

Case No. _____

In the
Supreme Court of Georgia

REPUBLICAN NATIONAL COMMITTEE, et al.
Appellants,

v.

NAOMI AYOTA, et al.
Appellees.

On Appeal from the Superior Court of Cobb County
Civil Action File No. 24GC08111

EMERGENCY MOTION FOR SUPERSEDEAS

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BRIEF AND EMERGENCY PETITION FOR SUPERSEDEAS

The Republican National Committee and Georgia Republican Party Inc. respectfully submit this emergency motion for a stay of the injunction entered below pending disposition of this appeal.

“All absentee ballots” must be “returned” on “the day” of the “election.” O.C.G.A. § 21-2-386(a)(1)(A)(F). Ignoring that legislative command on the eve of the November 5 election, the Superior Court enjoined enforcement of Georgia’s mail-ballot receipt deadline, for a group of 3,000 voters in Cobb County. Op. 6-7. The Court entered this order to remedy a problem that the Cobb County election officials had already acted to remedy. Having narrowly missed the deadline to send absentee ballots, Cobb County officials announced that ballots would be sent overnight with prepaid express return.

The Superior Court’s deviation from the Legislature’s instruction is baseless. The Plaintiffs claim a burden on their right to vote, but the Georgia Constitution does not guarantee a right to vote *by mail*. Voters still have many options to vote, including by voting in person or delivering their absentee ballots in person. “It is thus not the right to vote that is at stake ... but a claimed right to receive absentee ballots” and cast them according to the Plaintiffs’ preferences. *McDonald v. Bd. of Election Comm’rs of Chi.*, 394 U.S. 802, 807 (1969).

Worse still, the Superior Court provided this relief to a proposed class of thousands of voters despite making no findings to support that class. After all, many of those voters are unlikely to need any relief at all given the steps Cobb County officials have already taken to ensure they receive absentee ballots. Some of them may even have already voted.

As a result, the order requires Cobb County election officials to count mail ballots received *after* Election Day up until 5:00 P.M. on November 8, 2024, for a select group of voters. Without relief from this Court, Appellants and the candidates that they represent will be irreparably harmed by the counting of legally invalid ballots. The Superior Court's injunction should be stayed.

Jurisdictional Statement

This court has jurisdiction under O.C.G.A. §5-6-34. The Superior Court entered an interlocutory injunction on November 1, 2024. Appellants timely noticed an appeal that day. This Court's Order is directly appealable to the Supreme Court of Georgia under Georgia Constitution Article VI, Section VI, Paragraphs II(1) and III(2) and O.C.G.A. § 5-6-34(a)(1).

Statement of Facts & Procedural History

Election Supervisors are required to send absentee ballots “within three days” after receiving a valid and timely application. O.C.G.A. § 21-2-384(a). The deadline for a timely application before the upcoming November general

election was October 25, but the Cobb County Board of Elections failed to mail around 3,000 absentee ballots by October 30. Order at 2. But the County Board acted promptly to remedy this problem. It announced that would send most absentee ballots overnight by the morning of November 1, and include prepaid express return envelopes.

Following this announcement, Appellees Naomi Ayota, Harrison Simmel, and Gabriel Dickson sued several members of the County Board of Elections in their individual capacities in the Superior Court of Cobb County. They requested not only express shipment of ballots, but also that requested absentee ballots be accepted until November 8, 2024, three days after election day. They asked for this relief not only on behalf of themselves, but for a class of around 3,000 Cobb County voters whose absentee ballots were not mailed by the statutory deadline. Appellants Georgia Republican Party and Republican National Committee were granted intervention in the Superior Court. Op. 2 n.2.

