

**IN THE SUPREME COURT
STATE OF GEORGIA**

GEORGIA REPUBLICAN PARTY,
THE NATIONAL REPUBLICAN
SENATORIAL COMMITTEE, and
THE REPUBLICAN NATIONAL
COMMITTEE

Petitioners,

v.

DEMOCRATIC PARTY OF
GEORGIA, DSCC, and WARNOCK
FOR GEORGIA

Respondents.

CASE NO. S23M0376

Court of Appeals Docket Number
A23E0013

**OPPOSITION TO EMERGENCY PETITION FOR WRIT OF
CERTIORARI AND EMERGENCY MOTION TO STAY**

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Table of Contents

Table of Citations.....	iii
Introduction.....	1
Statement of the Case.....	4
Argument.....	7
I. Intervenor’s improper petition for a writ of certiorari should be denied.	7
II. Intervenor has not proven their entitlement to a stay.	9
A. Intervenor is not likely to succeed on the merits.	9
1. The Holiday Exception does not apply to runoffs.	9
2. Intervenor lack standing to appeal.	15
B. Intervenor has not demonstrated that the equities favor a stay.....	18
1. The Petition makes no showing of irreparable harm.	18
2. The remaining equities, including the threat of irreparable harm to the public and Respondents, weigh strongly against a stay.	20
Conclusion	26

Table of Citations

	Page(s)
Cases	
<i>Avila v. State</i> , 333 Ga. App. 66 (2015)	11
<i>Barham v. City of Atlanta</i> , 292 Ga. 375 (Ga. 2013)	16
<i>Brown v. City of Atlanta</i> , 66 Ga. 71 (1880)	16
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992).....	24
<i>Citibank (S.D.), N.A. v. Graham</i> , 315 Ga. App. 120 (2012)	11, 13
<i>Ctr. for a Sustainable Coast, Inc. v. Turner</i> , 324 Ga. App. 762 (2013)	18
<i>Democratic Exec. Comm. of Fla. v. Lee</i> , 915 F.3d 1312 (11th Cir. 2019)	9
<i>Democratic Nat’l Committee v. Bostelmann</i> , 447 F. Supp. 3d 757 (W.D. Wis. 2020)	23, 24
<i>Fredrick v. State</i> , 181 Ga. App. 600 (1987)	13
<i>Ga. Coal. for the People’s Agenda v. Kemp</i> , 347 F. Supp. 3d 1251 (N.D. Ga. 2018).....	24
<i>Green Bull Ga. Partners, LLC v. Register</i> , 301 Ga. 472 (2017)	9
<i>Hamilton State Bank v. Nelson</i> , 296 Ga. 572 (2015)	16, 17
<i>Hampton Island Founders, LLC v. Liberty Cap., LLC</i> , 283 Ga. 289 (2008)	19

<i>Henry Cnty. Bd. of Registrars v. Farmer</i> , 213 Ga. App. 522 (1994)	15
<i>Hipster, Inc. v. August Mall Partnership</i> , 291 Ga. App. 273 (2008)	19
<i>Holcomb v. Gray</i> , 234 Ga. 7 (1975)	12
<i>League of Women Voters of N.C. v. North Carolina</i> , 769 F.3d 224 (4th Cir. 2014)	23
<i>Leiva-Perez v. Holder</i> , 640 F.3d 969 (9th Cir. 2011)	20
<i>Morgan v. U.S. Bank Nat’l Ass’n</i> , 322 Ga. App. 357 (2013)	8
<i>New Ga. Project v. Raffensperger</i> , 976 F.3d 1278 (11th Cir. 2020)	22
<i>Nken v. Holder</i> , 556 U.S. 418 (2009)	9, 20
<i>Obama for Am. v. Husted</i> , 697 F.3d 423 (6th Cir. 2012)	23
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	24
<i>State v. Towns</i> , 307 Ga. 351 (2019)	16, 17
<i>Va. House of Delegates v. Bethune-Hill</i> , 139 S. Ct. 1945 (2019)	18
<i>Wikimedia Found. v. Nat’l Sec. Agency/Cent. Sec. Serv.</i> , 14 F.4th 276 (4th Cir. 2021)	15
<i>Williams v. Salerno</i> , 792 F.2d 323 (2d Cir. 1986)	23

Statutes

2017 Ga. Laws Act 250	5, 12, 13
2016 Ga. Laws Act 347	5, 11
O.C.G.A. § 5-6-34.....	7, 8
O.C.G.A. § 21-2-385.....	<i>passim</i>
O.C.G.A. § 21-2-501.....	4

Other Authorities

Fulton County, <i>Early Voting Locations</i> , https://www.fultoncountygov/inside-fulton-county/fulton-county-departments/registration-and-elections/early-voting-locations	21
Ga. Const. art. VI, § VI, ¶ II	8
Ga. Const. art. VI, § VI, ¶ III	8
Ga. Const. art. VI, § VI, ¶ V	8
Mark Niese, <i>Saturday voting upheld in Georgia US Senate runoff</i> , ATLANTA JOURNAL-CONSTITUTION (Nov. 21, 2022), https://www.ajc.com/politics/georgia-appeals-court-allows-saturday-early-voting-in-us-senate-runoff/NNQ4B7DY25ARVGXK7AQPNDMM/	15

INTRODUCTION

This Saturday, November 26, no fewer than 19 counties plan to offer early voting in the runoff election for one of Georgia’s seats in the U.S. Senate. These counties have announced and promoted that voting will be available this Saturday, and voters in those counties—in which over four million Georgians reside—have made plans to vote based on those communications. Contrary to Intervenor’s baseless claims, *several* of these counties voted for the Republican nominee for U.S. Senate in the November 8 general election, sometimes by wide margins.¹

The counties’ plans are squarely in compliance with Georgia law, which requires that counties begin advance voting for this rapidly approaching runoff election “as soon as possible” to maximize the number of days on which Georgians can vote in the runoff. O.C.G.A. § 21-2-385(d)(1)(B). As now two courts have recognized, although Georgia law precludes counties from offering early voting on the second Saturday before a “primary or election” if that Saturday comes

