IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

DEKALB COUNTY REPUBLICAN PARTY, INC., Applicant, v. BRAD RAFFENSPERGER, IN HIS OFFICIAL CAPACITY AS GEORGIA SECRETARY OF STATE, Respondent.	Civil Action No. 24CV011028

SECRETARY OF STATE'S MOTION TO DISMISS AND BRIEF IN SUPPORT

Respondent Secretary of State Brad Raffensperger, in his official capacity as Georgia Secretary of State (the "Secretary"), submits the following brief in support if his Motion to Dismiss Applicant's Application for Writ of Mandamus (the "Application"). Applicant Dekalb County Republican Party, Inc. ("Applicant") seeks a writ of mandamus compelling the Secretary to comply with the voting system certification requirements of O.C.G.A. § 21-2-300(a)(2) and (3).

Because Georgia's voting system already complies with those certification requirements, the Application must be denied. The Application should be denied for the further reason that it is a last-minute effort to push false claims about Georgia's voting system and cast doubt on the upcoming

presidential election much like similar, unsuccessful claims asserted in other courts since 2020.

Despite the false narrative pushed by Applicant here, Georgia's statewide voting system is safe, secured, and in compliance with the two statutory certification requirements under Georgia law. First, the voting system must have been certified by the United States Election Assistance Commission (the "EAC") at the time of purchase. O.C.G.A. § 21-2-300(a)(3). Second, the voting system must also be certified by the Secretary as safe and practicable for use before it is used statewide. *See* O.C.G.A. § 21-2-300(a)(2). Applicant does not dispute that Georgia's voting system is certified by the EAC and the Secretary, and this should end the inquiry. But Applicant instead asks the Court to substitute its judgment for that of the EAC and rule that the voting system nevertheless does not meet the certification requirements established by the EAC, essentially overruling the EAC's prior determination. Even if this claim had any factual merit—and it does not—it is a wholly inappropriate use of the extraordinary remedy of mandamus.

It is clear from the face of the Application that Applicant cannot meet its burden for mandamus relief because it can neither show that it lacks an adequate remedy at law nor that it has a clear legal right to the relief it seeks.

First, Applicant lacks any clear legal right to the relief that it seeks. As to an order compelling the Secretary to comply with O.C.G.A § 21-2-300(a)(3), such a request is moot because, as conceded in the Application, the Secretary has already complied by purchasing an EAC-certified voting system in 2019. And O.C.G.A § 21-2-300(a)(3) imposes no additional requirements that the Secretary further second guess the prudence of the EAC's certification of Georgia's voting system, even if the Secretary had the legal authority to override the determination of a federal agency, which he does not. As to an order compelling the Secretary to comply with O.C.G.A § 21-2-300(a)(2), Applicant cannot use mandamus to compel a discretionary task. O.C.G.A § 21-2-300(a)(2) requires that the Secretary make a determination that voting equipment is "safe and practicable for use." Applicant does not allege that the Secretary has failed to make this determination; they attempt to challenge his judgment in finding the voting system safe and practicable for use in Georgia. That is not a proper use of mandamus. Nor is the Secretary a proper party to an order compelling compliance with Georgia State Election Board Rule 183-1-12-.12, which governs the conduct of poll managers and other polling officials, not the Secretary.

Second, Applicant has access to an adequate remedy at law—it may file a post-election contest claim.

Third, the Application attempts to prescribe precisely the manner in which the Secretary is to comply with O.C.G.A § 21-2-300(a)(2) and (3). Even assuming that Applicant had a clear legal right to mandamus relief—and it does not—mandamus does not entitle it to prescribe the manner in which the Secretary carries out his duties.

