IN THE SUPREME COURT

STATE OF GEORGIA

DEKALB COUNTY REPUBLICAN PARTY, INC. APPLICANT, V. BRAD RAFFENSPERGER, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF STATE OF THE STATE OF GEORGIA, RESPONDENT	Case No. _____

APPELLANT'S MOTION FOR INTERIM RELIEF PENDING APPEAL

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INTRODUCTION

In in this case the DeKalb County Republican Party, Inc. ("DeKalb GOP") seeks mandamus relief against the Secretary of State to compel him to bring Georgia's election systems into compliance with the duties imposed by O.C.G.A. § 21-2-300(a)(2) and (3) to field systems that comply with mandatory requirements of certification by the U.S. Election Assistance Commission ("EAC") with particular respect to cybersecurity. DeKalb GOP alleged and proved without contradiction that the system used in Georgia egregiously fail to comply with these requirements, and that the Secretary has failed and refused to take any remedial action despite knowing of the problem since July of 2021 and of the non-compliance with the certification requirements since late March of this year.

The Secretary argued and the trial court held that he had no ongoing duty to ensure that the systems complied with the certification requirements in the operational context. Instead, he argued and the trial court held, the entirety of his obligations regarding certification were limited to pre-purchase certifications, and that no ongoing duty arose even in the face of overwhelming and uncontradicted proof of grave, egregious and well-known cybersecurity risks.

DeKalb GOP has filed its notice of appeal to this Court, but the case has not yet been docketed in this Court. Due to the severity of the problem

and the time-sensitive urgency of the upcoming election, and the past fractious history of election disputes in Georgia, DeKalb GOP brings this motion for interim injunctive relief pending appeal to mitigate the cybersecurity risks that the Secretary obdurately refuses to mitigate himself.

This case involves issues of significant public importance and warrants the grant of the interim relief pending appeal requested herein.

STATEMENT OF THE CASE

Georgia's Dominion election systems were certified by the EAC in on January 30, 2019, prior to their purchase by the State. *See* Exh. A. See O.C.G.A. § 21-2-300(a)(3) (requiring pre-purchase EAC certification).

Per O.C.G.A. § 21-2-300(a)(2), the Secretary certified the Dominion system as "safe and practicable for use" on August 9, 2019. His certificate stating in pertinent part as follows:

> [T]he Dominion Voting System … has been thoroughly examined and tested and found to be in compliance with the applicable provisions of the Georgia Election Code and Rules of the Secretary of State, and as a result of this inspection. it is my opinion that this kind of voting system and its components can be safely used by the electors of this state in all primaries and elections as provided in Chapter 2 of Title 21 of the Official Code of Georgia; provided however, that I hereby reserve my opinion to reexamine this voting system and its components at any time so as to ensure that it continues to be one that can be safely used by the voters of this state.

See Exh. B attached hereto.[1]

The evidence showed without contradiction that the system does not in fact comply with EAC certification requirements for cybersecurity or the Secretary's certification that the system was "safe and practicable for use." The evidence showed the systems are noncompliant in the following respects: (1) encryption keys are stored in plaintext in the election database; (2) they still have a hard-coded vendor password that grants administrative privileges that has been publicly known since 2010 at the latest, "dvscorp08!"; and (3) multiple users use the same usernames and passwords. These vulnerabilities leave the system wide open to hacking and alteration of election results without detection.

The evidence also showed without contradiction that the Secretary has known about some or all of these vulnerabilities since July 1, 2021, and known of the noncompliance with certification requirements since no later than late March, 2024, but has failed and refused to take any remedial or mitigating measures in violation of his mandatory legal duties as Secretary of State.

[1] Although the Secretary's certificate was not included in the record in Superior Court, the Secretary of State's records are judicially noticeable, *Kingdom Retail Grp., LLC v. Pandora Franchising, LLC*, 334 Ga. App. 812, 817 n.4 (2015), even on appeal. O.C.G.A. § 24-2-201(f).

The Application for a writ of mandamus was filed on August 29, 2024. See Exh. C. The Secretary moved to dismiss on September 25, 2024, Exh. D, and DeKalb GOP responded on September 27, 2024. Exh. E. An evidentiary hearing was held on September 30, 2024, before the Honorable Scott McAfee of the Fulton Superior Court. See Exh. F, Transcript of Proceedings. On October 4, 2024, Judge McAfee dismissed the Application on the grounds that there was no clear legal right to mandamus relief. See Exh. G.

