No. _____

In the

Court of Appeals of Georgia

STATE OF GEORGIA,

Defendant-Appellant,

v.

DEMOCRATIC PARTY OF GEORGIA, INC., DSCC, AND WARNOCK FOR GEORGIA

Plaintiffs-Appellees.

On Appeal from the Superior Court of Fulton County
Case No. 2022-CV-372734

EMERGENCY MOTION FOR SUPERSEDEAS

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INTRODUCTION

This appeal and emergency motion arise out of the Superior Court of Fulton County's erroneous November 18, 2022 order (the "Order," attached as Exhibit A) enjoining the State and its agencies from enforcing the rules for advance voting—specifically, the prohibition on advance voting the Saturday after a State Holiday in O.C.G.A. § 21-2-385(d)(1)[1]—for the United States Senate runoff election. Given the fast-approaching election and the threat that the State's appeal will imminently become moot, the State requests that the Court issue an emergency stay pending appeal. Each of the factors this Court examines before issuing a stay supports the State's request. *See Green Bull Georgia Partners, LLC v. Register*, 301 Ga. 472, 474 (2017).

First, the State is likely to succeed on the merits because the Superior Court committed two legal errors which are subject to this Court's *de novo* review. As a threshold matter, the Order is barred by sovereign immunity or represents a misapplication of the Declaratory

[1] A copy of this provision, broken down into its parts for ease of reading, is attached as Exhibit B. For purposes of this brief, the State uses the labels set forth in that Exhibit.

Judgment Act. Ga. Const. art. I, § II, par. V(b); O.C.G.A. § 9-4-5. The Constitution waives sovereign immunity for injunctive relief only *after* the entry of a final declaratory judgment on the merits. But here, the Superior Court could not enter a final order because (1) the State had not been served; and (2) the Declaratory Judgment Act was not satisfied. Sovereign immunity, therefore, still applies and deprives the Superior Court of jurisdiction to order relief.

Notwithstanding this threshold lack of jurisdiction, the plain language of O.C.G.A. § 21-2-385(d)(1) also precludes advance voting in runoff elections on the Saturday after Thanksgiving. Specifically, the Legislature authorized advance voting on some Saturdays, but not when the Saturday "follows a public and legal holiday occurring on the Thursday or Friday immediately preceding." *Id.* (the "Holiday-Weekend Clause").

The Order recognizes this prohibition, but it erroneously concluded that the Holiday-Weekend Clause applies only to a "primary" or an "election," and not a "runoff," which cannot exist outside of a primary or election. Thus, the Superior Court's interpretation fundamentally misses the mark by ignoring that the Senate runoff

election *is* an "election" as that term is defined and used in the Election Code and the Georgia Constitution. *See* Ga. Const. art. I, § II, par. II; O.C.G.A. § 21-2-501(a). Specifically, the Election Code creates primaries and elections.[2] Runoff elections are merely extensions of those two categories and, contrary to the Order's reasoning, not a third type of election altogether. The rules that govern voting in primaries and elections—including the Holiday-Weekend Clause—therefore apply as equally to any runoff election as they do to those same primaries and elections. Any other conclusion not only betrays the plain statutory text, but also risks barring weekend voting in runoff elections altogether.

Second, the equities weigh in favor of granting a stay. The Superior Court's erroneous ruling barely a week before the beginning of advance voting not only undermines Georgia's election laws, but it also risks causing significant confusion among voters, creating a lack of uniformity among counties in the run-up to the election, and imposing significant burdens on election workers on a holiday weekend.

Given the fast-approaching election which would moot the appeal

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[2] The Code also creates "special elections" and "special primaries," but they are not at issue in this appeal. O.C.G.A. §§ 21-2-2(33) and (34).

and the State's likelihood of success on the merits of its appeal, a stay of the Superior Court's order (the "Order") is warranted and review is needed on an emergency basis.

Likewise, the Court should issue an administrative stay while it considers this motion.