Finally, the Application is barred by laches because of the Applicant's inexcusable, prejudicial delay in seeking a writ of mandamus. The claims in the Application are not new—they are the same discredited conspiracy theories about Georgia's voting system that have repeatedly been raised and rejected by courts. The so-called "experts" relied upon by Applicant in support of their claims have made other claims about the same voting system used by Georgia that have been rejected as frivolous, and not only have courts dismissed them, but one federal court held that Rule 11 sanctions were appropriate. *Lake v. Hobbs*, 623 F. Supp. 3d 1015 (D. Ariz. 2022), *aff'd* 83 F. 4th 1199 (9th Cir. 2023) (dismissing case alleging security vulnerabilities in voting system used by Arizona and Georgia); *Lake v. Hobbs*, 643 F. Supp. 3d 989 (D. Ariz. 2022) (imposing Rule 11 sanctions against plaintiffs' counsel); *see also* Application ("App.") ¶ 29 n.5, Matt Naham, *Kari Lake to SCOTUS: Hurry up, the 2024 election is coming and Dominion voting machines need to be banned*, Law and Crime (March 21, 2024), *available at* https://lawandcrime.com/supreme-

court/kari-lake-to-scotus-hurry-up-the-2024-election-is-coming-and-dominion-voting-machines-need-to-be-banned/ (last visited Sept. 25, 2024) ("Lake's dismissed lawsuit, which previously led to sanctions against the lawyers who brought it for making 'false, misleading, and unsupported factual assertions,' was also rejected by the U.S. Court of Appeals for the Ninth Circuit." (quoting *Lake*, 643 F. Supp. 3d at 1012)).[1]

Not only are Applicant's claims known to be factually baseless, but the timing of this action is suspect. Despite being aware of the basis of its claim for years, they waited until two months before the presidential election to file the Application with the full knowledge that it was far too late to make any changes to the state's voting system, suggesting that this is nothing more than an intentional, partisan "misuse of the judicial system to baselessly cast doubt on the electoral process." *Lake*, 643 F. Supp. 3d at 1010.

Applicant's delay is severely prejudicial to the Secretary and state elections officials who now have to spend precious time defending against frivolous litigation while they are preparing for the General Election that is 41 days away. These types of last-ditch efforts cause tremendous harm to the state

[1] Counsel was sanctioned in that case under Rule 11 and ordered to pay the Arizona Secretary of State $122,200 in attorneys' fees for pursuing frivolous litigation. *Lake v. Fontes*, Civil Action No. CV-22-00677-PHX-JJT, 2023 U.S. Dist. LEXIS 122594, *47 (D. Ariz. July 14, 2023).

and its voters by attempting to cast false doubt on the integrity of Georgia's elections. This action must be dismissed.

FACTUAL BACKGROUND

In 2019, the Georgia General Assembly passed House Bill 316, which adopted a uniform voting system using paper ballots marked by a ballot-marking device and tabulated by ballot scanners. O.C.G.A. § 21-2-300(a)(2). The legislature gave the Secretary of State the discretion to select the voting system, with the specific statutory requirement that the voting system "be certified by the United States Election Assistance Commission prior to purchase, lease, or acquisition." *Id.* § 21-2-300(a)(3). The Secretary was also to certify that the equipment was "safe and practicable for use" prior to use of the voting system in statewide elections. Following a competitive bidding process, the Secretary selected Dominion Voting Systems' Democracy Suite 5.5A ("Democracy Suite 5.5A"), which was certified by the EAC in 2019, prior to purchase by the State of Georgia. *See generally* App., Ex. 1; *see also id.*, Ex. 1 ¶ 14.1.8.

Under the Help America Vote Act, Congress gave the EAC the responsibility to develop federal standards for voting systems. To that end, the EAC developed Voluntary Voting System Guidelines (VVSG), which are a set of specifications and requirements against which voting systems can be tested

to determine if they meet required standards.[2] Factors examined under these tests include basic functionality, accessibility, and security capabilities. To be certified by the EAC, a voting system must be tested to the VVSG by a Voting System Test Laboratory (VSTL), who are independent testing labs also certified by the EAC. Democracy Suite 5.5A was certified by the EAC in 2019 as compliant with testing standard VVSG 1.0 following independent testing by SLI Compliance, a certified VSTL.[3]

After procurement of the Democracy Suite 5.5A system, the Secretary had additional independent testing conducted by Pro V&V, an EAC-certified VSTL who serves as the State of Georgia's certification agent. *See* Ga. R. & Reg. 590-8-1-.01. Following this successful testing, the Secretary certified the voting system as "safe and practicable for use" in Georgia, as required by statute, prior to use of the system statewide in 2020. The Democracy Suite 5.5A system has maintained continuous certification by the EAC and the Secretary since 2019, and the Application does not allege otherwise.