STANDARD OF REVIEW

Georgia's mandamus statute is a quasi-equitable legal remedy to compel public officers to perform required duties. *Marsh v. Clarke Cty. Sch. Dist.*, 292 Ga. 28, 29-30 (2012); *R.A.F. v. Robinson*, 286 Ga. 644, 646 (2010). The Georgia writ requires the lack of an adequate alternate legal remedy and a "clear legal right" to relief. *Ga. Assn. of Professional Process Servers v. Jackson*, 302 Ga. 309, 312 (2017). The law must require the officers' performance, but a "clear legal right" also exists either where officers fail entirely to act or where they commit a gross abuse of discretion. *Id.* at 312-13; O.C.G.A. § 9-6-21(a). "Arbitrary, capricious, and unreasonable" discretionary acts constitute gross abuses of discretion for mandamus. *Massey v. Ga. Bd. of Pardons & Paroles*, 275 Ga. 127, 128 (2002). This Court's review is *de novo*. *Love v. Fulton Cty. Bd. of Tax Assessors*, 311 Ga. 682, 683-84 (2021),

(*overruled in part on other grounds*, *Bray v. Watkins*, 317 Ga. 703, 704-05 (2023)).

Georgia appellate courts evaluate requests for interim relief pending appeal under a four-part test:

> When a court considers an application for a stay or injunction pending appeal, it 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, 473-74 (2017) (citing *Hilton v. Braunskill*, 481 U. S. 770, 776 (1987), and WRIGHT & MILLER, 11 FED. PRAC. & PROC. Civ. § 2904 (3rd ed. 2017)); *Bishop v. Patton*, 288 Ga. 600, 604-05 (2011); *cf. Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Although the appellant's likelihood of prevailing is generally the most important factor, an appellant "need not always show that he more likely than not will prevail on appeal." *Green Bull*, 301 Ga. at 474 (citing *Garcia-Mir v. Meese*, 781 F2d 1450, 1453 (II) (A) (11th Cir. 1986)). Instead, it may suffice to make a substantial showing on the merits if "the other equities weigh strongly in favor of … [an] injunction pending appeal." *Id.* (citing *Ruiz v. Estelle*, 650 F2d 555, 565 (II) (5th Cir. 1981)); *Zant v. Dick*, 249 Ga. 799, 800 (1982) (rejecting argument "that a substantial likelihood of success on

the merits must be shown in order to entitle an applicant to interlocutory injunctive relief in the courts of Georgia"). "Because the test for the issuance of an interlocutory injunction is a balancing test, it was not incumbent upon the County to prove all four factors to obtain the interlocutory injunction." *City of Waycross v. Pierce Cty. Bd. of Comm'rs*, 300 Ga. 109, 111-12 (2016) (citing *SRB Investment Svcs., LLLP v. Branch Banking and Trust Co.*, 289 Ga. 1, 5, n.7 (2011)).

ARGUMENT

I. INTERIM RELIEF IS AVAILABLE IN THIS APPEAL.

Before addressing DeKalb GOP's entitlement to interim relief below, DeKalb GOP first outlines the availability of interim relief as a jurisdictional and jurisprudential matter.

A. THIS COURT HAS JURISDICTION TO GRANT INTERIM RELIEF.

O.C.G.A. § 9-6-28(b) provides that "Mandamus cases shall be heard on appeal under the same laws and rules as apply to injunction cases." In injunction cases, O.C.G.A. § 9-11-62(c) authorizes injunctions pending appeal. See also *Green Bull*, 301 Ga. At 473 n.3

B. THE MOTION FOR INTERIM RELIEF IS TIMELY.

This Court's rules and Georgia's laws provide for motions for interim relief. *See* GA. S.CT. R. 26.1, 26.3, 26.4; O.C.G.A. § 9-11-62(c) (captioned "Injunction pending appeal"). This motion is timely under those rules.

C. In Superior Court, the DeKalb GOP requested the relevant relief and relied on the relevant issues.

The record below supports the relief that DeKalb GOP requests. In the prayer for relief DeKalb GOP requested that the Secretary be required to order the county election superintendents to produce within 24 hours of the polls closing the system logs, ballot images and Cast Vote Records. In the hearing DeKalb GOP's experts recommended additional measures to include increased system logging, unique usernames and passwords for each user, and packet capture devices to capture network traffic for analysis.

D. Mandatory interim relief is available if warranted under the four-part *Green Bull* test.

Although injunctions pending appeal typically maintain the status quo as prohibitory injunctions, *Owens v. Ink Wizard Tattoos*, 272 Ga. 728, 729 (2000), nothing strictly confines injunctions to only status-quo relief. *See Great Am. Dream, Inc. v. DeKalb Cty.*, 290 Ga. 749, 753 n.8 (2012). Instead, the availability of interim relief turns on balancing like the *Green Bull* test:

> An interlocutory injunction is a device to keep the parties in order to prevent one from hurting the other whilst their respective rights are under adjudication. There must be some vital necessity for the injunction so that one of the parties will not be damaged and left without adequate remedy.

Id. As explained here, interim relief is warranted for the 2024 election.

II. THIS COURT SHOULD GRANT INTERIM RELIEF FOR THE 2024 ELECTION.

DeKalb GOP meets all four *Green Bull* factors for an interlocutory injunction pending appeal with respect to the upcoming 2024 election. In addition, the mandamus relief is also sought as to future elections.

