

No. S23M0376

IN THE SUPREME COURT OF GEORGIA

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

Plaintiffs-Appellees,

v.

STATE OF GEORGIA,

Defendant,

GEORGIA REPUBLICAN PARTY, INC., NATIONAL REPUBLICAN
SENATORIAL COMMITTEE, and REPUBLICAN NATIONAL COMMITTEE,

Intervenors-Appellants.

On Appeal from the Georgia Court of Appeals
Case Nos. A23E0012, A23E0013

**BRIEF OF AMICI CURIAE NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC. AND ACLU OF GEORGIA IN OPPOSITION
TO INTERVENORS-APPELLANTS' EMERGENCY MOTION TO STAY**

Cory Isaacson (Bar No. 983797)
Rahul Garabadu (Bar No. 553777)
Caitlin F. May (Bar No. 602081)
ACLU OF GEORGIA
FOUNDATION, INC.
P.O. Box 570738
Atlanta, GA 30357
Telephone: (404) 594-2723

R. Gary Spencer (Bar. No. 671905)
John S. Cusick*
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, New York 10006
Telephone: (212) 965-2200
Facsimile: (212) 226-7592

**Pro hac vice motion forthcoming*

Counsel for Amici Curiae

TABLE OF CONTENTS

INTRODUCTION1

STATEMENT OF INTEREST2

BACKGROUND4

ARGUMENT AND CITATION TO AUTHORITIES7

 I. Prohibiting Advance Voting on Saturday, November 26 Will Have a Disparate Impact on Black Voters. 8

 II. The Plain Language of O.C.G.A. § 21-2-385(d)(1) Permits Counties to Conduct Advance Voting for the Runoff Election on Saturday, November 26. ... 13

 III. To the Extent There Is Any Ambiguity in O.C.G.A. § 21-2-385(d)(1), This Court Should Interpret the Statute in Favor of Broader Voter Access. 16

CONCLUSION19

CERTIFICATE OF SERVICE21

RETRIEVED FROM DEMOCRACYDOCKET.COM

Amici NAACP Legal Defense & Educational Fund, Inc. (“LDF”) and ACLU of Georgia respectfully submit the following brief asking this Court to deny the Intervenor-Appellants’ motion to stay the Fulton County Superior Court’s order.

INTRODUCTION

The opportunity to cast ballots at advance voting locations during weekend hours has proven critical for Georgia voters. Weekend voting options are especially important for Georgia’s Black voters, who utilize weekend voting at substantially higher rates than other voters. If this Court were to sanction the Secretary of State’s misreading of Georgia law to prohibit counties from offering advance voting on Saturday, November 26, 2022, it will disproportionately burden Black voters. Indeed, in Georgia’s 2021 U.S. Senate runoff election, Black voters were nearly *twice as likely* as white voters to vote on Saturday.

As explained by the Superior Court, the plain language of the statute permits counties to offer advance voting on Saturday, November 26, 2022. Moreover, even if there were any ambiguity in the statute, this Court should be guided by the principles underlying Georgia’s constitutional protection of the right to vote, and longstanding canons of statutory interpretation, to resolve that ambiguity in favor of permitting broader voting access.

The State of Georgia is not appealing the decision of the Court of Appeals and has now indicated through representatives that the Secretary of State is working with

dozens of counties who have provided formal notice of their commitment to provide advance voting opportunities on Saturday, November 26. Prohibiting advance voting on Saturday at this juncture—so close to the November 26 date and with the State and counties working together to implement that day of voting—is likely to confuse voters and potentially disenfranchise many of them.

Amici therefore respectfully urge this Court to deny the Intervenor-Appellants' motion seeking a stay of the order of the Superior Court of Fulton County.