[2] *See* *Voluntary Voting System Guidelines* | U.S. Election Assistance Commission (eac.gov), last visited on Sept. 24, 2024.
[3] Democracy Suite 5.5-A (Modification) | U.S. Election Assistance Commission (eac.gov), last visited on Sept. 24, 2024.

LEGAL STANDARD

A motion to dismiss for failure to state a claim should be granted "if the allegations of the complaint, construed most favorably to the plaintiff, disclose with certainty that the plaintiff would not be entitled to relief under any state of provable facts." *Ewing v. City of Atlanta*, 281 Ga. 652, 653 (2007). When ruling on a motion to dismiss, the Court may consider written instruments attached to and incorporated in the complaint and answer. *See Handberry v. Stuckey Timberland, Inc.*, 345 Ga. App. 191, 191 (2018).

ARGUMENT AND CITATION OF AUTHORITY

Mandamus is an extraordinary remedy to compel a public officer to perform a required duty when there is no other adequate legal remedy. *Bland Farms, LLC v. Ga. Dep't of Agric.*, 281 Ga. 192, 193 (2006). The court may grant such a remedy only when the petitioner has shown "a clear legal right to the relief sought or the public official has committed a gross abuse of discretion." *Id.* (citation omitted). If a petitioner fails to make a showing that "(1) no other adequate legal remedy is available to effectuate the relief sought; and (2) the applicant has a clear legal right to such relief," it is proper for the trial court to deny a petition for mandamus. *Ga. Ass'n of Prof'l Process Servers v. Jackson*, 302 Ga. 309, 312 (2017) (citation omitted).

Applicant has failed to meet its burden of demonstrating either that it lacks an adequate legal remedy to obtain the relief sought, or that it has a clear legal right to the relief it seeks. First, Applicant has failed to plead that it has clear legal right to any of the relief that it seeks. The Application purports to seek an order compelling the Secretary to comply with O.C.G.A. § 21-2-300(a)(3), but the Application does not allege that the Secretary has failed to "furnish a uniform system of electronic ballot markers and ballot scanners" that is "certified by the [EAC] prior to purchase . . . ." O.C.G.A. § 21-2-300(a)(3). In fact, the Application makes clear that the Secretary ***has*** purchased and furnished such equipment to the counties—its quibble appears to be with the certification methodology employed by the EAC. Applicant cannot use mandamus to compel the Secretary to investigate EAC's certification methodology or compliance decisions, nor does he have the legal authority to oversee the determinations of a federal agency. The Application also seeks an order compelling the Secretary to comply with O.C.G.A. § 21-2-300(a)(2), which requires that the Secretary certify that electronic voting equipment is "safe and practicable for use." The Application does not allege that the Secretary has failed to make such a determination, and in any event, such a determination involves a discretionary function. Second, Applicant has an adequate remedy at law—if following the election Applicant has actual evidence showing that

election results were compromised, rather than an unfounded fear that the system *could* be compromised, it may contest those results by filing an election contest under O.C.G.A. § 21-2-520 *et seq*. Third, the mandamus claim is barred by laches. Applicant admits that it knew of these so-called "flaws" for years. It made its own strategic decision to wait to bring this mandamus petition until nine weeks before the election.

Therefore, the petition for a writ of mandamus should be denied and Applicant's Application dismissed.

I. Applicant has no clear legal right to mandamus relief.

Applicant lacks any clear right to mandamus relief. "A clear legal right to the relief sought may be found only where the claimant seeks to compel the performance of a public duty that an official or agency is required by law to perform . . . . Where performance is required by law, a clear legal right to relief will exist either where the official or agency fails entirely to act or where, in taking such required action, the official or agency commits a gross abuse of discretion." *SJN Props., LLC v. Fulton County Bd. of Assessors*, 296 Ga. 793, 800 (2015) (citation omitted).