The Superior Court held a hearing on November 1, the same day that Plaintiffs filed their complaint. The Court agreed with Appellees and entered an order granting interlocutory injunctive relief. *Id.* at 3. The Court extended the ballot receipt deadline for “all Affected Voters” in Cobb County who have not yet received mail ballots from the close of Election Day until 5:00 PM on November 8, 2024. *Id.* at 6-7. The Court provided that Cobb County election

officials “shall accept all returned ballots by Affected Voters” that are received “on or before 5:00 P.M. on November 8, 2024.” *Id.* at 6-7. The Court further ordered Cobb County election officials to “provide notice as soon as possible, by email and text message, to all Affected Voters,” informing them that their ballots have been mailed or will be mailed, where to view a sample ballot, and that their absentee ballots must be received by “5:00 P.M. on November 8, 2024.” *Id.* at 7-8. The Georgia Republican Party and the Republican National Committee moved for a stay of the order pending appeal, which the Superior Court denied. They then timely noticed an appeal on November 1, 2024.

Argument

Stays of an injunction pending appeal are authorized “for the security of the rights of the adverse party.” O.C.G.A. § 9-11-62(c). In adjudicating an application for a stay pending appeal, a court must “weigh all of the pertinent equities, including the likelihood that the appellant will prevail on the merits of his appeal, the extent to which the applicant will suffer irreparable harm in the absence of a stay or injunction, the extent to which a stay or injunction would harm the other parties with an interest in the proceedings, and the public interest.” *Green Bull Ga. Partners LLC v. Register*, 301 Ga. 472, 473 (2017). The likelihood of success on the merits is the most important factor. *Id.*

I. Appellants are likely to succeed on the merits.

For at least three reasons, the delayed receipt of mail ballots does not violate Plaintiffs' constitutional right to vote under the Georgia Constitution. See Ga. Const. art. I, §1, ¶II.

First, the Georgia Constitution does not recognize a right to vote by mail. The Superior Court reasoned that Cobb County's delayed delivery of mail ballots might impose "a severe burden on the right to vote." Op. 4. The court cited no state law for that conclusion. And federal law uniformly holds that "there is no constitutional right to an absentee ballot." *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020); see also *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020) ("As other courts have stated, 'as long as the state allows voting in person, there is no constitutional right to vote by mail.'" (collecting cases)). When plaintiffs allege that some state mail-voting rule unduly burdens their right to vote, "[i]t is thus not the right to vote that is at stake ... but a claimed right to receive absentee ballots" and cast them according to personal preferences. *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969); see also *Tully v. Okeson*, 977 F.3d 608, 611 (7th Cir. 2020) ("[T]he Supreme Court told us that the fundamental right to vote does not extend to a claimed right to cast an absentee ballot...."). These uniform rulings are at least persuasive authority about similar provisions in the Georgia Constitution. See *Elliott v. State*, 305 Ga. 179, 187 (2019).

Second, Georgia makes it easy for its citizens to vote. Georgians can vote in person on election day from at least 7:00 AM to 7:00 PM. O.C.G.A. §21-2-403. They've been able to vote early in person for at least a month before election day. *See id.* §21-2-385(d)(1). All Georgians can vote early by absentee ballot with no excuse, and they can submit that ballot by mailing it, delivering it to the county registrar or absentee ballot clerk, or dropping it in one of the designated drop boxes. *Id.* §§21-2-380, 21-2-385. State law requires counties to have those drop boxes. *Id.* §21-2-382(c)(1).

In light of these many options, “the right to vote is not ‘at stake.’” *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 404 (5th Cir. 2020) (quoting *McDonald*, 394 U.S. at 807). “Georgia has provided numerous avenues to mitigate chances that voters will be unable to cast their ballots,” which means that regulations on absentee voting (such as “Georgia’s Election Day deadline”) do “not implicate the right to vote at all.” *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1281 (11th Cir. 2020). The Plaintiffs might respond that not all these options are available to all 3,000 affected voters. But the fact that most voters covered by the order can vote in person or place their ballot in a drop box is just a reason why the Superior Court’s extraordinary relief is overbroad. *See infra* Section IV.