STATEMENT OF INTEREST

Founded in 1940, LDF is the nation's first and foremost civil rights law organization. For more than 80 years, LDF has been guided by its founder Thurgood Marshall's goal of securing equal justice under the law for all Americans and breaking down barriers that prevent Black Americans from fully participating in American democracy. LDF focuses on eliminating racial discrimination in education, economic opportunities, criminal justice, and political participation, and has been involved in precedent-setting litigation relating to representation and voting rights before state and federal courts in matters that implicate the voting rights of people of color. *See, e.g., Milligan v. Merrill*, No. 21-1086 (argued Oct. 4, 2022); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021); *Evenwel v. Abbott*,

578 U.S. 54 (2016); *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254 (2015); *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

The ACLU of Georgia is a non-profit, non-partisan organization dedicated to preserving the civil rights and liberties enshrined in the United States Constitution, in the Bill of Rights, and under state law. In its effort to protect and defend fundamental rights, the ACLU of Georgia routinely challenges laws that inappropriately infringe on those rights, including laws that infringe on Georgians' ability to cast their ballot.

Last year, LDF, ACLU of Georgia, and other civil rights groups filed a lawsuit in federal court challenging certain provisions in Georgia's Senate Bill 202.¹ During that litigation, Plaintiffs have offered evidence showing that Georgia voters experience extremely long wait times for in-person voting and that non-white voters face substantially longer wait times than white voters. Amici have long advocated for the right to vote in Georgia and have recently advocated on the issue of advance voting in the December 6, 2022 runoff by sending a letter to all 159 counties urging

¹ First Amended Complaint, *Sixth Dist. of the African Methodist Episcopal Church v. Kemp*, No. 1:21-cv-01284-JPB (N.D. Ga. May 24, 2021), ECF No. 83.

them to exercise their discretion to add all additional advance voting days permissible under Georgia law.²

BACKGROUND

Georgia voters are set once again to exercise their fundamental right to engage in American democracy by voting in the December 6 runoff, less than one month after the 2022 general election. It is widely expected that turnout for the December 6 runoff will be extremely high. Advance voting options are critical to accommodate the large number of voters and to avoid long delays at the polls.

Nevertheless, the Secretary of State misconstrued Georgia law to limit advance voting options for voters throughout the state. On November 12, the Secretary issued an “Official Election Bulletin” to county election officials (“November 12 Bulletin”) declaring that advance voting cannot occur on Saturday, November 26, because, according to the Secretary, it is prohibited by O.C.G.A. § 21-2-385(d)(1).³ The Secretary’s novel interpretation of Georgia law contradicted

² See Letter from LDF, ACLU of Georgia, and S. Poverty L. Ctr., to Georgia Election Supervisors and Boards of Election (Nov. 15, 2022), <https://www.naacpldf.org/wp-content/uploads/2022.11.15-FINAL-Letter-re-Runoff-Advance-Voting25.pdf>. Although Amici believe the Georgia Secretary of State’s guidance asserting that counties are not allowed to offer advance voting on Saturday, November 26 was incorrect, Amici did not suggest in their letter—which was sent prior to the lower court rulings in this case—that counties should defy that guidance.

³ See Exhibit 1 to Plaintiffs’ Memorandum of Points and Authorities in Support of Their Emergency Motion for Temporary Restraining Order and/or Interlocutory Injunction.

his own public statements just days earlier that he “anticipate[d] that some counties may likely have Saturday voting following Thanksgiving.”⁴ It also contradicted his office’s interpretation of the law during the 2021 runoff election, when his office permitted counties across the state to provide advance voting on Saturday, December 26, the day after the Christmas holiday.⁵

Within days of the issuance of the November 12 Bulletin, Plaintiffs-Appellees in this action filed this lawsuit asking the Superior Court to declare that Georgia law does not prohibit counties from providing advance voting on November 26. The same day, multiple counties considered the dates they would provide advance voting for the runoff, recognized the pending legal challenge to the Secretary’s interpretation of O.C.G.A. § 21-2-385, and voted that they would provide advance voting on November 26 if the Secretary reversed his position or a court permitted it.⁶ Taking into account the voting trends from the 2020 election and the added hurdle of the Thanksgiving and state holidays which fall shortly before December 6,

⁴ *Ga. Sec’y of the State News Conf. on Election Results*, CSPAN, at 5:08–5:25 (Nov. 9, 2022), <https://www.c-span.org/video/?524156-1/georgia-secretary-state-brad-raffensperger-updatesenate-runoff-election>.

