Nos. A23E0012, A23E0013

IN THE COURT OF APPEALS FOR THE STATE OF GEORGIA

THE STATE OF GEORGIA,

Defendant-Appellant,

v.

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

Plaintiffs-Appellees.

ON APPEAL FROM THE SUPERIOR COURT OF FULTON COUNTY
CASE NO. 2022-CV-372734

OPPOSITION TO MOTIONS FOR SUPERSEDEAS AND STAY

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INTRODUCTION

In just two weeks, Georgia will conduct a runoff election for one of its seats in the U.S. Senate. The law requires counties to 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). Secretary of State Brad Raffensperger and his Chief Operating Officer Gabriel Sterling appeared separately on national television on November 9 and told Georgia voters to expect that some counties would hold early voting on November 26, the Saturday after Thanksgiving—just as several counties previously held advance voting on the Saturday after Christmas during the January 2021 runoff. Three days later, the Secretary reversed course and issued a bulletin barring counties from holding advance voting on November 26.

That prohibition has no basis in law because the Legislature, in 2017, *deleted* the word "runoff" from the Holiday Exception—which prohibits advance voting on the second Saturday before Election Day if it follows a holiday—making clear that the exception applied only to primary and general elections, *not* runoffs. Thus, unlike other provisions of O.C.G.A. § 21-2-385(d)(1) that expressly assign early-voting and

provisional-ballot rules to primary, general, *and* runoff elections, *id.* §§ 21-2-385(b), (d)(1), (e), the Holiday Exception intentionally excludes runoffs.

The State and the Intervenors provide no basis for staying the trial court's ruling pending this appeal. The trial court's reading of the law is manifestly correct. And neither the State nor the Intervenors have even *claimed* (much less proven) that they would suffer any irreparable harm absent a stay—a fact that is by itself sufficient to deny the motions. Instead, both movants vaguely assert that the 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).

Moreover, in the days that have followed the trial court's order, counties across Georgia have told their residents that advance voting will be available on Saturday, November 26, with more counties still joining their ranks. Those events have pushed the already lopsided equities even further in Plaintiffs' favor. The motions for a stay should be denied.

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 here 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, the word "runoff" appears nowhere in § 21-2-385(d)(1)'s second sentence.

The Legislature enacted the Holiday Exception in 2016. That legislation 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 Intervenor Mot. ("Sparks Aff."), 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. State Mot., Ex. A ("Order") 4 & n.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." State Mot., Ex. C.

Plaintiffs filed this suit two days after the Bulletin's release, seeking declaratory and injunctive relief. After a hearing, the Superior Court granted declaratory and injunctive relief. State Mot., Ex. A 1. The State noticed an appeal on November 20. The next day, the State and Intervenors (collectively, "Defendants") filed separate motions for an emergency stay.

ARGUMENT

"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). The State has not satisfied its burden of showing an entitlement to this extraordinary remedy. It has not proven (1) "a strong showing that it is likely to succeed on the merits," (2) that it

"will be irreparable 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 (2019).

I. Defendants are not likely to succeed in this appeal.

A. The Holiday Exception does not apply to runoffs.

As the State acknowledged below, the sole 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.*

Defendants' 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.

O.C.G.A. § 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 "*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.* Defendants' 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.

The State completely ignores the 2017 act's overwhelming demonstration that the Legislature intended runoffs to be excluded from the Holiday Exception, and Intervenors claim that the 2017 act did nothing at all, Intervenor Mot. 11–12. The Court, however, "cannot attribute to the General Assembly the intent to do a useless act by the specific deletion in language." *Holcomb v. Gray*, 214 S.E.2d 512, 513 (Ga. 1975). If the 2017 act's removal of "runoff" from the Holiday Exception was "an attempt to uniformly apply 'primary or election' across the election code," as Intervenors claim, Intervenor Mot. 11–12, then the Legislature would have *also* eliminated identical mentions of "runoff" in

§ 21-2-385(b) and (e). But it didn't. The Legislature's choice to delete "runoff" *only* from the Holiday Exception therefore 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*, 353 S.E.2d 41, 43 (Ga. App. 1987). Intervenors' theory that the 2017 act made no substantive change to the law also cannot be squared with 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.

Defendants' 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. State Mot. 13–16; Intervenor Mot. 7–8, 10. Even if the "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.*, 524 S.E.2d 481, 482 (Ga. 1999) ("[S]pecific statutes govern over more general statutes[.]").