JURISDICTION

On November 18, 2022, the Superior Court issued an interlocutory injunction and declaratory judgment against the State. That decision was immediately appealable under O.C.G.A. § 5-6-34(a)(4), and appellate jurisdiction lies in this Court. Ga. Const. art. VI, § 5, par. III; O.C.G.A. § 15-3-3.1(a)(2). Further, while a creature of the Superior Court's Order alone, a grant of a "declaratory injunction" is, in effect, a declaratory judgment that is immediately appealable. O.C.G.A. § 9-4-2.

BACKGROUND

After several lengthy runoff elections, in 2021, the General Assembly chose to return to a 28-day runoff period for primaries and elections for federal office and amend the provisions governing advanced voting in such primaries and elections. O.C.G.A. §§ 21-2-

501(a)(1); Ga. L. 2021 p. 14 §§ 42, 28; O.C.G.A. §§ 21-2-501(a)(1) (shortening the runoff time); 21-2-385(d)(1) (providing for advance voting in runoff elections). Several elections since have been governed by these new rules, including 2021's municipal runoff elections.

The 2022 statewide general election in Georgia was held on November 8th. No candidate for the office of United States Senate received a majority of votes. Consequently, the general election is continuing to a runoff election between the top two candidates. O.C.G.A. § 21-2-501(a)(1).

On November 12, 2022, the Secretary of State's office issued guidance to county elections officials regarding certification of the general election results and preparation for the Senate runoff election. Exhibit C, November 12, 2022 Official Election Bulletin. The guidance advised that advance voting for the December 6th general election runoff,

- Must begin as soon as possible prior to the runoff election and no later than Monday, November 28;
- Must take place between November 28 and December 2; and
- May take place on Sunday November 27, and even prior to Thanksgiving if counties are able to complete the required preparations and notifications by then.

Id. The guidance further advised that advance voting "cannot occur on … Saturday, November 26th" because it "is prohibited by O.C.G.A. 21-2-385(d)(1), which states that if the second Saturday before the runoff election follows a Thursday or Friday that is a state holiday,"—in this case Thanksgiving and State Holiday 1—"voting on that Saturday is not allowed." *Id.* This represents the same public and written guidance from the Secretary in 2021. Yet, those elections did not result in a lawsuit.

Two days after the Secretary's staff issued the guidance this year, Plaintiffs filed this lawsuit. Brought expressly pursuant to the Declaratory Judgement Act (O.C.G.A. §§ 9-4-2, -4, -5), the lawsuit seeks a declaration that counties may hold advance voting on November 26, 2022, and an injunction prohibiting the State from interfering with counties who choose to do so. Plaintiffs also filed separate motions for (1) Temporary Restraining Order and/or Interlocutory Injunction and (2) Expedited Hearing on the TRO Motion. Despite not being served, the State agreed to appear at a hearing on the TRO Motion, but it did not waive service, nor did it waive sovereign immunity.[3]

[3] To date, the State has still not been served with process.

The Superior Court granted the motion for expedited hearing and held a hearing on the TRO motion on November 18, 2022, at which it heard argument from the State and Plaintiffs. Later that day, the Superior Court issued an "injunction declaring that O.C.G.A. § 21-2-385(d)(1) does not explicitly prohibit counties from conducting advance voting on Saturday, November 26, 2022," and enjoining the State from (1) "interfering in counties' efforts to do so or preventing any votes cast on that day from being counted or included in the certified election results," and (2) "interfering in any effort by Georgia counties to provide advance voting on Saturday, November, 26, 2022, due to [their failure] to comply with the [seven-day notice] requirement in O.C.G.A. § 21-2-385(d)(3)[.]" The Order makes no mention of sovereign immunity or service of process.

The State filed a notice of appeal with the Superior Court, which was docketed by the Superior Court Clerk on November 21, 2022 and served upon all parties. *See* Exhibit D.

ARGUMENT

The "most important" consideration in deciding whether to stay an injunction pending appeal is the "likelihood that the appellant will

prevail." *Green Bull Georgia Partners*, 301 Ga. at 473. A stay is plainly warranted in this case because the State is likely to prevail on the merits of this appeal and because the equities weigh in favor of a stay. Setting aside the Superior Court's erroneous statutory interpretation, it lacked jurisdiction to enter the injunction order in the first place.