¹ As of the evening of November 22, the Secretary of State’s Office’s Chief Operating Officer, Gabriel Sterling, has publicly identified 18 counties presently offering voting this Saturday: Baker, Bibb, Chatham, Clarke, Cobb, DeKalb, Douglas, Fulton, Gwinnett, Macon, Mitchell, Muscogee, Newton, Randolph, Rockdale, Terrell, Walton, and Ware. @GabrielSterling, Twitter (Nov. 22, 2022 at 5:16 p.m.), <https://twitter.com/GabrielSterling/status/1595179380535431169>. Since that time, Respondents are aware of at least one additional county (Henry) that has announced Saturday voting. See @HenryCounty, Twitter (Nov. 22, 2022, 7:27 p.m.), <https://twitter.com/HenryCounty/status/1595212399036047360>. Republican Senate candidate Herschel Walker’s share of the general election vote exceeded 60% in at least three of these counties and least 70% in two of them.

immediately after a holiday (hereinafter, the “Holiday Exception”), that restriction does not apply to runoffs. *Id.* § 21-2-385(d)(1). In fact, the Legislature in 2017 *deleted* the word “runoff” from the Holiday Exception. Thus, unlike other provisions of O.C.G.A. § 21-2-385 that expressly assign early voting and provisional ballot rules to “primary, election, *or* runoff” *id.* §§ 21-2-385(b), (d)(1), (e) (emphasis added), the Holiday Exception intentionally excludes runoffs. Accordingly, several counties held advance voting on the Saturday after Christmas in the last Senate runoff election just last year.

The counties’ plans to offer voting this coming Saturday are also consistent with statements made by Secretary of State Brad Raffensperger and his Chief Operating Officer Gabriel Sterling in separate television appearances just a few weeks ago on November 9, in which each stated that some counties would hold early voting on November 26, the Saturday after Thanksgiving. Although the State then issued inaccurate guidance to the contrary, it has since abandoned that position. And two days ago, the Secretary’s Office announced that “[c]ounties who choose to [m]ay offer Saturday voting on November 26.”² Just yesterday, Mr. Sterling again added the State’s imprimatur to this process by promoting advance voting in these counties on three separate occasions while noting there may be others as well.³

² See @GabrielSterling, Twitter (Nov. 21, 2022 at 7:11 p.m.), <https://twitter.com/GabrielSterling/status/1594846028657823745>.

³ See generally @GabeSterling, <https://twitter.com/GabrielSterling>.

Alone, the Georgia Republican Party, National Republican Senatorial Committee, and Republican National Committee (“Intervenors”), persist, asking this Court to grant a petition for certiorari on an emergency basis *and* to stay the Superior Court’s order below, injecting chaos into the runoff election *a mere three days before* voting is set to take place. Their appeal is deficient on its face—Intervenors have failed to comply with this Court’s “mandatory” requirement in Rule 38 that petitions for certiorari be filed only “after the date of entry of judgment” in the Court of Appeals. For that reason, the Court must deny their petition for a writ of certiorari.

Even if a writ of certiorari could be granted, the Intervenors are not entitled to a stay. Beyond being wrong on the merits and lacking standing to appeal, their allegations fall far short of the irreparable harm necessary to warrant the emergency relief they seek. They have not even *claimed* (much less proven) that they would suffer any irreparable harm absent a stay—a fact that is itself sufficient to deny their petition. Instead, they vaguely assert the Superior Court’s order undermines uniformity in election administration because not all counties will choose to hold advance voting on November 26, a claim undercut by the fact that the statute presupposes a lack of uniformity by instructing counties to commence advance voting “as soon as possible” rather than on a date certain. *Id.* § 21-2-385(d)(1)(B). Indeed, their own brief **admits** that the “General Assembly enacted” an advance

voting “framework that *mandates* advance voting on some days” but merely “*permits* it on other days.” *See* Pet. 9 (emphases in original).

Finally, Intervenor’s predictions of “chaos” are similarly baseless. Some, but not all, counties offered Saturday voting on the day after Christmas during the 2021 runoffs and no “chaos” ensued. If anything, it is the Intervenor’s eleventh-hour request that threatens to create confusion, as many counties—and now the Secretary’s office as well—have spent days promoting Saturday voting to Georgians. That substantial and growing reliance interest on the availability of advance voting this Saturday pushes the already lopsided equities even further against granting a stay.

STATEMENT OF THE CASE

Georgians will choose their next Senator in a runoff scheduled for December 6, 2022. O.C.G.A. § 21-2-501(a)(1). Early voting in that runoff is governed by O.C.G.A. § 21-2-385(d)(1), which sets forth different rules for primaries, general elections, and runoffs. For example, whereas advance voting must commence “[o]n the fourth Monday immediately prior to [a] *primary or election*,” such advance voting must begin “[a]s soon as possible prior to a *runoff*,” but “no later than the second Monday immediately prior to such *runoff*.” *Id.* (emphases added).

At issue here is § 21-2-385(d)(1)’s second sentence, which provides for weekend voting prior to “primar[ies] and election[s].” Most relevant is that

sentence's Holiday Exception, which prohibits advance voting on the second Saturday before Election Day if it immediately "follow[s] a public and legal holiday occurring on the Thursday or Friday" prior. *Id.* Unlike the many other portions of § 21-2-385 that expressly speak of primaries, general elections, *and* runoffs, *see, e.g.,* § 21-2-385(b), (e), the word "runoff" appears nowhere in § 21-2-385(d)(1)'s second sentence.

The Legislature enacted the Holiday Exception in 2016. That provision required advance voting on the second Saturday prior to Election Day unless "such second Saturday follows a public and legal holiday occurring on the Thursday or Friday immediately preceding such second Saturday," in which case advance voting would instead be "held on the third Saturday prior to such primary, election, *or runoff.*" 2016 Ga. Laws Act 347 § 4. A year later, however, the Legislature amended the Holiday Exception by striking "runoff" from the provision. 2017 Ga. Laws Act 250 § 18. The Legislature explained that this change "revise[d] the period of time for certain advance voting." *Id.*

The Legislature's clear exemption of runoffs from the Holiday Exception has prompted several counties to recently offer early voting on the second Saturday before a runoff when it followed a holiday. Ahead of the January 2021 runoff, at least Fulton and Gwinnett Counties held voting on December 26, the day after Christmas. Ex. D to Pet. at Exs. 5, 6.

Consistent with this history, on November 9, 2022, Secretary of State Raffensperger and his Chief Operating Officer appeared separately on national television and confirmed that counties had the option to hold early voting on November 26, the Saturday after Thanksgiving. Pet., Ex. E at 4. Just three days later, however, the Secretary reversed course, issuing an “official election bulletin” addressed to county election officials and county registrars asserting that O.C.G.A. § 21-2-385(d)(1) prohibited “Advanced Voting on Saturday, November 26th.” Pet., Ex. F at 21.