A. DEKALB GOP IS LIKELY TO PREVAIL IN THE APPEAL.

The first *Green Bull* factor is the movant's likelihood of prevailing in the appeal. *Green Bull*, 301 Ga. at 473-74; *Winter*, 555 U.S. at 20. As explained in this Section, DeKalb GOP is likely to prevail in its mandamus appeal, notwithstanding the Superior Court's denial of mandamus relief.

1. The mandamus criteria are met.

The core requirements for mandamus relief are the lack of an adequate alternate remedy and a clear legal right to relief. *Professional Process Servers*, 302 Ga. at 312. Both conditions are met here.

(a) *DeKalb GOP lacks an alternate remedy.*

DeKalb GOP has no alternate remedy, much less an adequate one. The Secretary argued that an election contest was an adequate remedy, but this argument is plainly groundless, as the court below ruled. Order, p. 4-5. The election contest remedy is only available only to a "person who was a candidate at such primary or election for such nomination or office, or by any aggrieved elector who was entitled to vote for such person or for or against such question." O.C.G.A. § 21-2-521. Thus, DeKalb GOP could not even file

an election contest. Secondly, the only relief available in such a case is a new election, which would do nothing to solve the problem here in question.

(b) *DeKalb GOP has a clear legal right to relief.*

As explained below, DeKalb GOP has a clear legal right to mandamus relief. Significantly, a "clear legal right" can exist even when the right is not obvious on the surface: "As long as the statute, once interpreted, creates a peremptory obligation for the officer to act, a mandamus action will lie." *13th Reg'l Corp. v. U.S. Dep't of Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980); *United States v. Palmer*, 871 F.2d 1202, 1209 (3d Cir. 1989) (same); *Estate of Smith v. Heckler*, 747 F.2d 583, 591 (10th Cir. 1984) ("If, after studying the statute and its legislative history, the court determines that the defendant official has failed to discharge a duty which Congress intended him to perform, the court should compel performance[.]"). Moreover, unlike federal or common law mandamus, Georgia's mandamus also extends to abuses of discretion. *Professional Process Servers*, 302 Ga. at 312-13; O.C.G.A. § 9-6-21(a). The following three subsections measure the Secretary's conduct against those standards under Georgia law.

2. <u>The trial court's "one-and-done" interpretation is irrational and complies with easily ascertainable legislative intent.</u>

The Secretary argues—and the Superior Court held—that the election-law requirements for certifying voting equipment as compliant with EAC

guidelines and as safe and practicable to use in elections is a one-time inquiry, with no requirement that the voting equipment meet certification requirements in actual operations. This Court reviews that issue *de novo*, *Love*, 311 Ga. at 683-84, and should reject that interpretation.

(a) *Georgia imposes an ongoing requirement that election systems meet certification requirements.*

As set forth in the Application, the Secretary is responsible for fielding a uniform election system in Georgia. O.C.G.A. § 21-2-300(a)(1) provides: "(1) The equipment used for casting and counting votes in county, state, and federal elections shall be the same in each county in this state and shall be provided to each county by the state, as determined by the Secretary of State." The Secretary must certify the equipment as "***safe and practicable for use***." O.C.G.A. § 21-2-300(a)(2) (emphasis added). The certification on its face and by its plain meaning relates to the safety of the systems in the operational environment during elections.

O.C.G.A. § 21-2-300(a)(3) provides that "The state shall furnish a uniform system of electronic ballot markers and ballot scanners for use in each county as soon as possible. ***Such equipment shall be certified by the United States Election Assistance Commission prior to purchase, lease, or acquisition***." (Emphasis added).

As plead in the Application and proved at trial, EAC certification requires voting systems to be tested for compliance with the Voluntary Voting System Guidelines ("VVSG"). *See* Exh. H; U.S. Election Assistance Commission, Certified Voting Systems, https://www.eac.gov/voting-equipment/certified-voting-systems (last visited Sept. 27, 2024) ("Voting systems will be tested against the voluntary voting system guidelines (VVSG), which are a set of specifications and requirements to determine ***if the systems provide all of the basic functionality, accessibility and security capabilities required***." (Emphasis added)). It is undisputed that to pass EAC testing for certification, a voting system must comply with the VVSG.

The VVSG specifically includes requirements for data encryption, and also adopts the Federal Information Processing Standards 140-2 ("FIPS 140-2") defining the mandatory practices for protection of cryptographic keys. In particular, VVSG 1.0 (2005) requires "cryptographic keys … use a FIPS 140-2 level 1 or higher validated cryptographic module." VVSG § 7.4.5.1(a)(i), p. 122 (Hashes and Digital Signatures); see also id., § 7.5.1(b)(i), p. 125 (Maintaining Data Integrity); § 7.7.3(a)(ii), p. 132 (Protecting Transmitted Data); and § 7.9.3, p. 138 (Electronic and Paper Record Structure subsection a). *See* Exh. I (VVSG) and J (FIPS 140-2).