The State argues that the Superior Court's interpretation must be wrong because it would mean that nothing in § 21-2-385(d)(1)'s second sentence would apply to runoffs. State Mot. 18. But that is a far more defensible interpretation than the Defendants', which sidesteps the same sentence's command that advance voting "shall" occur on the third Saturday prior to Election Day. Indeed, it appears that Defendants cannot agree on how to handle that clause: Intervenors suggest that the provision's reference to "primary or election" does not apply to runoffs after all, Intervenor Mot. 12–13, whereas the State ignores the discrepancy altogether. Either way, their reading requires half of § 21-2-385(d)(1)'s second sentence to apply to runoffs (the Holiday Exception) but not the *other half* (required advance voting on the third Saturday prior to Election Day), despite the use of identical language in both clauses. *Henry Cnty. Bd. of Registrars v. Farmer*, 444 S.E.2d 877, 878 (Ga. App. 1994) (rejecting a "selectively strict reading of [a] statute" that would enforce one "portion of the statute" but "ignore the rest of the

sentence"). Defendants cannot have their cake and eat it too—the second sentence of Section 385(d)(1) either applies to runoffs or it does not.

Finally, Defendants claim that, under Plaintiffs' reading, all weekend voting would be barred by § 21-2-385(d)(1)'s final sentence, which states that early voting may occur only on days permitted by that subsection. State Mot. 18–19; Intervenor Mot. 11. But that argument ignores § 21-2-385(d)(1)(B)'s authorization of early voting to occur "as soon as possible." If it is "possible" for a county to begin voting as early as November 26, § 21-2-385(d)(1)(B) authorizes voting on that date.

B. Sovereign immunity poses no bar.

The State's argument that sovereign immunity barred the trial court's order fails for three reasons.

First, the State is wrong that a trial court must grant final declaratory relief before granting an interlocutory injunction. The Constitution waives sovereign immunity "so that a court awarding declaratory relief . . . may, only after awarding declaratory relief, enjoin such actions to enforce its *judgment*." Ga. Const. art. I, Section 2, para. V(b)(1) (emphasis added). The State asserts that this reference to "judgment" means a "final" judgment, such that "parties seeking to enjoin

the State must first obtain a final declaratory judgment." Stat Mot. 9–10. Not so. Georgia law recognizes *both* interlocutory and final judgments. O.C.G.A. § 9-11-40 ("The judges of any courts of record may, on reasonable notice to the parties, at any time and at chambers in any county in the circuit, hear and determine *by interlocutory or final judgment* any matter or issue where a jury trial is not required or has been waived.") (emphasis added). The Constitution's waiver of sovereign immunity applies to "judgments" regardless of whether they are "interlocutory" or "final." Declaratory relief need not be "final" before the trial court grants injunctive relief against the State.

Second, even if a "final" judgment was necessary, the court's order operates as one. "Although the injunction in this case is denominated as a TRO, there is no magic in nomenclature. A document is to be construed by its substance or function, rather than its name." *Taylor Investment Partners II, LLC v. Moe's Franchisor, LLC*, 344 Ga. App. 552, 553 (Ga. Ct. App. 2018) (quoting *Dolinger v. Driver*, 269 Ga. 141, 142 (1998). The trial court resolved the ultimate issue regarding the interpretation of Section 21-2-385(d)(1)—which both parties agreed was the sole issue in the case—and "[t]hus, in substance, the TRO operated as a grant of a

declaratory judgment in favor of" Plaintiffs. *Id.*; *see also* O.C.G.A. § 9-4-2(a)-(b) ("[T]he declaration shall have the force and effect of a final judgment or decree and be reviewable as such."). As such, sovereign immunity poses no bar to the grant of an interlocutory injunction.

There is no merit to the State's argument that a final declaratory judgment was improper because it issued earlier than 20 days after the State was served. State Mot. 10. The State waived this argument by failing to raise it *at all* below, including in either its brief or at the hearing. *See In re DB*, 277 Ga. App. 454 (Ga. Ct. App. 2006) ("A party can waive defects in service of process unless an objection is made at the first practicable opportunity."); *see also Locke's Graphic & Vinyl Signs, Inc. v. Citicorp Vendor Fin., Inc.*, 285 Ga. App. 826, 828 (2007) ("An argument not raised in the trial court is waived and cannot be raised for the first time on appeal."). And even if that were not so, the Declaratory Judgment Act states that the 20-day rule shall not apply "if the parties consent in writing to an earlier" proceeding. O.C.G.A. § 9-4-5. The State consented to a hearing on Plaintiff's motion without any mention of § 9-4-5 and, indeed, *chose the earlier hearing date* it now complains about. *See* Ex. 1 (e-mail from State's counsel to the Court consenting to a hearing on

Friday, November 18). Its counsel subsequently entered a general, rather than special, notice of appearance without objection to the service issues it now uses to deflect from the merits. *See* Ex. 2. By doing so, the State waived any service-related argument. *See Brown v. Fokes*, 283 Ga. 231, 232 (2008) (defense counsel's "general appearance . . . amounts to a waiver of the issuance of . . . process served, and confers jurisdiction on his person regardless of the fact that process was not served on him").