Plaintiffs filed this suit two days after the Bulletin’s release, seeking declaratory and injunctive relief. After a hearing, the Superior Court granted Plaintiffs’ requested relief. Pet., Ex. E at 1. The State noticed an appeal on November 20. The next day, the State and Intervenor (collectively, “Defendants”) filed separate motions for an emergency stay. Plaintiffs filed a response the same day and the Court of Appeals denied both motions shortly thereafter.

After the Court of Appeals declined to stay the Superior Court’s order, the Secretary of State’s office announced that it would not seek any further appeal and would instead begin assisting counties that chose to offer advance voting on Saturday, November 26. Intervenor elected to continue seeking relief and filed an Emergency Petition for Writ of Certiorari and Emergency Motion to Stay the

Superior Court's Declaratory and Injunctive Relief on November 22. This Court ordered Respondents to file a response by 9:00 a.m. on November 23.

ARGUMENT

I. Intervenors' improper petition for a writ of certiorari should be denied.

Intervenors' petition for a writ of certiorari is fatally premature. This case remains pending before the Court of Appeals, which has not issued a final judgment. This Court's Rule 38, which sets forth "mandatory" prerequisites to seeking a writ of certiorari to the Court of Appeals, instructs that such a petition may not be filed until "*after* the date of entry of judgment." Because the Court of Appeals has not issued a judgment in this case, Intervenors cannot yet seek certiorari.

Intervenors cite no authority suggesting they can ask this Court to issue a writ of certiorari before the Court of Appeals enters its judgment. Their only remotely relevant citation is O.C.G.A. § 5-6-34(a), *see* Pet. 8 & n.2, but nothing in that provision allows Intervenors to skirt Rule 38's mandatory requirement that a petitioner wait until the Court of Appeals enters judgment. While Section 5-6-34(a) sets forth the jurisdiction of the Court of Appeals and this Court to entertain direct appeals from "judgments and rulings of the superior courts" and other trial-level

tribunals, it provides no authority to seek a writ of certiorari to the Court of Appeals before that court even issues a judgment.⁴

Perhaps aware that Rule 38 bars their effort to seek certiorari at this time, Intervenor attempt in a footnote to frame the Court of Appeals’ refusal to stay the Superior Court’s decision pending full merits review as a decision that Intervenor may “appeal” to this Court. Specifically, they claim that the Court of Appeals’ denial of a stay pending appeal “had the effect of extending the Plaintiffs’ injunctive relief, and thus falls under Section 5-6-34(a)(4).” Pet. 9 n.2. That theory is seriously flawed. Section 5-6-34(a) provides only for direct appeals of *trial court* orders, not an appeal from the Court of Appeals to this Court.⁵ Indeed, there is no such thing as an “appeal” from the Court of Appeals to this Court; the only option for a party seeking to overturn a decision of the Court of Appeals is to ask for a writ of certiorari. Ga. Const. art. VI, § VI, ¶ V. As explained, such petitions are governed by Rule 38,

⁴ Intervenor have not sought to appeal the Superior Court’s order directly to this Court. The only notice of appeal that has been filed in the Superior Court in this case is the State’s, which was directed to the Court of Appeals. Pet, Ex. I. In any event, Intervenor cannot directly appeal the Superior Court’s order to this Court because this case does not involve any of the matters that fall under this Court’s mandatory appellate jurisdiction. *See* Ga. Const. art. VI, § VI, ¶¶ II, III.

⁵ The only case Intervenor cite in this portion of their petition—*Morgan v. U.S. Bank Nat’l Ass’n*, 322 Ga. App. 357, 359 (2013), Pet. 9 n.2—demonstrates this point. That case involved a direct appeal from a *superior court* to the *Court of Appeals*, not an appeal from the Court of Appeals to this Court.

which requires Intervenor to wait until after the Court of Appeals issues its judgment. Because that has not yet happened, Intervenor's petition must be denied.

II. Intervenor has not proven their entitlement to a stay.

"A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009); see *Green Bull Ga. Partners, LLC v. Register*, 301 Ga. 472, 473 n.3 (2017) (citing federal case law for standard governing stay pending appeal). Intervenor has not satisfied their burden of showing an entitlement to this extraordinary remedy. They have not proven (1) "a strong showing that [they are] likely to succeed on the merits," (2) that they "will be irreparably injured absent a stay," (3) that a "stay will [not] substantially injure the other parties interested in the proceeding," or (4) that a stay will serve "the public interest." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317 (11th Cir. 2019).

A. Intervenor is not likely to succeed on the merits.

1. The Holiday Exception does not apply to runoffs.

The sole merits issue in this case is the proper construction of O.C.G.A. § 21-2-385(d), which governs advance voting for Georgia's elections. That provision plainly permits counties to commence "advance voting" as "*soon as possible* prior to a runoff from any general primary or election but no later than the second Monday immediately prior to such runoff." O.C.G.A. § 21-2-385(d)(1)(B) (emphasis added).

Counties are therefore free to hold advance voting days for runoffs as soon as practicable after a “primary or election.” *Id.*

Intervenors’ claim that counties may not hold early voting on November 26 runs headlong into the statutory text, which expressly applies this limitation only to primary or general elections, and not runoffs. The provision reads in relevant part:

Voting . . . shall be conducted on the second and third Saturdays during the hours of 9:00 A.M. through 5:00 P.M. and, if the registrar or absentee ballot clerk so chooses, the second Sunday, the third Sunday, or both the second and third Sundays prior to a primary or election during hours determined by the registrar or absentee ballot clerk, but no longer than 7:00 A.M. through 7:00 P.M.; provided, however, that, if such second Saturday is a public and legal holiday pursuant to Code Section 1-4-1, if such second Saturday follows a public and legal holiday occurring on the Thursday or Friday immediately preceding such second Saturday, or if such second Saturday immediately precedes a public and legal holiday occurring on the following Sunday or Monday, such advance voting shall not be held on such second Saturday but shall be held on the third Saturday prior to such primary or election beginning at 9:00 A.M. and ending at 5:00 P.M.

Id. § 21-2-385(d)(1)(B) (emphases added). As the emphasized text makes clear, the Holiday Exception applies only to *primary* and *general* elections, not *runoffs*.