The Applicant's evidence at the hearing showed that the election systems fielded by the Secretary do not comply with these requirements in that the encryption keys are stored unprotected and in plain text in the election database and can be retrieved with a straightforward SQL query by anyone, whether an insider or outsider with low-level hacking skills. With the encryption keys, any such bad actor could alter or insert fraudulent election files, including ballots and results, without detection. The Secretary did not offer any opposing evidence, and did not in any way weaken this testimony on cross-examination.

In addition, the evidence showed without contradiction that a hard-coded vendor administrative user password had been unchanged since no later than 2010, as noted in a testing labs deficiency report admitted as Exh. K. In a demonstration video, Applicant's expert Clay Parikh demonstrated the decryption of this password, and explained that with this administrator password a bad actor could perform essentially any manipulation or alteration of the system they might want, and could do so undetectably. That password is "dvscorp08!".

Mr. Parikh also showed that multiple users on systems from Appling, Bibb, Jones and Telfair counties used the same user names and passwords, again a clear violation of password management practices mandated by the VVSG.

In all of these respects, the evidence showed *without any contradiction whatsoever* that the system falls woefully short of the secure storage of encryption keys required by the combination of (1) O.C.G.A. § 21-2-300(a)(3) (requiring EAC certification); (2) EAC certification (requiring compliance with VVSG); (3) the VVSG (requiring compliance with FIPS 140-2); and (4) FIPS 140-2 (requiring secure storage of encryption keys). Moreover, this vulnerability fails the requirement that Georgia's election systems be "safe and practicable for use." § 21-2-300(a)(2).

Clay Parikh described the storage of the encryption keys as "egregious", T-110, and further explained:

> ***There is no security***, for what little that you claim as security is irrelevant, what's more important than security is integrity of the system, ***there is no integrity***, because you have to understand that these keys are vital to the security and the integrity of the system, this is how you validate that it is secure, that it cannot be tampered with.

T-111 (emphasis added). Mr. Cotton testified that:

> [5:58:07] If I'm looking at [cybersecurity of the encryption keys] from a hacker's point of view, Hallelujah! If I'm looking at it from a cyber security perspective, I can't believe that anybody would ever do this. ***You know if you're talking about the criticality of the ensuring the integrity of the vote which is the base for our democracy then how could you ever leave this unprotected, so I find it frankly appalling.***

T-245-6 (emphasis added). Mr. Cotton drew an analogy to a bank vault:

> if you've got a bank vault and that's the latest and greatest lock on that bank vault, and you tout that security on that bank vault, what they've done here is the equivalent of writing in big bold letters the combination on the wall next to the lock. · Okay? · So there really is no security if you can get access either remotely or physical access to those systems.

T-264.

The Application and the evidence at the hearing further showed that in the long-running *Curling v. Raffensperger* litigation before Judge Totenberg in the Northern District of Georgia, Plaintiff's expert Professor J. Alex Halderman had prepared a sealed expert report dated July 1, 2021 (later unsealed) that was delivered to the Secretary's attorneys at that time, that noted the encryption keys were stored in plain text in the election database and could be retrieved with a SQL query that he included in his report in Section 9.1. Professor Halderman reached the same alarming conclusions regarding the insecure storage of the encryption keys as the Applicant's experts.

The trial court's holding that there was no ongoing requirement to comply with EAC certification standards with respect to cyber security renders the certification requirement an empty gesture and nullifies the obviously intended substantive requirements that the system meet cyber security standards so that it can be safely used in elections and not merely in a testing lab. The trial court's holding cannot be reconciled with the plain

language of the VVSG, which requires ongoing compliance, including correction of any deficiencies that become known. Thus, the VVSG imposes a requirement of "quality assurance":

> Quality assurance provides ***continuous confirmation that a voting system conforms with the Guidelines*** and to the requirements of state and local jurisdictions. Quality assurance is a vendor function that is initiated prior to system development ***and continues throughout the maintenance life cycle of the voting system***.

Exh. I, Section 8.1, p. 147 (emphasis added). *See also* § 9.5(d) (discussing establishment of procedures to resolve identified defects).

In sum, the Applicant's evidence was overwhelming and uncontradicted that the system in use in Georgia does not even come close to complying with the standards for EAC certification, a mandatory requirement of O.C.G.A. § 21-2-300(a)(3), and that they are not even remotely "safe and practicable for use" in election as required by O.C.G.A. § 21-2-300(a)(2).

(b) *The trial court's one-and-done interpretation could not have been intended by the legislature.*

"In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy." O.C.G.A. § 1-3-1(a). Here, the evil is an election system unprotected from cyber threats, and the remedy is a system that complies with the cyber security certification requirements. "The judiciary has the duty to reject a construction of a statute which will result in

unreasonable consequences or absurd results not contemplated by the legislature." *Haugen v. Henry County*, 277 Ga. 743 (2004). It defies common sense to conclude that a requirement that a system be certified as secure and "safe and practicable ***for use***" does not also require that it actually be secure ***in use***, but that is precisely the reasoning adopted by the trial court.