⁵ *See LIST | Early Voting Locations Around Atlanta for Georgia Senate Runoffs*, 11Alive (Dec. 9, 2020), <https://www.11alive.com/article/news/politics/elections/list-early-voting-locations-around-atlanta-georgia-senate-runoffs/85-6e82565b-0e57-4fb5-a09a-0866a18236de> (updated Jan. 3, 2021).

⁶ *See, e.g.,* FGTV - Fulton Government Television, *Fulton County Board of Registration & Elections Meeting, November 15, 2022*, YouTube, at 41:10–43:10 (Nov. 15, 2022), <https://www.youtube.com/watch?v=vkoPBb7mIfg>.

it is imperative that Georgia counties be permitted to exercise their discretion under the law to provide advance voting on Saturday, November 26.

On November 18, the Superior Court issued an opinion concluding that Georgia law permits counties to offer advance voting on Saturday, November 26, and granted Plaintiffs-Appellees' request for declaratory and injunctive relief. On November 21, the State filed a notice of appeal and requested an emergency stay from the Court of Appeals, which was denied later that day. The State is no longer pursuing an appeal in this action, and has stated through a spokesperson that "[t]he court has worked its will," following the decision issued by the Court of Appeals denying the State's emergency motion for a stay of the Superior Court injunction.⁷ In other words, the State's interest at this point is in implementing advance voting on Saturday, November 26 and working with counties to administer voting options on that day. This is why staff members of the Secretary of State's Office have publicly indicated that they are "[w]orking with the counties now to see who will be [offering early voting on Saturday, November 26]."⁸ Twenty-three counties have now publicly committed to and have taken steps to offer early voting on Saturday,

⁷ Mark Niese, *Saturday Voting Upheld in Georgia US Senate Runoff*, Atlanta J.-Const. (Nov. 21, 2022), <https://www.ajc.com/politics/georgia-appeals-court-allows-saturday-early-voting-in-us-senate-runoff/NNQ4B7DY25ARVGXK7AQPNBDSMM/>.

⁸ Gabriel Sterling (@GabrielSterling), Twitter (Nov. 21, 2022, 7:11 PM), <https://twitter.com/GabrielSterling/status/1594846028657823745?s=20&t=STeyuzU9Giu7fosCjrkQQw>.

November 26. Many voters in these counties are now relying on the option to cast their ballots on Saturday. These voters would be confused and potentially disenfranchised if this option becomes unavailable to them. Under these circumstances, Intervenors-Appellants' request for an emergency stay would also cause confusion and undermine their own purported interest in guarding against "last-minute changes to the rules for the runoff elections."⁹

ARGUMENT AND CITATION TO AUTHORITIES

This Court should deny the Intervenors-Appellants' motion seeking a stay of the order of the Fulton County Superior Court. The Secretary of State's flawed interpretation of O.C.G.A. § 21-2-385(d)(1) as prohibiting advance voting on Saturday, November 26 will have a disparate impact on Black voters, whose access to the ballot box will be disproportionately restricted without a Saturday advance voting option. The plain language of the statute forecloses the Secretary's basis for prohibiting advance voting on November 26. Even if there were any ambiguity in the language, however, this Court should, consistent with the democracy canon of statutory interpretation, construe the statute in the manner most favorable to voters and permit advance voting on November 26. Amici, therefore, urge this Court to

⁹ Emergency Petition for Writ of Certiorari and Emergency Motion to Stay the Superior Court's Declaratory and Injunctive Relief at 24, *Democratic Party of Ga. v. Georgia*, No. S23M0376 (Ga. Nov. 22, 2022).

deny the Intervenor-Appellants' motion seeking a stay of the order of the Superior Court of Fulton County.