The lack of any reference to runoffs is not an accident. In the very same subsection, the Legislature made distinctions among three categories of elections: (1) a primary election (referred to as a “primary”); (2) a general election (referred to as an “election,” *see id.* § 21-2-2(5) (defining “election” as a “general or special election and not . . . a primary or special primary”)); and (3) a runoff, *id.* § 21-2-385(d)(1)(B)). Section 21-2-385(d)(1) creates distinct rules for these different

categories of elections and refers to them expressly when doing so. For example, advance voting must begin the “fourth Monday immediately prior” to a primary or general election; for runoffs, however, advance voting must instead begin as “soon as possible . . . but no later than the second Monday” prior to the election.

The Legislature also separately categorized primaries, general elections, and runoffs elsewhere in § 21-2-385. Subsection (b) limits a person’s ability to assist others to complete their mail-in ballots “in any primary, election, or runoff.” Similarly, subsection (e) requires counties to publish daily reports on the number of provisional ballots cast until the fourth day following “a primary, election, or runoff.”

The Legislature’s repeated and express delineations among primaries, general elections, and runoffs in § 21-2-385 makes “clear that [it] knew how to specify” when certain rules should, and should not, apply to runoffs. *Avila v. State*, 333 Ga. App. 66, 70 (2015). Its choice to refer *specifically* to a “primary or election”—but *not* a “runoff”—when drafting the second sentence in § 21-2-385(d)(1) is an unmistakably deliberate omission and “a matter of considered choice.” *Citibank (S.D.), N.A. v. Graham*, 315 Ga. App. 120, 122 (2012).

Any doubt about the Legislature’s intent is put to rest by § 21-2-385(d)(1)’s history. When the Legislature crafted the Holiday Exception in 2016, it applied to each “primary, election, *or runoff*.” 2016 Ga. Laws Act 347 § 4 (emphasis added).

The following year, the Legislature amended that provision by striking a single word—“*runoff*”—and leaving “primary or election.” 2017 Ga. Laws Act 250 § 18. In doing so, the Legislature made unequivocally clear that the Holiday Exception would now apply to a “primary or election” but *not* a runoff. *Id.* Intervenor’s interpretation of § 21-2-385(d)(1)(B) would undo the Legislature’s handiwork, grafting the term “runoff” back into a statute from which the General Assembly specifically deleted it. That would, in effect, overturn the 2017 act.

Intervenor largely ignore the 2017 act’s overwhelming demonstration that the Legislature intended runoffs to be excluded from the Holiday Exception. *See* Pet. 20. They instead suggest, without a shred of evidence, that the 2017 amendment was merely “part of an attempt to uniformly apply ‘primary or election’ across the election code.” *Id.* But that argument is swiftly defeated by the fact that the 2017 amendment left untouched multiple references to “primary, election, or runoff” in the same provision, including in subsections (b) and (e). *See* 2017 Ga. Laws Act 250 § 18. Deleting the term “runoff” in only one of three instances where the Legislature paired it with “primary or general” in § 21-2-385 does nothing to achieve the end Intervenor ascribe to the 2017 amendment, and this Court “cannot attribute to the General Assembly the intent to do a useless act by the specific deletion in language.” *Holcomb v. Gray*, 234 Ga. 7, 8 (1975). The Legislature’s choice to delete “runoff” *only* from the Holiday Exception—but not multiple other subsections in the same

provision—cannot be treated as an idle act. “Where 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.” *Fredrick v. State*, 181 Ga. App. 600, 601 (1987) (citation omitted). Intervenor’s theory that the 2017 act made no substantive change to the law also contradicts the act’s caption, which states that the removal of “runoff” from the Holiday Exception was meant “to *revise* the period of time for certain advance voting.” 2017 Ga. Laws Act 250.

Intervenor’s citations to provisions *outside* of § 21-2-385 where references to primaries and elections encompass runoffs, or the fact that a runoff is a “continuation” of a primary or general election, provide no answer to the overwhelming evidence that the Legislature intended to exempt runoffs from the Holiday Exception. Pet. 15, 18. Even if the terms “primary or election” in *other* parts of the law may refer to runoffs, that is plainly not the case in § 21-2-385, where the Legislature specifically chose to draw distinctions between “primaries,” “elections,” and “runoffs.” *Glinton v. And R, Inc.*, 271 Ga. 864, 866–67 (1999) (“[S]pecific statutes govern over more general statutes[.]”); *see also Graham*, 315 Ga. App. at 122 (explaining omission of a term used elsewhere in same statute is a “matter of considered choice” by the Legislature).⁶

⁶ That courts, like laypeople, sometimes casually refer to runoffs as “elections” is not relevant to interpreting the specific statutory provision at issue here. *See* Pet. 16.

Intervenors next argue that the Superior Court’s interpretation must be wrong because it would mean that nothing in § 21-2-385(d)(1)’s second sentence applies to runoffs. Pet. 18–19. But that is a far more defensible reading than the strained interpretation offered by the Intervenors, which suggests that only *half* of § 21-2-385(d)(1)’s second sentence applies to runoffs—specifically the Holiday Exception that Intervenors hope to see apply here—but not the *other half* that requires advance voting on certain Saturdays in the first place. *See id.* at 20-21. That is implausible on its face—it cannot be the case that the statute’s *exception* to mandatory Saturday voting applies, but not the underlying *command* to hold Saturday voting that necessitates that exception in the first place.

The Intervenors’ labored textual reasoning confirms the point. They claim that the phrase “primary or election” in the first clause of the sentence refers to primaries, general elections, *and* runoffs because a runoff is a continuation of an election; yet they argue simultaneously that the identical phrase in the second clause refers only to primaries and general elections, but *not* runoffs. *Id.* That is nonsensical—ascribing different meanings to identical terms in *the same sentence* is simply not how statutes are read in Georgia. *See Henry Cnty. Bd. of Registrars v. Farmer*, 213 Ga. App. 522, 522 (1994) (rejecting a “selectively strict reading of [a] statute” that would enforce one “portion of the statute” but “ignore the rest of the sentence”). Moreover, the second clause refers to “*such* primary or election,” referring back to the first clause’s

earlier mention of mandatory Saturday voting and optional Sunday voting “prior to a primary or election.” O.C.G.A. § 21-2-385(d)(1)(B); *see also, e.g., Wikimedia Found. v. Nat’l Sec. Agency/Cent. Sec. Serv.*, 14 F.4th 276, 297 (4th Cir. 2021) (noting the term “such” means “of the character, quality, or extent *previously indicated* or implied” (emphasis added)). Intervenors cannot have their cake and eat it too; the second sentence of § 385(d)(1) either applies to runoffs or it does not, and Intervenors are not free to pick and choose among its clauses as it suits them.⁷