The trial court applied the absurdity doctrine articulated by Supreme Court Justice Antonin Scalia, in his treatise READING LAW: READING LAW: THE INTERPRETATION OF LEGAL TEXTS. While this authority has been cited from time to time, it does not reflect the practice followed in Georgia. One respected author has concluded that "Georgia courts have applied the Absurdity Doctrine far more broadly than READING LAW." *See* Charles M. Cork III, *Reading Law in Georgia* at 31, SSRN (Nov. 6, 2014) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2520296 (last visited Oct. 10, 2024).

This Court explained the Georgia version of the absurdity doctrine as follows:

> Where the **letter** of the statute results in **absurdity** or **injustice** or would lead to contradictions, the meaning of general language may be restrained by the **spirit or reason** of the statute. Where the intention of the legislature is so inadequately or vaguely expressed that the court must resort to construction, it is proper to consider the results and consequences. **It is the duty of the court to consider the results and consequences** of any proposed

> construction and **not** so construe a statute as will result in **unreasonable or absurd** consequences not contemplated by the legislature.

New Amsterdam Casualty Co. v. Freeland, 216 Ga. 491, 495 (Ga. 1960) (emphasis added).

The court below cited Scalia's READING LAW as if it were a statement of the law in Georgia. However, "Georgia's application of the Absurdity Doctrine, … is vastly broader than *Reading Law's* comparable rule." *Reading Law in Georgia* at 30. It is applied to more than merely the correction of scrivener's errors. The codified rule of construction makes this clear:

> In all interpretations of statutes, the courts shall **look diligently for the intention** of the General Assembly, **keeping in view** at all times the old law, **the evil**, and **the remedy** [addressed by the statute].

O.C.G.A. 1-3-1(a) (emphasis added). "[S]uch was the rule long before there was any code of laws compiled for this state." *Everett v. Planters' Bank*, 61 Ga. 38, 41 (1878). "It was urged in the argument that we should be controlled by the strict letter of the statute. It is an ancient maxim of the law, that 'he who sticks to the letter sticks to the bark.' He gets the shell without the kernel; the form without the substance." *Booth v. Williams*, 2 Ga. 252, 255-256 (1847). *See also Lamad Ministries v. Board of Tax Assessors*, 268 Ga. App. 798, 802 (2004) ("In construing statutes, interpretations which cause an unreasonable intent to be found, an intent to

do an unreasonable thing, or intent to do futile and useless things, will not be found to be the legislative intent; instead, the construction of intent should further the purpose of the Act."); *Haugen v. Henry County*, 277 Ga. 743(2) (2004) ("The judiciary has the duty to reject a construction of a statute which will result in unreasonable consequences or absurd results not contemplated by the legislature.")

Thus, in *Telecom*usa, Inc. v. Collins*, 260 Ga. 362, 363-364 (1990), this Court held

> [T]he "golden rule" of statutory construction … requires us to follow the literal language of the statute unless it produces contradiction, absurdity or such an inconvenience as to insure that the legislature meant something else. When literal reading of the statute produces such an absurdity, the appellate court must then seek to make sense out of the statute, while being faithful to the legislative intent. To define the legislative intent, the court considers **the purpose of the statute** and **its impact on the body** of law as a whole. The court also considers the law as it existed before the statute was passed and identifies the mischief sought to be corrected.

This codified and judicially-cemented rule of construction may not be disregarded in favor of a non-binding commentator's preferred view of the federal absurdity canon.

Here, the method of construction mandated by the General Assembly strongly supports granting Appellants' request for mandamus. The statute being construed here, Act 166, was enacted in 2001 in response to the hotly

disputed 2000 election contest in Florida, where the Supreme Court eventually had to resolve the race between George W. Bush and Al Gore. *See* F. Pratt, *Elections: Elections and Primaries Generally*, 18 GA. ST. U.L. REV. 96 (Fall 2001). "The 2000 presidential election brought the attention of the nation to the lack of integrity in current voting systems." *Id.* at 98. "As the Georgia General Assembly came into session, many believed that reforms in Georgia election laws were necessary to prevent what happened in Florida from happening in Georgia." *Id.*

> As a result of the statewide groundswell, Secretary of State Cathy Cox published a report on Georgia election procedures including suggestions for reforms.... The Secretary concluded that major election reform in Georgia was necessary **to make the system of counting votes more accurate** and **to restore the confidence of voters in the voting system**. Secretary Cox's report included several suggestions for improvement, many of which were incorporated into [Act 166].

Id. at 99 (emphasis added).]

To restore confidence, the statute expressly requires that all voting machines used must initially be "certified by the Secretary of State as safe and practicable for use" after they were "certified by the United States Election Assistance Commission." *Id.* at 111. EAC certification requires compliance with the cybersecurity requirements of the VVSG and FIPS 140-2.