I. Prohibiting Advance Voting on Saturday, November 26 Will Have a Disparate Impact on Black Voters.

The lack of a Saturday advance voting option for the upcoming runoff election will disproportionately hinder the ability of Black voters in Georgia to have their voices heard in the election.¹⁰ Black voters use Saturday advance voting at a rate consistently higher than white voters in Georgia. Indeed, during the 2021 runoff election, Black voters were nearly *twice as likely* as white voters to use Saturday advance voting.¹¹ Economic disparities that limit the opportunity of Black voters to vote during the work week make Saturday advance voting a critical avenue for Black voters in Georgia to participate in the political process. This is even more true in the

¹⁰ Historically, Georgia's runoff system was itself designed to diminish Black voting power. *See generally* Brianna Holt, *A Segregationist Introduced Runoff Elections, and Now They'll Determine Which Black Candidate Gets Georgia's Senate Seat*, Insider (Nov. 10, 2022), available at <https://www.insider.com/georgia-runoff-law-jim-crow-segregationist-denmark-groover>. The runoff system was championed by segregationists and adopted in 1964, and was intended to enable white Georgians—who often split their vote among multiple candidates in the plurality system—to consolidate into a single voting bloc in a runoff election to defeat candidates preferred by Black voters. *Id.*

¹¹ Michael C. Herron & Daniel A. Smith, *The Racial Politics of Early In-Person Voting in Georgia*, J. Election Admin. Rsch. & Practice (forthcoming 2022) (manuscript at 15).

context of a truncated runoff election timeline, during which advance voting opportunities in general are significantly more limited.

As of the filing of this brief, Amici are aware of at least twenty-three counties that have publicly committed and taken steps to provide advance voting on Saturday, November 26 in reliance on the Superior Court's order: Athens-Clarke, Baker, Burke, Chatham, Cobb, Crawford, DeKalb, Douglas, Fulton, Gwinnett, Henry, Macon, Macon-Bibb, Mitchell, Muscogee, Newton, Randolph, Rockdale, Screven, Terrell, Troup, Walton, and Ware. According to data from the 2020 U.S. Census, over 61% of Georgia's Black voting-age residents live in these twenty-three counties. These counties are disproportionately Black: the aggregate Black Voting Age population in these twenty-three counties is 38% Black, compared to an aggregate Black Voting Age Population of just 23% in the rest of the state. The law envisions that different counties will offer different advance voting days in accordance with the needs and voting preferences of their voters. A decision by this Court to deny the Intervenors-Appellants' motion to stay the Fulton County Superior Court's order would, of course, not prevent additional counties from offering advance voting on Saturday, November 26. However, based on the counties that have thus far decided to offer this option, any decision to stay or reverse the Superior Court's order will have a disproportionate impact on Black voters.

The fact that Black voters utilize Saturday voting options at higher rates is a longstanding reality of Georgia's voting patterns. In a forthcoming article, scholars Michael Herron and Daniel Smith compare the advance voting rates of Black and white voters in Georgia for the past eight elections.¹² Relying on election returns and voter registration data from the Secretary of State, their study concludes that in each of these elections, Black voters in Georgia are consistently more likely to utilize Saturday advance voting than white voters.¹³ Higher usage of Saturday advance voting among Black voters is not surprising given the economic disparities Black Georgians face that may make it more difficult for them to vote during weekdays. There is a severe racial income gap in Georgia. Based on data provided by the U.S. Census, per capita income among white Georgians is \$38,136, whereas per capita income among Black Georgians is \$24,114.¹⁴ Black residents are more than four times as likely to use public transportation to commute to work.¹⁵ These disparities (among many others) make it more difficult for Black voters to take time off of work to vote. Saturday voting gives Black voters the flexibility to balance family and work obligations that can make voting on a weekday difficult or impossible.

¹² *Id.* at 14–15. Herron and Smith draw advance voting data from the following elections: the 2016 Presidential Preference Primary; the 2016 Primary; the 2016 General; the 2018 Primary; the 2018 General; the 2020 Primary; the 2020 General; and the 2020 Runoff.

¹³ *Id.*

¹⁴ *See* U.S. Census 2020 American Community Survey Table A14024.

¹⁵ *See* U.S. Census 2020 American Community Survey Table B08105.