The State is likely to succeed on appeal because (1) sovereign immunity deprived the Superior Court of jurisdiction; and (2) Georgia law does not recognize runoff elections as altogether distinct from primary or general elections. These legal issues are reviewed *de novo*. *Hill v. First Atlantic Bank*, 323 Ga. App. 731, 732 (2013) (involving statutory construction). The harm to the State is likewise irreparable: without a stay, the State's appeal will become moot on Saturday, well before it can correct the Order's flaws. Public interest supports applying laws as written and rejects the idea of changing those laws right before an election.

I. The State is likely to succeed on the merits of its appeal.

A. The State's sovereign immunity barred the trial court from granting an interlocutory injunction.

Georgians waived sovereign immunity for injunctions against the State "only *after* awarding declaratory relief." Ga. Const. art. I, § 2, par.

V (emphasis added). Thus, trial courts must *first* award declaratory relief pursuant to the Declaratory Judgment Act, and only *then* may they issue an injunction. The Superior Court skipped this critical step, as the Order cannot be reconciled with the Declaratory Judgment Act. This is fatal to the resulting injunction.

When applied, the constitutional defense of sovereign immunity deprives courts of jurisdiction to issue relief, including declaratory judgments, and temporary and permanent injunctions. *Lathrop v. Deal*, 301 Ga. 408, 424 (2017); *Olvera v. Univ. Sys. of Georgia's Bd. of Regents*, 298 Ga. 425, 427 (2016); *Georgia Dep't of Nat. Res. v. Ctr. for a Sustainable Coast, Inc.*, 294 Ga. 593, 603 (2014). The defense applies absent an *explicit* constitutional or statutory waiver. Ga. Const. art. I, § II, par. IX(e).

A constitutional waiver is found in art. I, § II, par. V(b), which provides a *limited* waiver of sovereign immunity for certain declaratory-judgment actions in superior court, and further allows a court—"only *after* awarding declaratory relief"—to issue injunctions against the state "to enforce its judgment." *Id.* (emphasis added). Thus, to issue any injunctive relief against the State pursuant to this provision, a superior

court must first issue a final declaratory judgment. In other words, parties seeking to enjoin the State must first obtain a final declaratory judgment.

Declaratory judgments are statutory in nature, and courts' applications of them are necessarily governed by statute. *See Clein v. Kaplan*, 201 Ga. 396, 403 (1946). The Declaratory Judgment Act does not authorize preliminary or interlocutory relief: judgments "have the force and effect of a *final* judgment[.]" O.C.G.A. § 9-4-5 (emphasis added). Long ago, the Legislature also imposed temporal prerequisites that the Superior Court did not satisfy. A declaratory-judgment action "may be tried at any time designated by the court *not earlier than 20 days after the service therefore*, unless the parties consent in writing to an earlier trial." *Id.* (emphasis added). This timeline is not advisory; indeed, courts have been reversed for ignoring them as the Superior Court did here. *Taylor Inv. Partners II, LLC v. Moe's Franchisor, LLC*, 344 Ga. App. 552, 554 (2018) ("Because the trial court erred in treating the hearing on the TRO motions as a trial on the substance of the declaratory judgment action earlier than 20 days after service was perfected, we reverse the trial court's order for failure to comply with

OCGA § 9-4-5."); *Morris v. Mullis*, 264 Ga. App. 428, 432 (2003) (similar).

Here, the State has not even been served let alone been subject to a trial. The November 18th hearing addressed only Plaintiffs' emergency TRO Motion, which took place a mere *three days* after Plaintiffs filed their petition. Under these circumstances, and pursuant to the plain text of the Declaratory Judgment Act, no declaratory judgment could have been entered. *Williams v. Resurgens & Affiliated Orthopaedists*, 267 Ga. App. 578, 580 (2004) ("[U]ntil service is perfected or waived … the trial court has no jurisdiction or authority to enter any ruling in the case[.]"); O.C.G.A. § 9-12-6 (a judgment granted without jurisdiction is a "mere nullity"). Without appropriate service and satisfaction of the Declaratory Judgment Act's 20-day requirement, the Order cannot be reconciled with the State's defense of sovereign immunity. Ga. Const. art. I, § 2, par. V(b)(1)–(2). This is not a close call.