At the hearing below, the Secretary's counsel cited Beth K. Boatright and Andrew Smith, *HB 316 - Voting System*, Georgia 36 State U. L. Rev. 81, 85. (2019) as support for their interpretation of the certification requirements. However, the article explains that cybersecurity was "at the forefront of both legislative and judicial attention" as a result of reports of Russian attempts to hack the 2016 election and concern that Judge Totenberg in the *Curling* litigation was on the verge of ordering the State replace the Diebold DRE system, which she eventually did.

Then-Secretary of State Brian Kemp formed the Secure, Accessible & Fair Elections (SAFE) Commission to make recommendations to the legislature on a replacement voting system. Both the acronym, "SAFE," and its first word, "Secure," reflect the importance of cybersecurity. The final recommendations of the Commission are found at https://sos.ga.gov/sites/default/files/2022-03/safe_commission_report_final_1-10-18.pdf (last visited Oct. 10, 2024). Recommendation #5 called for adherence to best cybersecurity practices.

Secretary Raffensperger spoke to the Commission and emphasized the importance of cybersecurity:

> As you know, the Secretary of State's office is the focal point for elections because the priceless franchise to vote requires free, clean and accurate elections throughout every aspect of the election process. Obviously, a key component of this is secure voting machines. Our machines were state of the art

> in 2002 and, today, it is imperative we complete our research for security and technology for the next decade.
>
> I have said that we need the most secure, updated voting technology with a verifiable paper audit trail and a system that moves voters faster through the line so we can reduce wait times.

Transcript of Proceedings before the SAFE Commission, December 12, 2018, pp. 3-4, https://sos.ga.gov/sites/default/files/2022-03/safecommissiontranscript12.12_.18_.pdf (last visited Oct. 10, 2024).

Despite the crystal clarity of the importance of secure and accurate election systems, the trial court held there was no duty to ensure operational compliance with EAC certification standards. This may be analogized to holding that even if the Secretary has actual knowledge that his submarine has a screen door instead of a water-tight hatch, his pre-purchase certification of the vessel as sea-worthy relieves him of any further responsibility for the safety of the ship and crew. By the trial court's reasoning, even if the Secretary had actual knowledge that Dominion machines switched half of the votes from Democrats to Republicans, he would have no continuing duty to act to remedy the problem.

Compounding the incongruity of the trial court's holding, the contract for the purchase of the Dominion system, Exh. L, emphatically and unambiguously requires continuing compliance with all applicable certification standards. It requires the systems ***"meet all Mandatory***

Requirements" and ***"accurately function in accordance with those requirements … enabling State and all other State Entities to accurately and securely administer elections throughout the State of Georgia in accordance with Applicable Laws of the State of Georgia***." Contract at § 1.2 (emphasis added). "In addition, proper system and software hardening procedures are clearly defined and regularly tested. Data integrity and confidentiality is also implemented according to NIST defined and FIPS validate [sic] procedures and algorithms." *Id*., Exh. B to Exh. L, § 8.9. "Dominion implements security protocols that meet or exceed EAC VVSG 2005 requirements. All of Dominion's security protocols are designed ***and implemented to stay current*** with the rapidly evolving EAC security requirements set forth by various iterations of the VVSG." Exh. B to Exh. L, section 8. "Data generated by the Democracy Suite platform is protected by the deployment of FIPS-approved symmetric AES and asymmetric RSA encryption." (*Id*., section 8.3). The Contract further requires the vendor to carry out periodic security assessments to "***ensure Contractor's continued compliance with Contractor's obligations as relate data security under this Agreement."*** § 7.2.1 Compliance.

We are confronted with the spectacle of the Secretary disclaiming any ongoing requirement of compliance with cybersecurity certification standards, while telling the public that "We take **every measure possible**

to ensure the **integrity, security, and fairness** of our elections process." *See* https://sos.ga.gov/page/elections-security (emphasis added). (last visited Oct. 10, 2024).

The court's finding of "no ambiguity" in O.C.G.A. § 21-2- 300(a)(1)-(3) also failed to consider that [s]ometimes 'the facts of [a] case[ ] … reveal a latent ambiguity in the language of [a statute].'" *Patton v. Vanterpool*, 302 Ga. 253, 258 (Ga. 2017) (McFadden, J., dissenting) (*quoting Daugherty v. Norville Indus.*, 174 Ga. App. 89, 90 (1985) (emphasis added). The facts of this case certainly expose such a latent ambiguity in the statute. In such cases, "[o]ur duty is to consider the results and consequences of any proposed construction and, based upon the particular facts and circumstances of the case, not so construe a statute as will produce unreasonable or absurd consequences not contemplated by the legislature." *Daugherty*, 174 Ga.App. at 90.