2. Intervenors lack standing to appeal.

Intervenors’ petition for a writ of certiorari should be denied for a separate reason: Intervenors lack standing to appeal the Superior Court’s order. To demonstrate standing to appeal, Intervenors must show that the decision below

⁷ Intervenors’ suggestion that Plaintiffs’ interpretation provides no guidance on the days and times during which counties may conduct advance voting misreads the statute. The third sentence of § 21-2-385(d)(1) states that voting may occur between 7:00 a.m. and 7:00 p.m. And § 21-2-385(d)(1)(B) establishes that advance voting for runoffs should commence as soon as possible, thus permitting advance voting on Saturdays or any day that the county is prepared to offer it up until the Friday immediately before the runoff. While Intervenors may be dissatisfied with the amount of discretion that this provision confers upon county officials, that is how the Legislature chose to draft the statute which, as the Secretary now admits, is “something the General Assembly should consider clarifying to avoid confusion in the future.” Mark Niese, *Saturday voting upheld in Georgia US Senate runoff*, ATLANTA JOURNAL-CONSTITUTION (Nov. 21, 2022), <https://www.ajc.com/politics/georgia-appeals-court-allows-saturday-early-voting-in-us-senate-runoff/NNQ4B7DY25ARVGXK7AQPNBDSMM/>. It certainly does not support Intervenors’ more strained reading of the provision, which simply picks and chooses which clauses apply to runoffs at will.

“aggrieved” them. *State v. Towns*, 307 Ga. 351, 351 n.2 (2019). It is not enough that they were a party below. See *Hamilton State Bank v. Nelson*, 296 Ga. 572, 573 (2015); *Towns*, 307 Ga. at 351 n.2 (“The State, however, has no standing to complain on appeal about a ruling that in no way aggrieved the state”); *Brown v. City of Atlanta*, 66 Ga. 71, 76 (1880) (plaintiff-appellant lacked standing to appeal because he failed to “show error which has hurt him”). Intervenorors fail to demonstrate standing to appeal for three reasons.

First, the order on appeal entered declaratory and injunctive relief against the *State*—not Intervenorors. Ordinarily, “one against whom a judgment has been entered [has] standing to appeal from that judgment.” *Barham v. City of Atlanta*, 292 Ga. 375, 376 (Ga. 2013). This Court, for example, recently held that a bank that sued over unpaid debts lacked standing to appeal an order directing the defendants to “turn over to [the Bank] the keys to and possession of [certain] real property.” *Hamilton State Bank*, 296 Ga. at 573 (“[T]he trial court never required the Bank to take possession, and so, any such error could not have harmed the Bank. Consequently, the Bank cannot be heard to complain about the order, which was directed only to the Nelsons.”).

Here, too, the Intervenorors lack standing to challenge the Superior Court’s order, “which was directed only to” the State. *Id.* The Superior Court’s order provides that *the State* is “enjoin[ed] . . . from interfering in any effort by Georgia

counties to provide advance voting on Saturday, November 26, 2022.” Pet., Ex. E at 9–10. The State, however, has chosen not to appeal and is instead actively working with counties to facilitate early voting on November 26. The order was not directed at the Intervenor and does not compel or restrain the Intervenor in any way.

Second, and relatedly, Intervenor has failed to show that they are “in [any] way aggrieved” by the Superior Court’s order. *Towns*, 307 Ga. at 351 n.2; *see also Hamilton State Bank*, 296 Ga. at 573 (no standing on appeal where “any such error could not have harmed” appellant). Intervenor has not even claimed—much less proven—that they have suffered *any* harm from the order being appealed. *See infra* § II.B.1. Nor could they. The order does not, for example, limit the ability of any Republican voter from participating in the upcoming runoff; to the contrary, the order *expands* the ability of Georgians who support the Republican nominee to cast a ballot for him. Because Intervenor identifies no reason at all to believe they are aggrieved by the Superior Court’s decision, they cannot seek relief from this Court. “In short, [Georgia] would rather stop than fight on,” and Intervenor “cannot alone continue the litigation against the [State’s] will.” *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1956 (2019).

Third, even if Intervenor identified a concrete harm from the Superior Court’s decision, they offer no evidence that the relief they request here would redress that harm. *See Ctr. for a Sustainable Coast, Inc. v. Turner*, 324 Ga. App.

762, 767 (2013) (dismissing appeal due to appellant’s “inability to demonstrate redressability”). If granted, Intervenor’s request to *stay* the Superior Court’s declaratory and injunctive relief would return the parties to the scenario that existed before this suit was filed: an absence of any binding judicial conclusion about the legality of advance voting on November 26. As noted above, the Secretary is currently working with counties to facilitate voting on that date. Intervenor has offered no evidence that, if the Court entered a stay, the Secretary or the nineteen counties that have announced an intention to conduct advance voting on November 26 would change their behavior. Given the last-minute nature of this stay request, there is strong reason to believe they would not. Because there is no evidence the relief Intervenor seeks would redress any injury caused by the decision below, they lack standing to seek such relief.

B. Intervenor has not demonstrated that the equities favor a stay.

1. The Petition makes no showing of irreparable harm.

The Court should deny the petition for the independent reason that the Intervenor failed to even *claim* irreparable harm, either here or before the Court of Appeals, which is “vital necessity” for such relief. *Hampton Island Founders, LLC v. Liberty Cap., LLC*, 283 Ga. 289, 293 (2008) (citing *Price v. Empire Land Co.*, 218 Ga. 80, 85 (1962)); *see also Hipster, Inc. v. August Mall Partnership*, 291 Ga. App. 273, 275 (2008). Indeed, it is not even clear what irreparable harm the Intervenor

claim will be inflicted on *them*, as nearly all their discussion of the issue is framed in terms of the *State's* interest. *See e.g.*, Pet. 22 (noting State's interest in an "efficient, fair, and free election"); *id.* at 23 (describing the compelling interests of "[t]he State of Georgia, through the Secretary" and "Georgia's interests"); *id.* at 24 (arguing "Georgia has an interest in its election laws being applied as written"). But, tellingly, the State *declined* to seek further relief from the Court of Appeals' order and is instead now *assisting* counties that have chosen to offer Saturday voting, rendering the Intervenors' already irrelevant claims of irreparable harm completely baseless.