The duty which a mandamus complainant seeks to have enforced "must be a duty arising by law, either expressly or by necessary implication; and the law must not only authorize the act be done, but must require its performance."

Bland Farms, 281 Ga. at 193 (citation omitted). "Where the duty of public officers to perform specific acts is clear and well defined and is imposed by law, and when ***no element of discretion is involved*** in performance thereof, the writ of mandamus will issue to compel their performance." *Id.* (emphasis added) (citation omitted).

A. The Secretary has already complied with O.C.G.A. § 21-2-300(a)(3) and has no legal duty to conduct an independent investigation of the EAC's certification methodology.

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). The plain language is clear: the Secretary's only obligation is to purchase or lease equipment that has already been certified by the EAC. It is clear from the face of the Application that the Secretary has done so. *See* App., Ex. 1 ¶ 14.1.8 (purchase agreement between Dominion and the Secretary affirming that "[a]ll relevant components of the Solution, any Upgraded Solution, and all Software, Equipment, and other components forming a part thereof for which certification by the [EAC] is available have been certified by the EAC as of delivery of the Solution to the State); *see id.*, Ex. 4 ¶¶ 22–23 (affidavit of Benjamin Cotton arguing for the ***decertification*** of Georgia's the

Democracy Suite 5.5A system, recognizing that the machines are currently certified). And the Application does not allege that the Democracy Suite 5.5A system has ever been decertified by the EAC.

The Application does not allege that the Secretary furnished the counties with equipment that was not certified by the EAC prior to purchase. Instead, the Application attempts to challenge the EAC's certification methodology and compliance with its own articulated standards by recasting O.C.G.A. § 21-2-300(a)(3) as requiring the Secretary to ensure that there is "ongoing compliance with the VVSG requirements for data encryption[,]" App. ¶ 23. That is not what O.C.G.A. § 21-2-300(a)(3) requires. The text is quite clear that the Secretary is only mandated to purchase EAC-certified equipment for the counties. He has undisputedly done so, and therefore there is no relief that mandamus can provide. *See R.A.F. v. Robinson*, 286 Ga. 644, 646 (2010) ("[O]nce the public duty has occurred, the prayer that mandamus be issued compelling a public officer to perform that public duty is moot." (alternations and citation omitted)).

For mandamus to lie, the duty Applicant seeks to have enforced must be one that is not only authorized but ***required*** by law. *See Bland Farms*, 281 Ga. at 193. Nothing in the text of O.C.G.A. § 21-2-300(a)(3) requires that the Secretary conduct an ongoing, independent investigation as sought by

Applicant to ensure that voting machines that are already EAC-certified are consistent with EAC certification standards. The Secretary is entitled—and in fact is ***required***—to rely on EAC's certification of voting equipment to determine that such equipment is safe to use.

It is clear what Applicant really seeks to challenge is not the Secretary's compliance with O.C.G.A. § 21-2-300(a)(3) but the EAC's certification methodology and certification decisions. *See* App. ¶¶ 14–18; *see also id.*, Ex. 4 ¶ 24 ("The current methodology of the EAC approved auditors is flawed in that it only checks for changes to a specific filename that is located in a specific file path."). That is a wholly inappropriate use of the extraordinary remedy of mandamus.

B. Applicant cannot challenge the Secretary's judgment that the state voting system is "safe and practicable for use" through a petition for writ of mandamus.

Absent abuse of discretion, mandamus will not lie if there is exercise of discretion. *See Burke Co. v. Askin*, 291 Ga. 697, 700–01 (2012) (mandamus will not lie against an official exercising discretion unless that official's actions were a gross abuse of discretion). "A discretionary act . . . calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed." *Common Cause/Ga. v. City of Atlanta*, 279 Ga. 480, 482

(2005). However, "[m]andamus can be used to compel an official to ***exercise*** his or her discretion, but not to direct the ***manner*** in which that discretion is exercised." *R.A.F.*, 286 Ga. at 646. (emphasis added).