Viewed in full context, the trial court's interpretation of the statute produces a result that cannot be squared with any rational legislative purpose. No doctrine of statutory interpretation can properly compel the conclusion that the Secretary has no operational compliance obligation when he has actual knowledge that the machines he certified as "safe and practicable for use" are in fact flagrantly unsafe and insecure. Whatever the jurisprudential merits of textualism may be, experience teaches that any

interpretative doctrine can capture its adherents and drive them, in the name of doctrinal purity, into nonsensical cul-de-sacs:

> Judges march at times to pitiless conclusions under the prod of remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial right. They perform it, nonetheless, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity.

Benjamin Cardozo, GROWTH OF THE LAW, 66. (*quoted in Anthony v. Anthony*, 236 Ga. 508, 224 S.E.2d 349, 352, Hall, J., dissenting). Whatever its merits, Georgia courts have not in the past, are certainly currently not bound to follow Scalia and Garner's guidance.

3. The Secretary's "one-and-done" interpretation is inconsistent with Georgia's election laws.

Even if the trial court's interpretation were not contrary to these elementary principles of statutory interpretation, it remains inconsistent with the Secretary's ongoing obligations under Georgia election law. As for what constitutes an abuse of discretion, we may consider federal administrative law:

> To decide whether the [agency's] action was arbitrary, capricious, or an abuse of discretion, we must determine whether the agency adequately considered the factors relevant to choosing a [result] that will best serve the purposes of the statute[.]

Am. Paper Inst. v. Am. Elec. Power Serv. Corp., 461 U.S. 402, 413 (1983) (interior quotation marks and alterations omitted); *Southern S. S. Co. v.*

NLRB, 316 U.S. 31, 46-47 (1942) (finding abuse of discretion where agency sought to fulfill one Congressional objective but "wholly ignore[d] other and equally important Congressional objectives"). Given the two ongoing obligations identified here and the uncontested evidence in this litigation, the Secretary has grossly abused his discretion, thereby justifying mandamus relief and interim relief until full compliance is achieved.

(a) *The Secretary has ongoing obligations to examine voting systems.*

Under O.C.G.A. § 21-2-379.2(a), "[t]he Secretary of State may, at any time, in his or her discretion, reexamine any such [election] system." Consistent with this statutory authority, the Secretary in his certification of the system as "safe and practicable for use" expressly reserved the option to reexamine the system to ensure its continued safety for election purposes: "I hereby ***reserve my opinion to reexamine this voting system and its components at any time*** so as to ensure that it ***continues to be one that can be safely used*** by the voters of this state." See Exh. B (emphasis added).] The Secretary has now grossly abused this reserved discretion, even assuming *arguendo* that he had not done so when DeKalb GOP filed this action.

Consistent with the Secretary's authority in § 21-2-379.2(a) and reservation of the right to reexamine in the above-quoted certificate,

exercises of administrative discretion do not close the door to future reconsideration:

> An initial agency interpretation is not instantly carved in stone. On the contrary, the agency must consider varying interpretations and the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances.

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (internal quotation marks, alterations, and citations omitted).

Specifically, in this litigation, (1) the DeKalb GOP proved without contradiction that that Dominion systems in Georgia have grave vulnerabilities and do not comply with the requirements for EAC certification or certification by the Secretary; (2) the Secretary moved to dismiss, arguing—without citation—that DeKalb GOP' had raised "tired old claims" that had previously been asserted and adjudicated to be without merit in other litigation; (3) the DeKalb GOP filed sworn testimony from the Secretary's General Counsel that the encryption-key and certification issues in this case were a "new allegation that was made for the 1st time in a court filing that was filed in August of 2024" and explaining that "those allegations were not made in 2020 and … they're … different allegations relating to the equipment." Supplemental Brief in Response to Motion to Dismiss, pp. 9-10 and Exh. A thereto. Under the circumstances, even assuming *arguendo* that

the Secretary's initial indifferent position was defensible,[2] that indifference became indefensible in the face of the uncontested evidence presented at the hearing on the Dominion system's vulnerabilities and the Secretary's own General Counsel's sworn testimony showing that his initial position was wrong. We are well past the point at which willful ignorance becomes an abuse of discretion. *Pataula Elec. Membership Corp. v. Whitworth*, 951 F.2d 1238, 1243 (11th Cir. 1992); *Vitug v. Holder*, 723 F.3d 1056, 1064 (9th Cir. 2013) (agency "abuses its discretion where it ignores arguments or evidence"); *Wu Lin v. Lynch*, 813 F.3d 122, 129 (2d Cir. 2016) ("we expect [agency] to supply cogent reasons for its rulings"); *Charles River Park "A", Inc. v. Dep't of Hous. & Urban Dev.*, 519 F.2d 935, 942 (D.C. Cir. 1975); *cf. Gazaway v. Godfrey*, 163 S.E. 480, 481 (Ga. 1932) (county board of education). The Secretary's refusal to act on the information that he has learned in both *Curling* and this action abuses the discretion that § 21-2-379.2(a) gives him.