Regardless, the relief granted below causes no harm to the Intervenors whatsoever—it simply requires the State to not impede the efforts of some counties to grant residents a single extra day of advance voting. The State has now accepted that judgment and an increasing number of counties across Georgia are now choosing to offer that extra day of voting to their residents. Any burden of conducting advance voting on November 26 is borne by counties that choose to open the polls on that day. The order below inflicts no harm whatsoever on Intervenors, who do not even assert that the availability of advance voting on November 26 will put them at an electoral disadvantage. Regardless, "simply showing some possibility of irreparable injury" is not enough. *Nken*, 556 U.S. at 434-35. "[I]f the petitioner has not made a certain threshold showing regarding irreparable harm . . . then a stay

may not issue, regardless of the petitioner’s proof regarding the other stay factors.” *Leiva-Perez v. Holder*, 640 F.3d 969, 965 (9th Cir. 2011) (citing *Nken*, 556 U.S. at 434-35). The complete failure of Intervenor’s to articulate an irreparable injury in the absence of a stay pending appeal requires this Court to deny its petition. *Nken*, 556 U.S. at 434-35.

2. The remaining equities, including the threat of irreparable harm to the public and Respondents, weigh strongly against a stay.

In contrast to the paltry showing of harm from the Intervenor’s, the threat of irreparable harm to the public and Respondents if a stay is granted is severe. As of the evening of November 22, before Henry County announced its plans, the Secretary of State’s office counted eighteen counties across the state—while recognizing “[t]here may be others tomorrow”—that plan to offer advance voting this coming Saturday and are promoting voting on that day to their residents. *See* @GabrielSterling, Twitter (Nov. 22, 2022 at 5:16 p.m.), <https://twitter.com/GabrielSterling/status/1595179380535431169>; *see also* Exs. A-E. These plans have been broadly communicated to voters in these counties, which are home to millions of Georgians.

Just as examples, Randolph and Chatham Counties have each promoted their plans to offer Saturday voting in local and regional newspapers, including the *Savannah Morning News*. *See* Ex. A ¶¶ 6-7 (“McCrae Aff.”); Ex. B (“Williams

Aff.”). These and other counties have likewise promoted voting on that day on their websites and through other online channels. *See Williams Aff.*; *McCrae Aff.* ¶¶ Ex. D ¶ 5 (“Taylor Aff.”); Ex. C ¶ 5 (“Day Aff.”); Ex. E (“Finney Aff.”); *see also, e.g.*, Fulton County, *Early Voting Locations*, <https://www.fultoncountygga.gov/inside-fulton-county/fulton-county-departments/registration-and-elections/early-voting-locations>. Counties have already undertaken preparatory steps like reserving public space for polling sites and scheduling staff for shifts at the polls. *See Williams Aff.*; *McCrae Aff.* ¶ 8; *Finney Aff.*; *see also @KellyGirtz*, Twitter (Nov. 22, 2022 5:35 p.m.) <https://twitter.com/kellygirtz/status/1595184341377847297> (uploading a letter from Mayor Girtz to the Honorable Justices of this Court and advising that Athens-Clarke County has “secured locations and staff for early voting on Saturday November 26, and have promoted these times and locations widely”) (“Girtz Letter”). Gwinnett County, for example, has “taken steps to ensure the availability of staff at all eleven (11) [of its] advanced voting locations.” *Taylor Aff.* ¶ 4; *Day Aff.* ¶ 4.⁸

⁸ Intervenors submitted an affidavit from Chairwoman Alice O’Lenick of the Gwinnett County Board of Registration and Elections in support of their petition. But the facts in her November 17 affidavit have been overtaken by events on the ground. Subsequent to her affidavit, the Gwinnett County Board voted to offer advance voting on Saturday, November 26, reflecting the desire of that Board to offer such voting. *See Taylor Aff.* ¶ 3, 6; *Day Aff.* ¶¶ 3, 6. Further, Ms. O’Lenick’s suggestion that it would be an “insurmountable” challenge for Gwinnett County to secure staff and machinery necessary to operate all eleven early voting sites in the

Staying the lower court’s relief will throw these efforts into disarray mere days before voting is set to occur and will further confuse voters in these counties who believe that advance voting will be available this Saturday. Those dangers are even more acute now that the Secretary has dropped his opposition to Saturday voting and is currently *promoting* it to Georgia voters through his Chief Operating Officer. The Intervenor’s extraordinary request for relief, unjustified by even the meagerest showing of irreparable harm, threatens to sow confusion among voters and county election officials. *Cf. New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1284 (11th Cir. 2020) (citing *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020); *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). As Chairman McCrae of the Chatham County Board of Registrars explained, “[e]liminating early in person voting scheduled for Saturday, November 26, 2022 at this late juncture” would “create confusion among the voting public” and “be harmful to voters in Chatham County” in view of the County’s preparations and promotion of such voting. McCrae Aff. ¶ 9; *see also* Williams Aff. (explaining that eliminating Saturday voting at this “late” hour would be “detrimental” to residents of Randolph County); Finney Aff. (similar); Girtz Letter (explaining that permitting Saturday

county has proven wrong—in fact, advance voting will be available “at all eleven (11) locations” in the county “between the hours of 7:00am and 7:00pm.” Taylor Aff. ¶¶ 3-4; *see also* Day Aff. ¶¶ 3-4 (same).

voting to proceed would “ensure public confidence in our democratic process and limit voter confusion”).

Confusion aside, the Intervenor also seek to unlawfully limit voting opportunities for Georgians, including many of Respondents’ members, supporters, and constituents who wish to avail themselves of advance voting on Saturday. As explained above, nothing in Georgia law precludes counties from offering advance voting to their residents this Saturday, yet the Intervenor ask this Court to strip away that voting opportunity at the eleventh hour. Courts have repeatedly found that such an “infringement on the fundamental right to vote constitutes irreparable injury.” *Democratic Nat’l Committee v. Bostelmann*, 447 F. Supp. 3d 757 (W.D. Wis. 2020); *see Obama for Am. v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012) (“A restriction on the fundamental right to vote . . . constitutes irreparable injury.”); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (plaintiffs “would certainly suffer irreparable harm if their right to vote were impinged upon”). That remains the case even when the opportunity to vote is not denied altogether. *See, e.g., League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 248 (4th Cir. 2014) (finding irreparable harm from elimination of same-day registration and out-of-precinct voting); *Bostelmann*, 447 F. Supp. 3d at 769 (finding irreparable harm from shortened voter registration deadline). Numerous county officials across Georgia have made clear that they *want* to afford their residents this opportunity, particularly

for individuals who work during the week, and that barring them from doing so at the last minute would undercut faith in the democratic process. *See, e.g.,* McCrae Aff. ¶ 9; Williams Aff.; Day Aff. ¶ 6; Taylor Aff. ¶ 6; Finney Aff.; Girtz Letter.

