Nos. S25A0362, S25A0490

IN THE SUPREME COURT OF THE STATE OF GEORGIA

STATE OF GEORGIA,
Appellant,
and
REPUBLICAN NATIONAL COMMITTEE, et.al.
Appellants,
v.
ETERNAL VIGILANCE ACTION, INC., et al.
Appellees.

BRIEF OF AMICI CURIAE HISTORY PROFESSORS IN SUPPORT OF APPELLEES ETERNAL VIGILANCE ACTION, INC., et al.

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INTEREST OF AMICI CURIAE

This brief is submitted on behalf of amici curiae Orville Vernon Burton, J. Morgan Kousser, Allan J. Lichtman, Peyton McCrary, and Jason Morgan Ward. Their biographies are set forth in the attached Appendix. Amici are university professors and historians with expertise concerning political, legal, and social history, including Georgia and Southern history. They have served as expert witnesses in voting rights litigation in Georgia and elsewhere around the country, and have published numerous peer-reviewed books, articles, and other scholarly works addressing elections, disenfranchisement efforts, and abuses of the electoral process.

Amici have a strong interest in ensuring that Georgia courts maintain their longstanding tradition of protecting the integrity of elections and the election certification process. They submit this brief to aid the Court's consideration of the legality of the "Reasonable Inquiry Rule" and the "Examination Rule"[1] adopted last year by the State Election Board that are the subject of this appeal. Amici believe these new rules are contrary not only to the Georgia Election Code, but also to an unbroken line of this Court's precedents from the post-Reconstruction era and continuing through the 20th

[1] SEB Rule 183-1-12-.02 ("Reasonable Inquiry Rule"); SEB Rule 183-1-12-.12 ("Examination Rule").

century, which uniformly held that election canvassers' duties to certify vote counts are non-discretionary or "ministerial."

Amici are concerned that if the Superior Court decision is reversed and the Reasonable Inquiry Rule and Examination Rule are allowed to stand, they will be abused to thwart the will of the people as expressed in their votes and subvert the free and fair elections which have long been the hallmark of our democracy. These democratic principles have been critically important to ensuring that all eligible voters, regardless of race or gender, can participate in Georgia elections. History teaches us that if the process of certification becomes politicized or otherwise manipulated without guardrails, there is a real danger of mass voter disenfranchisement and undermining public confidence in the integrity of the outcome.

SUMMARY OF ARGUMENT

Two of the rule amendments adopted by Georgia's State Election Board ("SEB") that are at issue in this appeal - the Reasonable Inquiry Rule and the Examination Rule - are contrary to this Court's longstanding precedents. In a series of post-Reconstruction decisions dating back 125 years, this Court has consistently held that the duties of election canvassers, whether at the state, county, or local level, "are purely ministerial," entail only the "mathematical act of tabulating the votes" and declaring the "mathematical result," are strictly "regulated by statute," and "are not left to the discretion

of the party performing" them. *Tanner v. Deen*, 33 S.E. 832, 835-36 (Ga. 1899); *Davis v. Warde*, 118 S.E. 378, 391 (Ga. 1923); *Bacon v. Black*, 133 S.E. 251, 253 (Ga. 1926). As this Court stated in a seminal 1947 decision, election canvassers "are given no discretionary power except to determine if the returns are in proper form and executed by the proper officials and to pronounce the mathematical result, unless additional [statutory] authority is expressed." *Thompson v. Talmadge*, 41 S.E.2d 883, 893 (Ga. 1947). Significantly, the Opening Brief filed by Appellants The Republican National Committee and The Georgia Republication Party does not even mention any of these significant cases.

Particularly in times of social upheaval, instability, and intense political partisanship, there is greater incentive for political parties to attempt to manipulate the certification process to change election outcomes. As observed in a recent law review article, "[f]or as long as our country has held elections, rogue local officials have attempted to manipulate or interfere with election certification to benefit their preferred candidates."[2] In recent elections, numerous election officials across the country have refused to

[2] Lauren Miller & Will Wilder, *Certification and Non-Discretion: A Guide to Protecting the 2024 Election*, 35 Stanford Law & Policy Rev. 1, 5 (2024).

certify results in violation of law, often citing false claims of voter fraud or irregularities.[3]

This Court's longstanding recognition that election certification is a strictly non-discretionary duty - not an opportunity to conduct wide-ranging inquiries that could change election results - achieves many salutary objectives. First and foremost, it preserves Georgians' constitutional right to vote and to have their votes counted. *See* Ga. Const. art. 2, § 1, ¶ II. As this Court emphasized more than a century ago:

> In a republican government, where the exercise of official power is but a derivative from the people, through the medium of the ballot-box, it would be a monstrous doctrine that would subject the public will and the public voice, thus expressed, to be defeated by either the ignorance or the corruption of any board of canvassers. The duties of these boards are simply ministerial.