Saturday advance voting also reduces traffic at both Election Day polling sites and advance voting locations during other days, reducing long lines that disproportionately impact Black voters. This is especially true in some of the counties offering advance voting on Saturday, November 26 because voters in those counties have experienced longer lines on Election Day in past years. Georgia voters consistently face some of the longest lines in the country.¹⁶ Georgia stands out even among states with long lines because its voters face longer-than-average lines whether they vote on Election Day or during advance voting.¹⁷ And voters of color bear the brunt of these burdens. In every Georgia election for which data exists, non-white voters have faced substantially longer average wait times than white voters.¹⁸ These disparities exist even when controlling for other factors, such as whether a voter lives in a rural or urban area.¹⁹

The risk of long lines is even more significant in the upcoming runoff given the dramatic increases in voter turnout in Georgia in recent years, anticipated high turnout for the runoff, and the significantly shorter advance voting period as compared to the November general election. Indeed, Georgia had record-breaking

¹⁶ See An Evaluation of SB202's Impact on Election Wait Times in Georgia by Dr. Stephen Pettigrew at i, *In Re Georgia Senate Bill 202*, No. 1:21-mi-55555-JPB (N.D. Ga. May 25, 2022), ECF No. 171-21.

¹⁷ *Id.* at 9–11.

¹⁸ *Id.* at 13–14 & Fig. 3.7.

¹⁹ *Id.* at 15–19.

turnout every day of the advance voting period in November's election.²⁰ This is a continuation of record turnout in recent Georgia elections, including both the November 2020 general election and the January 2021 runoff elections. Advance voting was a major factor in the ability of local election officials to accommodate the increased turnout in these elections. Approximately 2.7 million Georgians utilized advance voting in the 2020 general election.²¹ More than 2 million voters cast ballots through advance voting in the runoff election.²² A significant driver of the record-breaking turnout in these elections was the historic participation of Black voters: of the over 5 million Georgians who voted in the general election, 30% were Black.²³ While turnout typically declines significantly for runoff elections, that was not true in the January 2021 runoff, when over 4.4 million Georgians returned to the polls. Advance voting turnout was particularly high in counties with large minority

²⁰ *Georgia Voters Set All-Time Midterm Early Turnout Record*, Sec'y of State (Nov. 5, 2022), <https://sos.ga.gov/news/georgia-voters-set-all-time-midterm-early-turnout-record>.

²¹ *Record Breaking Early In-Person Voting Continues: October 25, Noon Update*, Ga. Sec'y of State (Oct. 25, 2020), <https://sos.ga.gov/news/record-breaking-early-person-voting-continues-october-25-noon-update>.

²² *See Georgia Early Voting Statistics - 2021 Senate Run-Off Election*, U.S. Elections Project (Jan. 6, 2021), https://electproject.github.io/Early-Vote-2020G/GA_RO.html.

²³ *New Georgia Runoffs Data Finds That More Black Voters Than Usual Came Out. Trump Voters Stayed Home*, Wash. Post (Jan. 29, 2021), <https://www.washingtonpost.com/politics/2021/01/29/new-georgia-runoffs-data-finds-that-more-black-voters-than-usual-came-out-trump-voters-stayed-home/>.

populations, with some counties seeing a nearly 500% increase.²⁴ Saturday advance voting rates among Black voters were disproportionately higher than those of white voters, by a factor of nearly double during the runoff.²⁵ Indeed, turnout in the January 2021 runoff election was even higher than that of the recent November 2022 general election, foreshadowing extremely high turnout in the upcoming runoff election.

The lack of a Saturday advance voting option, combined with the anticipated high turnout and extremely truncated advance voting period, will only exacerbate the existing racial disparities in Georgia that hinder access to the ballot box for Black voters.

II. The Plain Language of O.C.G.A. § 21-2-385(d)(1) Permits Counties to Conduct Advance Voting for the Runoff Election on Saturday, November 26.