Respondents themselves will also each suffer irreparable harm if a stay is granted because such relief will impede their ability to increase voter turnout and thus pursue their core missions as organizations, which depend on offering their members and constituents every possible lawful opportunity to vote. *See Ga. Coal. for the People's Agenda v. Kemp*, 347 F. Supp. 3d 1251, 1268 (N.D. Ga. 2018) (finding unlawful obstacles to organization's voter mobilization efforts would cause it to "suffer irreparable injury").

Permitting Saturday voting to proceed in counties that wish to offer it is also *firmly* in the public interest, as it ensures that thousands of voters are not denied access to advance voting on a day when their counties wish to offer it. *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("It is beyond cavil that voting is of the most fundamental significance under our constitutional structure.") (cleaned up). In contrast, barring voters from advance voting on November 26 due to the vagaries of the holiday calendar—and over the wishes of local officials who had planned to provide such

voting opportunities in accordance with Georgia law—will subvert the most fundamental public policy of our political system.

There is absolutely no merit to the Intervenor's countervailing arguments on the public interest. Despite their caterwauling about how the Superior Court's order "eviscerate[es]" the Legislature's desire for uniformity, *see* Pet. 23, their very own petition *admits* that the "General Assembly enacted" an advance voting "framework that *mandates* advance voting on some days" but merely "*permits* it on other days," directly undercutting their claim that the Legislature desired complete uniformity in advance voting, *id.* at 9 (emphases in original). Indeed, that claim makes no sense to begin with—the Legislature instructed counties to commence advance voting for runoffs "as soon as possible," O.C.G.A. § 21-2-385(d)(1), a command that all but ensures Georgia's 159 counties will offer different periods of early voting for runoff contests. Similarly, the statute expressly makes *Sunday* voting discretionary in some cases, further ensuring some measure of variation across counties.

Finally, Intervenor's suggestion that the lower courts' rulings impose last-minute changes to election rules is not credible—Plaintiffs' interpretation of the statute is consistent with how counties applied the Holiday Exception in the 2021 runoff and the view expressed just two weeks ago by the Secretary that counties had the option to offer advance voting on November 26. It is Intervenor, not Plaintiffs,

that seek to disrupt this practice which has governed successive runoffs—the Secretary’s now abandoned bulletin notwithstanding.

CONCLUSION

The Court should deny Intervenor’s emergency petition for a writ of certiorari and, in any event, decline to stay the orders below.

Respectfully submitted on this 23rd day of November 2022.

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Attorneys for Respondents

Exhibit A

RETRIEVED FROM DEMOCRACYDOCKET.COM

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

DEMOCRATIC PARTY OF GEORGIA, INC.,)
DSCC, and WARNOCK FOR GEORGIA)
)
Plaintiffs,)
)
VS.) CIVIL ACTION NO.: 2022-CV-372734
)
THE STATE OF GEORGIA,)
)
Defendant.)

AFFIDAVIT OF COLIN MCRAE

Before me, the undersigned authority, personally appeared Colin McRae, who being by me duly sworn, states as follows:

1. My name is Colin McRae. I am of sound mind and of the age of majority.
2. I serve as Chairperson of Chatham County Board of Registrars. Chatham County Board of Registrars is the entity responsible for administering early voting in Chatham County, Georgia.
3. The following statements are based on my personal knowledge during my more than seventeen (17) years of service as a Member of the Board of Registrars of Chatham County, including four terms as Chairperson of the Board.
4. The statements set forth below are made in my individual capacity and do not necessarily reflect the positions or opinions of my fellow Board Members of the Chatham County Board of Registrars, nor the positions or opinions of the Chatham County Board of Registrars as a whole.
5. Chatham County Board of Registrars has publicly committed to offering early in person voting on Saturday, November 26, 2022.
6. Chatham County Board of Registrars has publicized that it will offer early in person voting on Saturday, November 26, 2022.
7. *Savannah Morning News*, Chatham County's newspaper of record, has published a front-page story notifying the voting public that early in person voting will take place on Saturday, November 26, 2022.
8. Chatham County Board of Registrars has scheduled twenty (20) elections workers to staff early in person voting on Saturday, November 26, 2022.



9. Eliminating early in person voting scheduled for Saturday, November 26, 2022 at this late juncture would be harmful to voters in Chatham County. It would create confusion among the voting public and could engender mistrust in the elections process.



Colin McRae

Subscribe and sworn before me on this 22 day of November, 2022.



Notary Public



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Exhibit B

RETRIEVED FROM DEMOCRACYDOCKET.COM

Affidavit Form

I, Chairman Wesley L. Williams, of the Randolph County Board of Commissioners in the presence of the County Clerk Carlisa Cooper undersigned notary public, under oath or affirmation make the following statements:

 Saturday voting will allow citizens to vote who may otherwise work throughout the week, Saturday will be the only opportunity for citizens to vote.

 Our Board of Elections have made preparations for Saturday voting by publicizing in the local newspapers, the County's website and the Secretary of State's website.

 To not allow Saturday voting at this late will be detrimental to the citizens of Randolph County.

Wesley L. Williams Date: 11/22/2022
Signature of Affiant

State of Georgia

County of Randolph

Signed and sworn to (or affirmed) before me on 11/22/2022
Date

by Chairman Wesley L. Williams,

who is

 personally known

or

 ☒ proved to me on the basis of satisfactory evidence to be the person

who appeared before me.

Carlisa L. Cooper
(signature of notary public)

Notary Public, State of Georgia Stamp/Seal

My commission expires: 1/30/2025

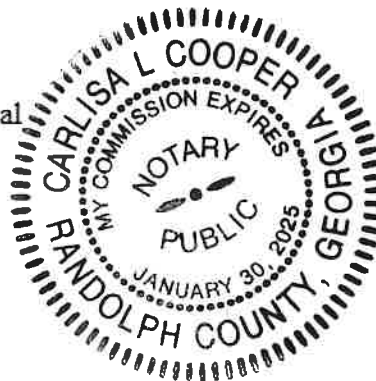


Exhibit C

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AFFIDAVIT OF STEPHEN DAY

STATE OF GEORGIA

COUNTY OF GWINNETT

Personally appeared before the undersigned officer duly authorized to administer oaths in this state came Stephen Day who, having been sworn, deposes and states the following:

1.