Third, these many voting methods are made even easier by the relief already granted by Cobb County. For the voters affected by the delay, Cobb

County has rushed delivery of absentee ballots with a prepaid express return envelope. *See* Op. 2. The order requires Cobb County to overnight those ballots *tonight*. Overriding the statutory delivery deadline is unnecessary relief. It's also improper relief because it applies a different voting rule for a narrow group of voters. *See Bush v. Gore*, 531 U.S. 98, 104 (2000).

II. Appellants will suffer irreparable harm in the absence of a stay.

The Superior Court's order instructing Cobb County election officials to violate state and federal law will inflict irreparable harm on Appellants, unless this Court grants a stay. The Superior Court's order is certain to injure the Republican candidates whom Appellants represent. The Republican candidates whom Appellants represent and who are seeking election in Georgia "have a cognizable interest in ensuring that the final vote tally accurately reflects the legally valid votes cast. An inaccurate vote tally is a concrete and particularized injury to candidates." *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020). These candidates are "harmed" by the Superior Court's order instructing Cobb County officials to receipt and count ballots in violation of state and federal law. *Trump v. Wisconsin Elections Comm'n*, 506 F. Supp. 3d 620, 632 (E.D. Wis. 2020). "The counting of votes that are of questionable legality... threaten[s] irreparable harm." *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (granting stay) (Scalia, J., concurring).

III. The equities and public interest warrant a stay.

The Superior Court's order violates the public interest requiring mail ballots to be counted that will have been returned contrary to law. The Court's order acknowledges that "it is always in the public interest to ensure compliance with state law." Op. 5-6 (cleaned up). But the order violates that standard. State law provides that "[a]ll absentee ballots" must be "returned" on "the day" of the "election" and the "board of registrars or absentee ballot clerk shall promptly notify the elector by first-class mail that the elector's ballot was returned too late to be counted and that the elector will not receive credit for voting in the primary or election." O.C.G.A. §21-2-386(a)(1)(A)(F). But the Superior Court's order allows mail ballots to be returned and counted for three days past "the day" of the election. Op. 6-7. Consequently, the Superior Court's own order requires *non-compliance* with state law.

Further, the Superior Court's injunction is also inappropriate because "there is not sufficient time left" before the "general election for the parties to present their arguments and the trial court to research and rule upon this difficult issue." *O'Kelley v. Cox*, 278 Ga. 572, 576 (2004) (Hunstein, J., concurring) (refusing to grant injunction in state ballot amendment close to election). Indeed, voters and the democratic process "suffer when time constraints compel" a trial court to issue "rushed rulings" that "can serve only to undermine the public's faith in the legitimacy and accuracy of the judicial process." *Id.* at 576-

77. Allowing the Superior Court “to negate the duly-enacted election laws of a state” concerning an impending election “is toxic to the concepts of the rule of law and fair elections.” *Carson*, 978 F.3d at 1061. It is simply “common sense” that “courts will not disrupt imminent elections absent a powerful reason for doing so.” *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016).

There is no “powerful reason” for flouting the General Assembly’s duly promulgated Election Day deadline for mail ballots. Under the Superior Court’s order, the affected voters will receive their absentee ballots by tomorrow, accompanied by prepaid express-delivery envelopes. *See* Op. 2. They’ve arguably been placed in an even easier situation than those who requested and received normal mail-in ballots right up to the deadline. If this Court stays the Superior Court’s injunction and preserves the status quo, no Georgia voter will necessarily be disenfranchised. Since these ballots have all already been sent out by “November 1, 2024” with express shipping already “prepaid,” this means that all affected voters “can return them by Tuesday’s deadline.” Cobb Cnty. Elections Dep’t, *Cobb Elections Express Shipping Thousands of Outstanding Absentee Ballots* (Oct. 31, 2024), perma.cc/4STG-XPUN. And a majority of those voters reside in Georgia can still vote in person on election day. *See id.*

But if the Superior Court’s order remains in effect, state law is necessarily suspended. Worse, it’s suspended for only one group of voters. *See Bush v. Gore*, 531 U.S. at 104. All other Georgians must follow the rules and return

their ballots on time. The interests of this small group of voters—who have already obtained relief for the county’s late ballot delivery—in obtaining an exemption from State law is outweighed by the State’s “extraordinarily strong interest in avoiding late, judicially imposed changes” to the General Assembly’s duly promulgated Election Day deadline for mail ballots. *Merrill v. Milligan*, 142 S.Ct. 879, 881 (2022) (Kavanaugh, J., concurral).

