general allegations about a *different* election—the November 3 general election—or, in some instances, features of the state's election system that have been in place for years, as well as outdated reports from other states. This is woefully insufficient to meet the high bar necessary to state a claim for an election contest.

Georgia courts "must presume that the results of an election contest are valid." *Middleton v. Smith*, 273 Ga. 202, 203 (2000). The election contest statute lays out five grounds upon which an election may be contested, only three of which are relevant here: (1) "[w]hen illegal votes have been received or legal votes rejected at the polls sufficient to change or place in doubt the result," O.C.G.A. § 21-2-522(3), (2) "[f]or any error in counting the votes or declaring the result of the primary or election, if such error would change the result," O.C.G.A. § 21-2-522(4), or (3) on the basis of "[m]isconduct fraud, or irregularity by any primary or election official or officials sufficient to change or place in doubt the result," O.C.G.A. § 21-2-522(1). Crucially, when alleging illegal voting, the contestant must show both "that [1] electors voted *in the particular contest being challenged* and [] [2] a sufficient number of them were not qualified to vote." *Deverger*, 282 Ga. at 567 (emphasis in original); *see also Miller v. Kilpatrick*, 140 Ga. App. 193, 193 (1976) (reversing trial court order of new election where ten total illegal votes were insufficient to change or place in doubt the result of the election). Similarly, when demonstrating misconduct and irregularities, "[i]t is not sufficient to show irregularities which simply erode confidence in the

outcome of the election. Elections cannot be overturned on the basis of mere speculation or an appearance of impropriety in the election procedures." *Middleton*, 273 Ga. at 203. Instead, the "drastic remedy" of setting aside an election "should be reserved for cases in which a person challenging an election has clearly established a violation of election procedures and has demonstrated that the violation has placed the result of the election in doubt." *Martin*, 307 Ga. at 222 (citation omitted).

Mr. Daugherty's claims fall far short of these standards. For example, all three counts of the Petition appear to allege that the January 5 runoff results are infirm due to problems with vote counting or illegal voting. But the purported voting machine problems discussed in Counts 1 and 3 do not rely on information specific to the January 5 runoff. *See Deverger*, 282 Ga. at 567. Rather, the supporting allegations are based on outdated reports from other states and a February 2019 letter to the Georgia House of Representatives about generalized problems with ballot-marking devices. *See* Pet. Exs. 2-4; Pet at 4-9. This provides the Court with no useful information about whether there were in fact any specific counting errors in the January 5 runoff. Similarly, Count 2 alleges that "illegal votes" were present and "legal votes" were rejected in the January 5 runoff, but the exhibits supporting those statements all relate to the November 3 election. *See, e.g.*, Pet. at 10 (discussing seating of political party representatives in November 3 election); *id.* (discussing physical processing of ballots without creases in November 3 election). These exhibits were *rejected* by courts in cases that were brought in which the litigants challenged the results of that election and are no more persuasive here. *See supra* n.4. And, even if Mr. Daugherty had raised challenges specific to the January 5 runoff, his Petition would fail for another reason: it does not provide any specific number of voters (or ballots) who were not qualified to vote in the January 5

runoff. In fact, Mr. Daugherty admits that "[t]he number of ballots adjudicated during the January 5, 2021 election is unknown." Pet. at 9. Mr. Daugherty's Petition accordingly fails to state a claim.

Mr. Daugherty's allegations of purported misconduct are similarly unsustainable. As with his allegations of illegal voting, the bulk of his misconduct allegations are based on events that occurred before the January 5 runoff. Pet. at 4-11; Pet. Exs. 1, 4-10, 12, 14-26. This is insufficient. Even if these allegations were true—and the public record proves they are not—they are far too attenuated from the January 5 runoff to raise even the inference of misconduct. Moreover, the alleged wrongful firing of two polls mangers in December 2020 is hardly misconduct sufficient to call into doubt the results of the January 5 runoff. Indeed, even Mr. Daugherty does not allege that this resulted in the wrongful counting (or not counting) of any votes. *See Martin*, 307 Ga. at 223-25 (noting that only one case[9] has ever overturned an election for election worker misconduct under O.C.G.A. § 21-2-522(1), and that the misconduct at issue must be specific and significant enough to have resulted in the inappropriate counting or not counting of votes sufficient to overturn the result).

The only direct allegation that Mr. Daugherty makes concerning the January 5 runoff is that there was a temporary voting machine malfunction in Columbia County on Election Day. Pet. at 13. But his own evidence demonstrates that "[a]t no point did voting stop as voters continued casting ballots on emergency ballots in accordance with the procedures set out in Georgia law." Pet. Ex. 30. Ironically, this supporting exhibit (which Mr. Daugherty affirmatively attaches to his Petition) is entitled "Runoff Election Running Smoothly Across the State." *Id*. Thus, even taking Mr. Daugherty's allegations as true, they are insufficient to meet the high bar required to state a

[9] Even in that case, *Stiles v. Earnest*, 252 Ga. 260 (1984), the overturned election consisted of a referendum in Seminole County, Georgia, on whether voters would elect school board members or else continue with an appointment system. It was decided by a margin of 17 votes.

claim for an election contest under Georgia law. *See, e.g., id.*; *Middleton*, 273 Ga. at 203. The Petition should be dismissed for failure to state a claim.