That is precisely what Applicant seeks to do here—utilize a mandamus to substitute its judgment regarding the safety and practicability of the Democracy Suite 5.5A voting system for the Secretary's. *See* App. ¶¶ 35–37. The Application does not allege that the Secretary has failed to make a determination that the voting system is "safe and practicable for use," as required by O.C.G.A. § 21-2-300(a)(2). Instead, the Application takes issue with the prudence of that determination. *See* App. ¶¶ 14–18, 24–26.

Applicant claims that the Secretary's determination as to whether the voting system is "safe and practicable for use" is a mere "ministerial duty." App. ¶ 39. That is belied by the complexity of the Application itself. The Georgia Supreme Court has explained that a "ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty." *Common Cause/Ga.*, 279 Ga. at 482. Yet Applicant attaches two lengthy, technical affidavits describing all the steps that the affiants took to determine whether the Dominion voting systems are, in their opinion, safe for use. *See* App., Exs. 3–4.

Nor does the Application allege how the Secretary has abused his discretion in determining that the voting system is safe and practicable for use. The Application alleges numerous failures on the part of the EAC and Dominion in the design and certification of the Democracy Suite 5.5A voting system, but none on the part of the Secretary in conducting his ***required*** duties. Instead, Applicant would impose on the Secretary an independent obligation to re-investigate the state's voting system that is already certified by the EAC.

Mandamus does not lie to dictate a general course of conduct, *see R.A.F.*, 286 Ga. at 646, and so it cannot be used to dictate the manner in which the Secretary determines if the Dominion voting systems are "safe and practicable for use." The Georgia Assembly expressly provided the Secretary with discretionary authority to choose voting equipment for counties. *See* O.C.G.A. § 21-2-300(a). Applicant should not be permitted to use mandamus as an avenue for substituting its own discretion.[4]

[4] The Application makes a passing reference to Rule 590-8-1-.01 of the Georgia Administrative Code. *See* App. ¶ 23 (quoting Ga. Comp. R. & Regs. r. 590-8-1-.01). But the Application does not allege that the Secretary has failed to comply with any aspect of Rule 590-8-1-.01. In any event, Rule 590-8-1-.01 also gives the Secretary discretion in the certification of voting systems. *See, e.g.*, Ga. Comp. R. & Regs. r. 590-8-1-.01(c) ("The Secretary of State may accept the results of the Qualification tests and/or Certification tests from another state or testing agency that has performed the tests described in these Rules.").

C. The Secretary is not a proper party to a mandamus claim seeking enforcement of Georgia State Election Board Rule 183-1-12-.12.

The Application "also requests that Georgia State Election Board Rule 183-1-12-.12 *Tabulating Results* be followed as part of the Court's mandated relief." App. ¶ 37. First, the Secretary is the only Respondent named in this action. Rule 183-1-12-.12 addresses the actions that poll managers must take in tabulating the results. It does not specifically direct the Secretary to take any action. The Application recognizes this—it requests that the Court's relief include an order that Rule 183-1-12-.12 is to "be followed," App. ¶ 37, not that the Secretary follow Rule 183-1-12-.12.

And second, even if Rule 183-1-12-.12 did dictate some course of action on the part of the Secretary, the Application does not allege that the Secretary has failed to take such action or will imminently fail to do so. There is simply no basis for a writ of mandamus ordering the Secretary to comply with Rule 183.1.12.12.

II. Applicant has an adequate remedy at law because it can file an election contest.

A writ of mandamus may not issue to compel a public official to perform a clear legal duty unless "there is no other specific legal remedy" to protect the petitioner's rights. OCGA § 9-6-20; *see also Bibb Cnty. v. Monroe Cnty.*, 294 Ga. 730, 734 (2014). Applicant cannot make such a showing because Applicant can

file an election contest claim pursuant to O.C.G.A. § 21-2-520 *et seq*. "Georgia law . . . allows elections to be contested through litigation, both as a check on the integrity of the election process and as a means of ensuring the fundamental right of citizens to vote and to have their votes counted accurately." *Martin v. Fulton Cnty. Bd. of Registration & Elections*, 307 Ga. 193, 194 (2019). If Applicant has reason to believe that the results of the 2024 election are irregular or that there is some other illegality, it can bring such a claim within five days of the certification of the official consolidation election. *See* O.C.G.A § 21-2-524.