For the reasons explained in the Superior Court's November 18, 2022 order, O.C.G.A. § 21-2-385(d)(1) permits counties to conduct advance voting for the December 6 runoff election on Saturday, November 26.²⁶ Relying on an incorrect interpretation of the statute, the Secretary of State claimed that counties are barred from holding advance voting on Saturday, November 26, because it follows the

²⁴ See Jason Braverman, *State Sees Record Early Voting Turnout, Including Nearly 500% Increase in Gwinnett from 2016*, 11Alive (Oct. 13, 2020), <https://www.11alive.com/article/news/politics/elections/georgia-early-voting-compared-to-2016/85-95453fa4-7c11-4fc5-bc00-3debc4fdeafd>.

²⁵ Herron & Smith, *supra* note 7 (manuscript at 15).

²⁶ See Order Granting Declaratory and Injunctive Relief, *Democratic Party of Ga. v. Georgia*, No. 2022-cv-372734 (Ga. Super. Ct. Nov. 18, 2022).

Thanksgiving Holiday on Thursday, November 24, and a generic “State Holiday” on Friday, November 25 (which was formerly a holiday commemorating Robert E. Lee’s birthday).²⁷ According to the Secretary, the statute precluded advance voting on the second Saturday prior to the election “if the second Saturday before *the runoff* follows a Thursday or Friday that is a state holiday” (emphasis added).²⁸ But the Secretary of State’s interpretation is belied by the plain language of this statute, which, contrary to the November 12 Bulletin, does not apply the post-holiday prohibition on advance voting to *runoff* elections. Rather, as explained by the Superior Court, O.C.G.A. § 21-2-385(d)(1) unambiguously applies this restriction *only* to primary elections and general elections.

The statute differentiates between, on the one hand, a “primary or election,” and on the other hand, a “runoff from any general primary or election.” Compare O.C.G.A. § 21-2-385(d)(1)(A) and (B). The language that precludes advance voting

²⁷ See Brian P. Kemp, Governor, to State Department Heads and Other Officials (Dec. 22, 2021), <https://team.georgia.gov/wp-content/uploads/2020/09/2022-State-Holidays-memo-12.22.21.pdf> (noting that the Friday after Thanksgiving is a generic “State Holiday”); see also Nathan Deal, Governor, to State Department Heads and Other Officials (July 28, 2014), <https://team.georgia.gov/wp-content/uploads/2014/08/2015-GA-State-Holidays.pdf> (noting that the Friday after Thanksgiving is a state holiday commemorating “Robert E. Lee’s Birthday”).

²⁸ See Bulletin from Blake Evans, Election Division Director, to County Election Officials and County Registrars (Nov. 12, 2022), <https://www.democracydocket.com/wp-content/uploads/2022/11/OEB-11122022-General-Election-Certification-and-December-Runoff-Advance-Voting.pdf>.

“if such second Saturday follows a public and legal holiday occurring on the Thursday or Friday immediately preceding such second Saturday” is limited to a “primary or election.” O.C.G.A. § 21-2-385(d)(1). In contrast, other provisions of the statute explicitly apply to “each primary, election, or runoff.” *Id.* The Secretary’s interpretation of the statute “runs afoul of the usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.”²⁹

In addition, as pointed out by the Superior Court, this code section was amended by the Legislature in 2017 to specifically remove the word “runoff” from the restrictive provision that precludes advance voting on the Saturday following elections.³⁰ As explained by the Superior Court, “[w]here a statute is amended to delete a word, it is presumed that the Legislature made the change to effect some purpose, and desired to make a change in the existing law.”³¹ This act by the Legislature confirms what the plain language already makes clear: the statutory language limiting advance on the second Saturday following a public and legal holiday does not apply to runoff elections. Therefore, the language limiting advance

²⁹ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (internal quotation marks omitted).

³⁰ See Order Granting Declaratory and Injunctive Relief, *supra* note 26, at 7.

³¹ *Id.* (quoting *Fredrick v. State*, 181 Ga. App. 600 (1987)).

voting on the second Saturday following a public and legal holiday does not apply to runoff elections.

III. To the Extent There Is Any Ambiguity in O.C.G.A. § 21-2-385(d)(1), This Court Should Interpret the Statute in Favor of Broader Voter Access.