CONCLUSION

For the above-stated reasons, Senator Warnock respectfully requests that this Court dismiss the Petition with prejudice.

Dated: April 9, 2021.

Respectfully submitted,

/s/ Adam M. Sparks
Halsey G. Knapp, Jr.
Georgia Bar No. 425320
Joyce Gist Lewis
Georgia Bar No. 296261
Adam M. Sparks
Georgia Bar No. 341578
KREVOLIN AND HORST, LLC
One Atlantic Center
1201 W. Peachtree Street, NW, Ste. 3250
Atlanta, GA 30309
Telephone: (404) 888-9700
Facsimile: (404) 888-9577
hknapp@khlawfirm.com
jlewis@khlawfirm.com
sparks@khlawfirm.com

Amanda R. Callais*
John M. Geise*
Zachary Newkirk*
PERKINS COIE LLP
700 Thirteenth Street NW, Suite 800
Washington, D.C. 20005
Telephone: (202) 654-6200
acallais@perkinscoie.com
jgeise@perkinscoie.com
znewkirk@perkinscoie.com

Counsel for Senator Warnock

**Pro Hac Vice Application Forthcoming*

EXHIBIT 1

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

MICHAEL J. DAUGHERTY, Contestant, v. FULTON COUNTY REGISTRATION AND ELECTION BOARD, DEKALB COUNTY REGISTRATION AND ELECTION BOARD, COFFEE COUNTY BOARD OF REGISTRATION AND ELECTIONS, GEORGIA STATE ELECTION BOARD, BRAD RAFFENSPERGER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE, RAPHAEL G. WARNOCK, AND THOMAS JONATHAN OSSOFF, Defendants.	CIVIL ACTION NO: 2021CV344953

AFFIDAVIT OF GENE AUTRY MORRIS

Personally appeared before me, the undersigned subscribing officer, duly authorized to administer oaths, Gene Autry Morris, who being duly sworn, deposed and stated as follows:

1. My name is Gene Autry Morris. I am over 18 years of age, a citizen of the State of Georgia, suffer from no legal disabilities, and am otherwise competent to testify to the matters contained herein. I have personal knowledge of the fact here, and if called as a witness, can testify completely thereto.

2. I am employed by Senator Raphael G. Warnock as an aide. I have never been given authority by Senator Warnock to accept service of process for Senator Warnock and no member of Senator Warnock's staff has ever told me that I am authorized to accept service of process for Senator Warnock. I am not aware of any formal office policy which provides that aides to Senator Warnock are authorized to accept service of process for Senator Warnock.

3. On March 15, 2021, I was working at Senator Warnock's Atlanta office at 3625 Cumberland Boulevard, Suite 970, Atlanta, Georgia 30339. While I was working in the office a woman knocked on the door to the office. I let her in. The woman said she was serving some papers from a law firm for Senator Warnock. She was not wearing anything identifying her as the Sheriff or an employee of the Sheriff's office, and did not identify herself as such.

4. The woman who knocked on the door on March 15, 2021 did not ask me my age or if I was authorized to accept service of process for Senator Warnock. She simply asked if I was one of Senator Warnock's staff members. When I said yes, she asked me to sign acknowledging the receipt of the papers she provided, which I did.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 8th day of April, 2021.

Gene Autry Morris

Gene Autry Morris

Sworn to and subscribed to before me
this 8th day of April, 2021.

Lissette Flores-Aponte

Notary Public

My commission expires: 07/30/2024

LISSETTE FLORES-APONTE
Notary Public - State of Florida
Commission # HH 25598
Expires on July 30, 2024

Notarized online using audio-video communication

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

MICHAEL J. DAUGHERTY, Contestant, v. FULTON COUNTY REGISTRATION AND ELECTION BOARD, DEKALB COUNTY REGISTRATION AND ELECTION BOARD, COFFEE COUNTY BOARD OF REGISTRATION AND ELECTIONS, GEORGIA STATE ELECTION BOARD, BRAD RAFFENSPERGER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE, RAPHAEL G. WARNOCK, AND THOMAS JONATHAN OSSOFF, Defendants.	CIVIL ACTION NO: 2021CV344953

CERTIFICATE OF SERVICE

This is to certify that I have this day served the within and foregoing **SENATOR RAPHAEL WARNOCK'S MOTION TO DISMISS ELECTION CONTEST WITH BRIEF IN SUPPORT** via *Odyssey eFileGA*, which will automatically provide notice and service to all counsel of record.

This 9th day of April 2021.

/s/ Adam M. Sparks
Adam M. Sparks
Georgia Bar No. 341578
Counsel for Senator Warnock