Applicant does not dispute that it has access to this remedy. Instead, the Application alleges that an election contest does not afford Applicant the remedy it seeks in the form of "an order compelling the Secretary of State to bring Georgia's election systems into compliance with State law . . . ." App. ¶ 46.[5] But the Application makes clear that it actually seeks a remedy to a hypothetical problem: what it perceives as "grave and urgent cyber security risk to the integrity of Georgia elections . . . ." *Id.* ¶ 33. The Application's concerns are hypothetical—the Application does not allege that there have been any attacks on Georgia's (or any other state's) Dominion voting systems

[5] As explained herein, *see supra* Sec. I, the Application does not allege that the Secretary has failed to undertake any legally required duties with respect to the Dominion voting systems.

in the past. Applicant therefore seeks to bring this action as a mandamus rather than an election contest because in the latter, the burden would be on Applicant to provide evidence of irregularity or illegality. *See Hunt v. Crawford*, 270 Ga. 7, 8 (1998) ("[T]he party contesting the election has the burden of showing an irregularity or illegality sufficient to change or place in doubt the result of the election.").

As to Applicant's arguments that such an election contest might be infeasible due to a limited time to file the challenge and that a post-election contest "clos[es] the barn door after the horse has left," App. ¶¶ 48–49, such is true for every post-election challenge. To permit mandamus to issue based on these arguments would be to open the flood gates to litigants using a petition for a writ of mandamus to pursue any pre-election challenge of a hypothetical problem with the election results.[6] In passing O.C.G.A. § 21-2-520 *et seq*., the Georgia Assembly specifically sought to "balance[] citizens' franchise against the need to finalize election results, which, in turn, facilitates the orderly and peaceful transition of power that is a hallmark of our government." *Martin*, 307 Ga. at 194. In other words, the short time frame is a feature, not a bug, of an election contest claim.

[6] Applicant also cites concerns that an election contest could be barred by the doctrine of laches. *See* App. ¶ 47. In fact, as discussed herein, the mandamus claim is already barred by laches, *see infra* Sec. IV.

Because Applicant has an available and adequate remedy at law, mandamus relief is inappropriate, and the Application should be dismissed.

III. Mandamus does not authorize the relief that Applicant seeks.

Even if Applicant had pled a viable claim for mandamus, the law is clear that a mandamus cannot be used to obtain the relief requested. Applicant is not simply seeking to compel the Secretary to take an alleged required action; they are attempting to dictate the form and content of such action. For example, in addition to a writ of mandamus compelling the Secretary to comply with O.C.G.A. § 21-2-300(a)(2) and (3), Applicant specifically seeks:

- "[M]andamus absolute, as a matter of law, ordering the Secretary of State of cause [s.i.c.] all encryption keys to be properly stored in an encrypted module as required by State law, the VVSG guidelines and FIPS 140-2, and to require all Counties to implement password and data retention and auditability practices that conform to the VVSG guidelines as set forth at Sections 2.1.5 System Audit; 2.1.5.1 Operational Requirements; 2.1.10 Data Retention; 5.3 Data and Document Retention; 5.4 Audit Record Data; 5.4.4 Vote Tally Data; 6.1.3 Data Transmission; 7.7.1 Controlling Usage [of Wireless Communications]; 7.9.3 Electronic and Paper Record Structure; 7.9.4. Equipment Security and Reliability." App. ¶ 35;

- An "order that all system logs, Cast Vote Records and ballot images be preserved and stored on read-only media and be made available to Applicant and the public for copying, downloading and/or inspection beginning within 24 hours of the close of the polls, continuing every 24 hours for any additional logs, records and reports produced thereafter, until the election has been certified. In addition, all system log files discussed above must be preserved and archived daily beginning with the first day that any ballot is cast on a ballot marking device or scanned on a tabulator

> and made available on the same terms as requested above." *Id.* ¶ 36.