Even if there were any ambiguity in the language of O.C.G.A. § 21-2-385(d)(1), this Court should interpret the statute in favor of broader access to the franchise and construe the statute to permit advance voting on Saturday, November 26. When evaluating ambiguities in state election laws, this Court should be guided by the “democracy canon,” a broadly accepted canon of statutory interpretation providing that “statutes tending to limit the citizen in his exercise of this right [to vote] should be liberally construed in his favor.”³² In this case, this Court should apply the democracy canon and construe any ambiguity in the scope of the post-holiday restriction on Saturday voting to permit broader availability of advance voting options rather than to restrict the availability of advance voting.

The democracy canon has its roots in the U.S. Constitution and state constitutional provisions like Article II, Section 1 of the Georgia Constitution, which

³² *Owens v. State ex rel. Jennett*, 64 Tex. 500, 509 (1885). See also Richard L. Hasen, *The Democracy Canon*, 62 Stan. L. Rev. 69, 71 (2009) (explaining that the democracy canon of statutory construction “has long and broad support in state courts” from cases in the 1800s through the present); see also Rebecca Guthrie, *State Courts, the Right to Vote, and the Democracy Canon*, 88 Fordham L. Rev. 1957, 1970 (2020) (tracking and collecting cases relying on the democracy canon through the present).

provides broad protection for the right to vote: “Every person who is a citizen of the United States and a resident of Georgia as defined by law, who is at least 18 years of age and not disenfranchised by this article, and who meets minimum residency requirements as provided by law shall be entitled to vote at any election by the people.” Although the issue has not to Amici’s knowledge previously arisen in Georgia, other state courts have interpreted similar state constitutional provisions as a basis to apply the canon. For instance, the Supreme Court of Florida has held, based on the Florida Constitution’s language protecting the right to vote, that “the courts, in construing statutes relating to elections, hold that the same should receive a liberal construction in favor of the citizen whose right to vote they tend to restrict and in so doing to prevent disfranchisement of legal voters[.]”³³ And the Supreme Court of Ohio has held that “[a]ll election statutes should be liberally interpreted in favor of the right to vote according to one’s belief or free choice, for that right is a part of the very warp and woof of the American ideal and it is a right protected by both the constitutions of the United States and of the state.”³⁴ Similarly, the Pennsylvania Supreme Court held that “[a]ll statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor. Where the elective franchise is regulated by statute, the regulation should, when and where

³³ *State ex rel. Carpenter v. Barber*, 198 So. 49, 51 (1940).

³⁴ *State ex rel. Beck v. Hummel*, 80 N.E.2d 899, 905–06 (1948) (citation omitted).

possible, be so construed as to insure rather than defeat the exercise of the right of suffrage.”³⁵

Moreover, courts have repeatedly applied this democracy canon of statutory interpretation in rejecting limitations on access to the franchise proposed by state executive officials. For example, in *State ex rel. Myles v. Brunner*, the Supreme Court of Ohio rejected the Ohio Secretary of State’s interpretation of a statute to require rejection of absentee ballot applications based on an applicant’s failure to mark a box on an application form as “unreasonable,” and concluded that its determination was “consistent with our duty to liberally construe election laws in favor of the right to vote.”³⁶ Similarly, in *Morper v. Oliver*, the New Mexico Supreme Court invalidated the New Mexico Secretary of State’s interpretation of a statutory requirement that led her to reject nominating petitions for U.S. Representative based on the omission of a form heading.³⁷ The New Mexico Supreme Court held that “[w]e must analyze the Secretary’s action with a skeptical eye in order to protect the right of New Mexico citizens to vote for the candidate of

³⁵ *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 Gen. Election*, 241 A.3d 1058, 1062 (Pa. 2020), cert. denied sub nom. *Donald J. Trump for Pres., Inc. v. Degraffenreid*, 209 L. Ed. 2d 172 (Feb. 22, 2021) (citation omitted).

³⁶ *State ex rel. Myles v. Brunner*, 120 Ohio St. 3d 328, 2008-Ohio-5097, 899 N.E.2d 120.