The Order is not saved by its being styled as an "injunction declaring" that O.C.G.A. § 21-2-385(d)(1) authorizes Saturday voting after Thanksgiving. *First*, the Superior Court's description of the Order as a "declaratory injunction" is illusory; there is no such thing. *Second*,

unlike injunctions, declaratory judgments have no "interlocutory" status. The only type of declaratory relief provided by Georgia law is a final declaratory judgment. O.C.G.A. §§ 9-4-2, 9-4-5. *Third*, the Petition was brought expressly pursuant to the Declaratory Judgment Act, which precludes *any* relief that changes the status quo—declaratory or injunctive—before 20 days after service. Exhibit E, Complaint, Counts I–II; O.C.G.A. §§ 9-4-3 (authorizing injunctions subject to § 9-4-5), 9-4-5 (precluding relief before 20 days after service). This means the Order is void.

Put simply, the constitutional waiver of sovereign immunity requires a final declaratory judgment before an injunction may issue. That did not and could not happen below. The failure of service and premature order prevents a valid declaratory judgment, which is a precondition to deciding the State has waived sovereign immunity. For this reason alone, the Order should be reversed.

B. O.C.G.A. § 21-2-385(d)(1)'s "Holiday-Weekend Clause" applies to runoff elections.

Apart from the Superior Court's lack of jurisdiction, the State is also likely to succeed on its appeal because the Superior Court erred in deciding that O.C.G.A. § 21-2-385(d)(1) permits counties to hold

advance voting on November 26, 2022 for the Senate runoff election. It plainly does not. Applying the established rules of statutory interpretation, the only proper interpretation is that the counties are prohibited from holding advance voting on this date.

Statutory interpretation starts with the text, applying its "plain and ordinary meaning" when read in the "most natural and ordinary way, as an ordinary speaker of the English language would." *Deal v. Coleman*, 294 Ga. 170, 172–73 (2013). This includes applying the rules of grammar. *Id.* at 173. A statute should not be read in isolation, but rather "in the context of the other statutory provisions of which it is a part." *Hendry v. Hendry*, 292 Ga. 1, 3 (2012). Indeed, "[i]t is a basic rule of construction that a statute … should be construed to make all its parts harmonize and to give a sensible and intelligent effect to each part[.]" *McIver v. State*, 314 Ga. 109, 119 (2022). Finally, statutes addressing the same subject matter are construed together. *Ultra Telecom, Inc. v. State*, 288 Ga. 65, 67 (2010).

Applying these principles, the Court must first look at the Election Code generally, including the statutory definitions that expressly apply to the entire Election Code. O.C.G.A. § 21-2-2

establishes primaries and elections. An "election" is a term that includes all elections but not primaries. O.C.G.A § 21-2-2(5). Runoff elections are not specifically defined in § 21-2-2, but both the State Constitution and another provision of the Election Code make clear that they are not a third category altogether but rather a "continuation" of the primary or general election where no candidate receives a majority of the vote. Ga. Const. art. I, § II, par. II (stating that "[a] runoff election shall be a continuation of the general election"); O.C.G.A. § 21-2-501(a)(5) (same). These provisions are critical when applying laws governing runoff elections. *See Ultra Telecom, Inc.*, 288 Ga. at 67 (requiring courts to construe statutes governing the same activity together).

Having established that Georgia recognizes two types of elections—primary and general elections—the next question turns on the text and structure of § 385(d)(1), which is one paragraph consisting of three sentences. The first sentence (the "Voting-Period Provision") sets the "*period*" of advance voting—*i.e.*, the temporal bookends when advance voting may occur—but it does not specify the specific dates and times for voting within that period. The second sentence (the "Dates-

and-Times Provision") provides more details by authorizing specific *dates* and *times* that advance voting must or may occur, *i.e.*, all weekdays during the period (except holidays) and particular Saturdays and Sundays. Lastly, the third sentence (the "Authorizing Provision") makes clear that advance voting is only allowed on the specific dates and times expressly provided for in § 385(d)(1) and no others.