IV. At a minimum, the Court should vacate the injunction as applied to over 3,000 voters not named in the suit.

Regardless of the merits and equities, this Court should narrow the injunction to the Plaintiffs named in this suit. Even though only three voters filed this lawsuit, the superior court granted relief to over 3,000 voters not named in this case. That kind of relief is obtainable only in a class action, which is “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” *Vest Monroe, LLC v. Doe*, 319 Ga. 649, 652 (2024) (citation omitted). And because of their “exceptional nature,” class actions “are permitted ‘only in the limited circumstances described in OCGA §9-11-23.’” *Id.* (citation omitted). But the superior court ignored those requirements, granting relief to over 3,000 voters who are not named in this suit, not similarly situated as the Plaintiffs, and some of whom might have already voted.

Indeed, the superior court made no class findings even though the Plaintiffs filed their complaint as a class action. They asked the court to certify a “proposed class” of “eligible and registered Cobb County voters who timely requested absentee ballots for the November 5, 2024, election and whose absentee ballots for the November 5, 2024, election were not mailed by the statutory deadline,” and to grant relief to that class of voters. Compl. 7. The Plaintiffs “bear[] the burden of proving that class certification is appropriate and must meet each of the four requirements of OCGA §9-11-23(a)—numerosity, commonality, typicality, and adequacy of representation—in addition to one of several requirements under OCGA § 9-11-23 (b).” *Vest Monroe*, 319 Ga. at 652 (cleaned up). And a “trial court may certify a class only if, after a rigorous analysis, the court determines that the statutory requirements have been satisfied.” *Id.* at 653 (cleaned up).

The superior court granted class-wide relief without making *any* class findings, let alone a “rigorous analysis.” *Id.* The court didn’t find that the questions of law and fact were common among the class members. O.C.G.A. §9-11-23(a)(2). Nor could it, because the circumstances of each voter, and the relative difficulties they face, vary substantially. The court didn’t find that the named Plaintiffs’ claims are typical of the class as a whole. *Id.* §9-11-23(a)(3). Nor could it, because the Plaintiffs experience *unique* hardships atypical of the class. They are two out-of-state voters and one legally blind voter. *See* Compl.

4. But a majority of the class—at least 2,000 voters—reside in Georgia and are thus able to vote in person or deliver their ballots through some other method. See Cobb Cnty. Elections Dep’t, *supra*. The Plaintiffs bear the burden of proving these elements, and the court can certify a class only after a “rigorous analysis,” *Vest Monroe*, 319 Ga. at 652, that supports an “order whether [the class] is to be so maintained,” Ga. Code §9-11-23(c)(1).

The superior court made no class findings, engaged in no class analysis, and issued no class-certification order. Granting relief beyond the named Plaintiffs in this case was a clear abuse of discretion.

Conclusion

For the foregoing reasons, this Court should stay the superior court’s injunction requiring members of the Cobb County Board of Registration and Elections to count mail ballots that are received later than the statutory mail-ballot receipt deadline under O.C.G.A. §21-2-386(a)(1)(A)(F). In the alternative, this Court should stay the superior court’s injunction of the ballot deadline as applied to voters not named in the Plaintiffs’ complaint.

Respectfully submitted this 1st day of November 2024.

/s/ Alex B. Kaufman

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RULE 20 CERTIFICATION

This submission does not exceed the word-count limit under Rule 20.

/s/ Alex B. Kaufman

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CERTIFICATE OF SERVICE

I certify that I served copy of the foregoing document on all parties and counsel of record via U.S. mail. In view of the expedited nature of this appeal, I have also sent same by electronic mail to below-listed counsel:

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