These requests do not seek proper mandamus relief.

Georgia law is clear that "mandamus will not lie to dictate the manner in which the action is taken or the outcome of such action." *Bibb County*, 294 Ga. at 736. As the Georgia Supreme Court has stated, "[w]here the act required to be done involves the exercise of some degree of official discretion and judgment upon the part of the officer charged with its performance, the writ may properly command him to act, or as is otherwise expressed, may set him in motion**; *it will not further control or interfere with his action, nor will it direct him to act in any specific manner***." *Ga. Dep't of Transp. v. Peach Hill Properties*, 278 Ga. 198, 200 (2004) (emphasis added) (citations omitted). The requested relief is precisely this type barred by the Georgia Supreme Court. Thus even to the extent that the Secretary had some independent obligation to investigate the EAC's methodology and certification decisions—which he does not—the only relief that Applicant could obtain is an order directing the Secretary to comply with O.C.G.A. § 21-2-300(a)(2) and (3), with which he is already in compliance.

IV. Applicant's mandamus petition is barred by the doctrine of laches.

The Georgia Supreme Court has made clear that a mandamus action can be barred by laches. *See Marsh v. Clarke Cnty. Sch. Dist.*, 292 Ga. 28, 30 (2012).

The doctrine of laches applies "when the lapse of time and the claimant's neglect in asserting rights results in prejudice to the adverse party." *Waller v. Golden*, 288 Ga. 595, 597 (2011) (quotation omitted). In determining whether laches applies, the Court considers "the length of the delay in the claimant's assertion of rights, the sufficiency of the excuse for the delay, the loss of evidence on disputed matters, the opportunity for the claimant to have acted sooner, and whether the . . . adverse party possessed the property during the delay." *Id.* "Courts should consider all the facts presented when balancing the equities to determine which party's rights are superior." *Id.* at 597–98 (quotation omitted).

Applicant has unreasonably delayed bringing this action. Applicant readily admits that it had knowledge of its claims for years and yet it waited until two months before the election to bring its mandamus petition. The Application alleges that "four Georgia counties produced election data for the 2020 election pursuant to open records requests issued more than *two years ago*, which data has been lawfully published online." App. at 2 (emphasis added). The Application and attached affidavits rely on this data. *See* App. ¶¶ 19–20; *id.*, Ex. 3 ¶ 7; *id.*, Ex. 4 ¶ 10. That delay is not explained. And yet having had access to this data for years, Applicant strategically waited to bring

this mandamus action until right before the November 5, 2024 General Election.

The delay has severely prejudiced not only the Secretary but the county election officials, all of whom have invested significant resources in preparing for the 2024 election. Georgia has been using the current voting system statewide since 2020, *see* App ¶ 12, and it has been used successfully in two statewide election cycles. The election project files for each county have already been built, and the counties have begun to conduct logic & accuracy testing to confirm that the BMDs and tabulation scanners are working as intended and correctly tabulating ballots. To require modifications to the entire voting system now, a mere six weeks before the election, would make it impossible to conduct this year's General Election and would disenfranchise the voters of the entire state.

As the prejudice to the Secretary would be severe and as Applicant cannot explain its years-long delay in bringing this action, its mandamus claim should be barred by laches.

CONCLUSION

Applicant has failed to demonstrate that they seek to compel the Secretary to undertake an act that is clearly required by law and does not involve the exercise of discretion, as required for mandamus relief. Applicant

has also failed to show that without mandamus relief, it will have no adequate remedy at law. Applicant further seeks relief that is not authorized by mandamus, and its petition for mandamus relief is also barred by the doctrine of laches. Accordingly, this Court should dismiss the Application for a Writ of Mandamus.

This 25th day of September, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing **MOTION TO DISMISS AND BRIEF IN SUPPORT** with the Clerk of Court using the Odyssey e-filing system, which will send notification of such filing to the parties of record via electronic notification.

Dated: September 25, 2024.

/s/ Elizabeth T. Young
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Senior Assistant Attorney General