My name is STEPHEN DAY. I am over the age of 18 and competent to make this affidavit. I am suffering under no legal disabilities. I give this affidavit freely and voluntarily and based upon my own personal knowledge.

2.

I am a member of the Gwinnett Board of Registrations and Elections and I make this affidavit in my individual capacity and not on behalf of the Board.

3.

On November 21, 2022, at a specially called meeting of the Gwinnett Board of Registrations and Elections, the Board voted by 3-2 vote to authorize Advanced Voting on Saturday, November 26, 2022 at eleven (11) locations between the hours of 7:00am and 7:00pm EST.

4.

The Gwinnett Board of Registrations and Elections has deployed voting equipment and taken steps to ensure the availability of staff at all eleven (11) advanced voting locations in Gwinnett County.

5.

Gwinnett County has publicized the availability of advanced voting for Saturday, November 26, 2022 on its website:

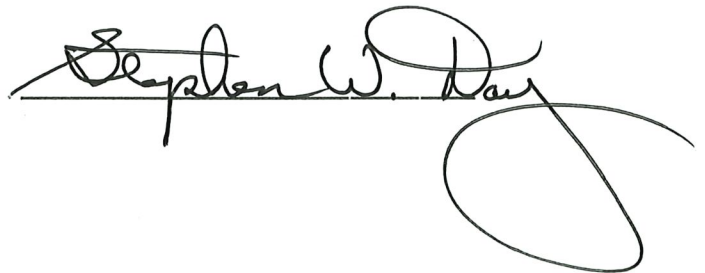
<<https://www.gwinnettcounty.com/web/gwinnett/departments/elections/absenteevoting-civilians/advancevoting>>

6.

As one of the members who voted in favor of advanced voting on Saturday, November 26, 2022, it is my firmly held belief that prohibiting advanced voting on Saturday, November 26th at this late juncture will harm voters, cause confusion, and disrupt operations to elections in Gwinnett.

The facts contained herein are true and accurate based upon my personal knowledge.

FURTHER AFFIANT SAYETH NOT.



Sworn and subscribed before me
this 22nd day of November, 2022.



NOTARY PUBLIC



Exhibit D

RETRIEVED FROM DEMOCRACYDOCKET.COM

AFFIDAVIT OF WANDY TAYLOR

STATE OF GEORGIA
COUNTY OF GWINNETT

Personally appeared before the undersigned officer duly authorized to administer oaths in this state came Wandy Taylor who, having been sworn, deposes and states the following:

1.

My name is WANDY TAYLOR. I am over the age of 18 and competent to make this affidavit. I am suffering under no legal disabilities. I give this affidavit freely and voluntarily and based upon my own personal knowledge.

2.

I am a member of the Gwinnett Board of Registrations and Elections and I make this affidavit in my individual capacity and not on behalf of the Board.

3.

On November 21, 2022, at a specially called meeting of the Gwinnett Board of Registrations and Elections, the Board voted by 3-2 vote to authorize Advanced Voting on Saturday, November 26, 2022 at eleven (11) locations between the hours of 7:00am and 7:00pm EST.

4.

The Gwinnett Board of Registrations and Elections has deployed voting equipment and taken steps to ensure the availability of staff at all eleven (11) advanced voting locations in Gwinnett County.

5.

Gwinnett County has publicized the availability of advanced voting for Saturday, November 26, 2022 on its website:
<<https://www.gwinnettcountry.com/web/gwinnett/departments/elections/absenteevoting-civilians/advancevoting>>

6.

As one of the members who voted in favor of advanced voting on Saturday, November 26, 2022, it is my firmly held belief that prohibiting advanced voting on Saturday, November 26th at this late juncture will harm voters, cause confusion, and disrupt operations to elections in Gwinnett.

The facts contained herein are true and accurate based upon my personal knowledge.

FURTHER AFFIANT SAYETH NOT.



Sworn and subscribed before me
this 22 day of November, 2022.



NOTARY PUBLIC

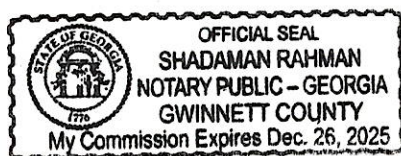


Exhibit E

RETRIEVED FROM DEMOCRACYDOCKET.COM

November 22, 2022

Before me the undersigned authority, personally appeared Omega R Finney, who, being by me duly sworn, states as follows:

My name is Omega R. Finney, I am over twenty-one years old. I have never been convicted of a felony or a crime involving moral turpitude and am otherwise competent to give this Affidavit. All of the facts recited in this Affidavit are within my personal knowledge and are true and correct.

I am the Chair of the Henry County Board of Elections and Registration in Henry County, Georgia. As a member of the Board of Elections, advocate for Henry County Voters and all Georgians to have access to voting – early voting is essential to ensure democracy.

Furthermore, Henry County Board of Elections and Registration and our Director of Elections has secured a location and staff for early voting on Saturday, November 26th 2022 - and promoted date, times and locations widely and via multiple communication mediums.

Due to limited time, I ask that we are able to continue to proceed with Saturday, November 26th 2022, voting to limit voter confusion, ensure public confidence in democracy and maintain consistency in communications to voters.

Please contact me if you have any questions.

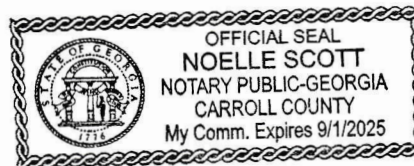
Sincerely,

Omega R. Finney

Chair

Henry County Board of Elections and Registration

Noelle Scott 11/22/22
NOELLE SCOTT



**IN THE SUPREME COURT
STATE OF GEORGIA**

GEORGIA REPUBLICAN PARTY,
THE NATIONAL REPUBLICAN
SENATORIAL COMMITTEE, and
THE REPUBLICAN NATIONAL
COMMITTEE

Petitioners,

v.

DEMOCRATIC PARTY OF
GEORGIA, DSCC, and WARNOCK
FOR GEORGIA

Respondents.

CASE NO. S23M0376

Court of Appeals Docket Numbers
A23E0013

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing **OPPOSITION TO EMERGENCY PETITION FOR WRIT OF CERTIORARI AND EMERGENCY MOTION TO STAY** prior to its filing by sending a true and correct PDF copy by electronic mail to the following counsel of record of the other parties to this litigation, as follows:

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Attorneys for The State of Georgia

This 23rd day of November 2022.

/s/ Adam M. Sparks
Adam M. Sparks (341578)
Attorney for Respondents

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