³⁷ *Morper v. Oliver*, 2020-NMSC-012, 470 P.3d 245, 251.

their choice.”³⁸ To the extent this Court finds any ambiguity in the language of O.C.G.A. § 21-2-385(d)(1), the democracy canon should be applied to prevent this unnecessary curtailment of an important access point for many Georgians’ right to vote and to allow advance voting in the December 6 runoff election on Saturday, November 26.

CONCLUSION

For the foregoing reasons, Amici respectfully ask this Court to affirm the Court of Appeals’ denial of the emergency motion seeking a stay of the order of the Fulton County Superior Court. Amici also respectfully request that they be allowed five minutes of argument time should the Court wish to hear argument on the Intervenors-Appellants’ stay motion.

Signature block on following page

³⁸ *Id.* (citation and internal quotation marks omitted).

Respectfully submitted, this 23rd day of November, 2022.

/s/ R. Gary Spencer

R. Gary Spencer (Bar. No. 671905)

John S. Cusick*

NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.

40 Rector Street, 5th Floor

New York, New York 10006

Telephone: (212) 965-2200

Facsimile: (212) 226-7592

Counsel for LDF

**Pro hac vice application forthcoming*

Cory Isaacson (Bar No. 983797)

Rahul Garabadu (Bar No. 553777)

Caitlin F. May (Bar No. 602081)

ACLU OF GEORGIA FOUNDATION,
INC.

P.O. Box 570738

Atlanta, GA 30357

Telephone: (404) 594-2723

Counsel for ACLU of Georgia

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and correct copy of the foregoing BRIEF OF AMICI CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AND ACLU OF GEORGIA IN OPPOSITION TO INTERVENORS-APPELLANTS' EMERGENCY MOTION TO STAY electronically filed, and served on the following counsel of record by electronic mail, who have agreed to accept service by electronic mail.

Adam M. Sparks (341578)
Joyce Gist Lewis (296261)
Jessica G. Cino (577837)
KREVOLIN & HORST, LLC
One Atlantic Center
1201 W. Peachtree Street, NW
Ste. 3250
Atlanta, GA 30309
(404) 888-9700
sparks@khlawfirm.com

Uzoma N. Nkwonta
Christopher D. Dodge
Daniel C. Osher
Graham W. White
Marcos Mocine-McQueen
ELIAS LAW GROUP LLP
10 G St. NE, Suite 600
Washington, D.C. 20002
Telephone: (202) 968-4490

Counsel for Plaintiffs-Appellees

Christopher Carr (112505)
Bryan K. Webb (743580)
Russell D. Willard (760280)
Charlene S. McGowan
OFFICE OF THE GEORGIA
ATTORNEY GENERAL
40 Capitol Square
Atlanta, GA 30334
(404) 458-3658
cmcgowan@law.ga.gov

Josh Belinfante (047399)
Vincent R. Russo (242628)
Edward A. Bedard (926148)
ROBBINS ALLOY BELINFANTE
LITTLEFIELD, LLC
500 14th St. NW
Atlanta, GA 30318
jbelinfante@robbinsfirm.com
vrusso@robbinsfirm.com
ebedard@robbinsfirm.com

Counsel for Defendant-Appellee

R. Thomas Warburton (218175)
Thomas L. Oliver III (745597)
BRADLEY ARANT BOULT
CUMMINGS LLP
1819 Fifth Avenue North
Birmingham, AL 35203
Telephone: (205) 521-8000
toliver@bradley.com

Judson H. Turner (719485)
Mark D. Johnson (395041)
Mark M. Middleton (504907)
Robert L. Fortson (142684)
Amber M. Carter (631649)
GILBERT HARRELL SUMERFORD
& MARTIN, P.C.
777 Gloucester St., Suite 200
Brunswick, GA 31520
Telephone: (912) 265-6700
acarter@ghsmlaw.com

Counsel for Intervenors-Appellants

This 23rd day of November, 2022.

/s/ R. Gary Spencer

R. Gary Spencer (671905)
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
Tel.: (202) 216 5578
Fax: (212) 226-7592
gspencer@naacpldf.org

Counsel for LDF