In granting Appellees' motion, the Superior Court found that the Dates-and-Times Provision's Holiday-Weekend Clause restricting Saturday voting on holiday weekends does not apply to runoff elections because the Holiday-Weekend Clause uses the phrase "primary or election," whereas the preceding Voting-Period Provision uses "primary, election, or runoff." Order at 6–7. In other words, the Order treats the runoff election not as a "continuation" of the general election, but an entirely new category altogether. This represents a fundamental misreading of the statute and the Election Code.

By focusing solely on the Voting-Period Provision and the Holiday-Weekend Clause, the Superior Court's reading both inconsistently interprets the Dates-and-Times Provision and fails to put § 385(d)(1) in the context of the entire Election Code. *Hendry*, 292 Ga. at 3 (a statute

must be read "in the context of the other statutory provisions of which it is a part."). A correct interpretation demonstrates that the entire Dates-and-Times Provision, including the Holiday-Weekend Clause, applies to runoff elections just as equally as to any other election.

Indeed, the Order does not cite the State Constitution or Election Code's reference to runoff elections. This failure to look at other statutes governing the same subject matter is error. *See Ultra Telecom, Inc.*, 288 Ga. at 67. If the General Assembly had wanted runoff elections to be an entirely different type of election, it would have provided a separate definition of them in O.C.G.A. § 21-2-2, or legislators would have excluded it from the definition of "election" (as it excluded primaries).

The Superior Court's alternative reading necessarily excludes runoff elections from large swaths of the Election Code—including laws governing voter registration, canvassing, and polling hours, among many others[4]—a clearly untenable result. *See Haugen v. Henry County*, 277 Ga. 743, 745 (2004) (the Court is not required "to reach an

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[4] *See, e.g.*, O.C.G.A. §§ 21-2-216 (voter registration is required in "any primary or election"); -493 (canvassing commences "after … a primary or election"); -403 (polls shall be open from 7:00 A.M. to 7:00 P.M. "at all primaries and elections[.]").

unreasonable result unintended by the legislature."); *see also Spalding County Bd. of Elections v. McCord*, 287 Ga. 835, 840 (2010) (stating that statutes should not be construed to produce absurd results). Precedent further supports this conclusion, as Georgia courts have previously considered the term "election" as inclusive of a "runoff election." *See, e.g.*, *Fuller v. Thomas*, 284 Ga. 397 (2008) (referring to a contested runoff as an "election," "runoff," and "runoff election"); *Spalding County*, 287 Ga. at 835 (same); *Meade v. Williamson*, 293 Ga. 142 (2013) (same).

The legislative and judicial use of these terms interchangeably underscores that an "election" ordinarily encompasses a "runoff election." *See Hasty v. Castleberry*, 293 Ga. 727, 731 (2013) (a statute is "to be construed in connection and in harmony with the existing law" and "with reference to other statutes and the decisions of the courts"). In this proper context, it is clear that when the legislature prohibited advance voting on the second Saturday prior to an "election" where such Saturday follows a state holiday, it intended and understood that this prohibition would apply to advance voting in a runoff election. This

reading is the only one which harmonizes § 385(d)(1) with the entirety of the Election Code.[5]

Further demonstrating the flawed reasoning contained in the Order, if taken to its logical conclusion, the Order's decision would *prohibit all weekend voting***.** While the Superior Court focuses on the use of "primary or election" in connection with the Holiday-Weekend Clause, that language is repeated in the § 385(d)(1). The Weekend-Voting Clause of the Dates-and-Times Provision likewise provides for mandatory Saturdays and optional Sundays "prior to a primary or election." Under the Superior Court's interpretation, then this clause would also not apply to runoff elections. Given the Authorizing Provision's clear prohibition on advance-voting on days not expressly authorized,[6] the Superior Court's interpretation would essentially

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[5] In this context, the Voting-Period Provision's specific call-out of "runoffs" is easily explained because the Voting-Period Provision contains provisions specific only to runoffs, whereas the Dates-and-Times Provision applies generally.