(b) *The Secretary has ongoing obligations to educate election officials in the proper use of voting systems.*

The Secretary is responsible to develop, implement, and provide "a ***continuing program*** to educate voters, ***election officials***, and poll workers

[2] The Secretary was aware of the Dominion vulnerabilities from sealed evidence in *Curling v. Raffensperger*, No. 1:17-cv-02989-AT (N.D. Ga.), before DeKalb GOP became aware of those vulnerabilities. DeKalb GOP respectfully submits that the Secretary's abuse of discretion began once he was on notice of those vulnerabilities.

in the proper use of [the] voting equipment" described in § 21-2-300(a)(2). *See* O.C.G.A. § 21-2-300(d) (emphasis added). The expert testimony below—which the Secretary did not challenge—demonstrated that the continued use of the voting equipment originally chosen by the Secretary has flaws that allow election data (including ballot images and results) to be manipulated, and that manipulation to be nearly untraceable. Now, knowing that these flaws exist, subsection (d) imposes a "continuing" duty to require the Secretary "to educate voters, election officials, and poll workers" about security flaws related to the open access to encryption keys and passwords.

Under this statutorily mandated "***continuing***" program, the Secretary certainly has a clear duty to "educate" election officials as to the flaws identified in the voting systems. His duty goes further, however, to "educate" election officials and poll workers as to "the proper use of such voting equipment." "Proper use" instructions would include instructions on how to eliminate or at least mitigate the known security flaws, so that November 2024 elections will not be compromised.

B. DeKalb GOP will suffer irreparable harm without interim relief.

The second *Green Bull* factor is the irreparable harm the movant will suffer without interim relief. *Green Bull*, 301 Ga. at 473-74; *Winter*, 555 U.S. at 20. On behalf of itself and its voter members, DeKalb GOP would be

irreparably harmed by an election that proceeds with the vulnerable Dominion system because—once the voting is complete without the requested transparency measures to detect manipulation—it would be impossible to ensure a lawful election. DeKalb GOP is entitled to the Secretary's faithful performance of his duties and is harmed by his abdication of those duties in this context.

C. INTERIM RELIEF WILL NOT HARM THE SECRETARY.

The third *Green Bull* factor considers any balancing harms to the nonmoving party. *Green Bull*, 301 Ga. at 473-74; *Winter*, 555 U.S. at 20. At the outset, this Court should not hear the Secretary's complaining of irreparable harm because the requested relief simply implements that the duties that the Secretary should perform in any event. *Cf. Medlock v. Allison*, 224 Ga. 648, 650 (1968) (no irreparable harm to plaintiff when defendant's action was required by law). Moreover, irreparable harm "is a conclusion of law which the court draws from the facts and circumstances as set forth in the petition." *Burrus v. Columbus*, 105 Ga. 42, 46 (1898). Merely alleging irreparable harm is insufficient where "no facts are alleged to show such injury." *Reeves v. Du Val*, 214 Ga. 630, 632 (1959). The Secretary offered no evidence or argument below to demonstrate any harm from complying with his duties.

D. THE PUBLIC INTEREST FAVORS INTERIM RELIEF.

The fourth *Green Bull* factor is the public interest. *Green Bull*, 301 Ga. at 473-74; *Winter*, 555 U.S. at 20. Where the parties dispute the lawfulness of government actions—especially with respect to voting—the public interest collapses into the merits: "cautious protection of the Plaintiffs' franchise-related rights is without question in the public interest." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005); *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1327 (11th Cir. 2019) "public interest is served when constitutional rights are protected"); *see also League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("no public interest in the perpetuation of unlawful [government] action"); *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003) ("the public interest [is] not served by the enforcement of an unconstitutional law") (interior quotation omitted); *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994) (recognizing "greater public interest in having governmental agencies abide by the federal laws"). Indeed, the reason for the writ of mandamus is to compel official compliance with public duties in the public interest. See *Sons of Confederate Veterans v. Henry County Board of Commissioners*, 315 Ga. 39, 48-49 (2022).

RELIEF REQUESTED

As interim relief, DeKalb GOP requests the following:

That the Secretary be required to:

1. Order county election superintendents to use unique usernames and passwords for each user of the election systems;
2. Order county election superintendents to set system and database logging settings to capture all election log events;
3. Order county election superintendents to produce to the public system logs on election systems within 24 hours of the close of the polls;
4. Order county election superintendents to produce ballot images to the public within 24 hours of the close of the polls;
5. Order county election superintendents to produce the Cast Vote Records to the public within 24 hours of the close of the polls; and

For such other and further relief as to the Court seems proper and just.

CONCLUSION

The Court should enter an injunction pending appeal to require the relief that DeKalb GOP requests in this motion.

Respectfully submitted, this October 11, 2024.

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

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CERTIFICATE OF SERVICE

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