Third, and finally, even if the State were immune from suit, the Georgia Republican Party, the National Republican Senatorial Committee, and the Republican National Committee remain defendants in the case. These Intervenor-Defendants assert the same interests as the State "in an efficient, fair, and free election as well as Georgia's interest in applying its election laws," as well as their own electoral interests. Intervenor Mot. 13. Declaratory relief therefore remains proper even if the State enjoyed sovereign immunity from the order below. O.C.G.A. § 9-4-2(b).

II. Defendants have not shown that the equities favor a stay.

A. Neither the State nor Intervenors have demonstrated irreparable harm.

The Court should deny the motions for the independent reason that neither the State nor the Intervenors have even *claimed* irreparable harm without a stay, which is "vital necessity" for such relief. *Hipster, Inc. v. August Mall Partnership,* 291 Ga. App. 273, 275 (Ga. Ct. App. 2008). And "simply showing some possibility of irreparable injury" is not enough. *Nken*, 556 U.S. at 434-35. Indeed, "if the petitioner has not made a certain thresholding 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).

Both the State and the Intervenors have failed to assert (let alone prove) that they will suffer any harm in the absence of a stay. *See* State Mot. 19-22; Intervenor Mot. 13-16. The relief granted below causes no harm to the State whatsoever—it simply requires the State to not impede the efforts of some counties to grant residents a single extra day of advance voting. Any burden of conducting advance voting on November 26 is borne by counties that choose to open the polls on that day. And any

possible claim of harm on the Secretary's part is undercut by the fact that he offered no complaint when some, but not all, counties offered Saturday voting after Christmas in 2020. Nor does the order below cause any harm to Intervenors, who do not even assert that the availability advance voting on November 26 will put them at an electoral disadvantage. The complete failure of both movants to claim irreparable injury in the absence of a stay pending appeal requires this Court to deny the motions. *Nken*, 556 U.S. at 434-35.

B. The remaining equitable factors counsel against a stay.

There is no merit to the State's argument that the requested relief undermines the Legislature's goal in achieving uniformity among counties in advance voting. The very fact that O.C.G.A. § 21-2-385(d)(1)(B) requires counties to hold advance voting for runoffs "*as soon as possible*" presupposes a lack of uniformity, as some counties will manage to begin advance voting sooner than others. Moreover, the statute already makes *Sunday* voting discretionary in some cases, further ensuring some measure of variation across counties. And Saturday early voting during runoffs is likewise discretionary for counties, as the 2021 runoffs show.

By contrast, a stay of the relief below would cause Plaintiffs significant irreparable harm. *First*, DPG's members include eligible voters who intend to cast ballots in advance of the December runoff election and will have less opportunity to do so if the trial court's relief is disturbed. Courts have repeatedly "held that 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 America 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 certainty suffer irreparable harm if their right to vote were impinged upon"). For this reason, courts routinely find irreparable harm from an unlawful restriction on the opportunity to vote, even if the vote is not denied entirely. *See, e.g., League of Women Voters of North Carolina 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 769 (W.D. Wis. 2020) (finding irreparable harm from shortened voter registration deadline). The harm to DPG's members will be all the greater if a stay is granted because—

since the Superior Court's order—counties have resumed promoting and preparing for Saturday voting. Once again pausing those efforts will generate unnecessary confusion, just as the Secretary's reversal of his longstanding view did.

Second, Appellees will each suffer irreparable harm because the restriction impedes their ability to increase voter turnout and thus pursue their core missions as organizations. *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"). Staying the lower court's relief will again subject Georgia counties to the Secretary's unlawful reading of § 21-2-385(d), which will disrupt already announced and in-progress plans to offer Saturday voting in only five-days' time. That would, in turn, irreparably harm Appellees, whose missions depend on offering their members and constituents every possible lawful opportunity to vote.

Finally, the relief granted by the trial court is squarely in the public interest. 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 ("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.

The State's argument that last-minute changes to election rules harm the public is not credible—it is the *State*, not Plaintiffs, who have attempted to re-write Georgia's election rules at the last minute. Counties applied Appellees' interpretation of the Holiday Exception in the 2021 runoff and, consistent with that past practice, the Secretary asserted just over a week ago that counties had the option to hold advance voting on November 26—before abruptly changing course three days later. Granting the requested relief now would ensure that advance voting for the runoff is held just like last year's runoff.

CONCLUSION

The Court should deny the motions.

Respectfully submitted on this 21st day of November 2022. This submission does not exceed the word count limit imposed by Rule 24.

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**Pro hac vice* application forthcoming

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CERTIFICATE OF SERVICE

I certify that there is a prior agreement with other parties to this litigation to allow documents in a PDF format sent via email to suffice for service. I further certify that I have this day served contemporaneously a copy of the foregoing **Opposition to Motions for Supersedeas and Stay** by filing the same using the Court's eFast filing system and via email to counsel for these other parties.

This 21st day of November 2022.

/s/ Adam M. Sparks
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