[6] The Superior Court says the Authorizing Provision does not apply because "Saturday voting *should* be considered an essential component" in getting advance voting to take place "as soon as possible" given the "short window for a runoff election[.]" Order at 9. Beyond improperly injecting its own policy preferences, the Superior

prohibit weekend voting altogether. O.C.G.A. § 385(d)(1). Thus, even under its own interpretation, the Superior Court's injunction would still have been issued in error.

In sum, the Superior Court's holding that Holiday-Weekend Clause does not apply to runoff elections and that counties may hold advance voting on Saturday, November 26 for the Senate runoff election is a plainly erroneous interpretation of Georgia law. The only interpretation consistent with the text and legislative intent of the statute is one which understands the Dates-and-Times Provision, including the Holiday-Weekend Clause, to apply as equally to runoff elections as any other election.

II. The remaining equities weigh strongly in favor of granting a stay.

The remaining factors also weigh in favor of a stay pending appeal. The Superior Court below enjoined the State's officials from fulfilling their duty to faithfully enforce duly enacted state law despite a complete lack of jurisdiction to do so. And without a stay, the State's

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Court's interpretation improperly conflates the *period* with the *dates and times*.

ability to rectify that harm will be essentially mooted within just a few days. *Green Bull*, 301 Ga. at 475 ("the prospect of the appeal becoming moot and the right of appellate review being lost as a result" constitute "an additional sort of irreparable harm[.]").

Moreover, the erroneous, last-minute changes to the election process—like the Superior Court's Order—not only implicate the public's strong interest in ensuring the State can enforce its election-law requirements but can also lead to voter confusion and incentivize voters to stay away from the polls. *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). Changing the schedule at this late hour only serves to disrupt the ability of county elections workers to staff polling locations and do the necessary preparations for the election, disadvantaging voters in those counties which have less resources and ability to find staff at the last minute over a holiday weekend. For this reason, the Supreme Court of the United States has repeatedly emphasized that federal courts "should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (April 6, 2020) (per curiam) (citing *Purcell*, 549 U.S. at 1); *see also New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. 2020).

Similar considerations apply to state courts. If this Order altering the rules of the election on its eve is allowed to stand, then one can expect to see numerous other lawsuits across Georgia seeking to do the same. The public interest weighs in favor of conducting elections subject to existing rules, not changing the rules on the eve of the election at the request of one of the participants. To do otherwise does not engender confidence in elections.

By contrast, a stay would not cause significant irreparable harm to Plaintiffs. As an initial matter, the Superior Court did not make any findings of fact nor conduct any analysis demonstrating irreparable harm to Plaintiffs absent one conclusory statement at the end of the Order. And that is because there is no irreparable harm to Plaintiffs here. Beyond the fact that the Election Code does not permit early voting on the Saturday after Thanksgiving, there are at least five days available for counties to hold advance voting pursuant to the Secretary's guidance, including a possible sixth day on Sunday, November 27. Voters may also vote absentee-by-mail or in person on December 6, 2022. When viewed in the context of all options available to Georgia voters, there is simply no serious burden placed on Plaintiffs nor on

voters by issuing a stay pending appeal. *See New Ga. Project*, 976 F.3d at 1281 (holding that Georgia's absentee ballot receipt deadline was not burdensome on voters because of the "numerous avenues to mitigate chances that voters will be unable to cast their ballots").

CONCLUSION

For the reasons stated above, the Court should grant the State's emergency motion for supersedeas and stay the trial court's injunction until such time as this Court can have a full hearing on the merits.

Respectfully submitted this 21st day of November, 2022,

This submission does not exceed the word-count limit imposed by Rule 24.

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CERTIFICATE OF SERVICE

Pursuant to Court of Appeals Rule 6, I hereby certify that on November 21, 2022, I served this brief via email to counsel for the parties at the contact information listed below. I further certify that there is a prior agreement among the parties to allow documents in a PDF format sent via email to suffice for service.

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