Houser v. Hartley, 120 S.E. 622, 625-26 (Ga. 1923).

The Reasonable Inquiry Rule and the Examination Rule would create enormous uncertainty, confusion, and controversy about the fairness of the vote counting process, undermining the electorate's confidence in our

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[3] *Election Certification Under Threat*, Citizens for Responsibility and Ethics in Washington (Aug. 15, 2024), https://www.citizensforethics.org/reports-investigations/crew-investigations/election-certification-under-threat/ (identifying county-level certification refusals in eight states since 2020, including in Georgia).

democracy and the integrity of our elections.[4] "[B]y invoking false claims of large-scale fraud, each refusal to certify threatens to validate the broader election denier movement and sow further doubt in the election administration process."[5] These rules would open the door wide for all manner of political mischief intended to advance partisan interests and frustrate the will of the people as expressed in their votes. Indeed, as vividly demonstrated in the discussion of *Thompson v. Talmadge* set forth below, which resolved the infamous "Three Governors" controversy, if certification becomes discretionary and politicized, there is a real risk of political conflict devolving into violence.

There is no legal basis for the Reasonable Inquiry Rule and the Examination Rule, as the Georgia General Assembly and this Court have both made crystal clear that election contests, not the certification process, are the proper avenue for resolving disputes about alleged voter fraud or irregularities. Indeed, this Court has expressly rejected the argument that

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4 In Secretary of State Raffensperger's August 15, 2024 press release opposing the SEB rules, he warned that they would "undermine voter confidence," "delay election results," and "could cause serious problems in an election that otherwise will be secure and accurate." https://sos.ga.gov/news/raffensperger-defends-georgias-election-integrity-act-last-minute-changes-delaying-election

5 Miller & Wilder, note 2, *supra,* at 5.

election superintendents can block certification due to alleged fraud or mistake, explaining that such issues are quintessential "judicial questions" that superintendents—who are "not selected for their knowledge of the law"—lack capacity to address. *Tanner v. Deen*, 33 S.E. at 835; *Bacon v. Black*, 133 S.E. at 253. This Court's precedents discussed below remain good law and have not been superseded by statute.

More than a century of this Court's precedents makes clear that certification is a mandatory, non-discretionary duty. Insofar as the Reasonable Inquiry Rule and Examination Rule provide otherwise, they are contrary to Georgia law. The Superior Court acted properly in declaring them unlawful and void.

ARGUMENT

This brief will focus on this Court's decisions regarding election certification and provide historical background for each case.

A. *Tanner v. Deen*, 33 S.E. 832 (Ga. 1899).

1. Historical Background

Tanner arose in the context of a bitter political struggle between the Democratic and Populist parties in Georgia. The Populist Party gained strength across the country, and especially in the South, during the 1890s. Many factors contributed to the party's rise, including high levels of debt among Southern farmers, increasing costs, decreasing value of agricultural

output, and price gouging.[6] Southern Populists also famously appealed for Black votes, seeking, in the words of the classic account by C. Vann Woodward, to substitute "tolerance, friendly cooperation, justice and political rights for the Negro" for the Democratic program of what Woodward called "race hatred, political proscription, lynch law, and terrorism."[7]

The Populist Party's rise caused Georgia Democrats to fear a loss of power to a multiracial alliance of Black farmers and sharecroppers and poor whites.[8] As in other states throughout the South, the rise of this powerful coalition engendered significant efforts by the Democratic Party to disenfranchise Black voters by election fraud, intimidation, gerrymandering, other discriminatory laws, and ultimately amendments to state constitutions,

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6 *See generally* Alex Mathews Arnett, *The Populist Movement in Georgia*, Vol. 7 The Georgia Historical Quarterly 313 (1923) https://www.jstor.org/stable/40575768?seq=1

7 C. Vann Woodward, *Tom Watson, Agrarian Rebel* at 220-21 (1938).

8 *See generally* J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (1974); Gerard N. Magliocca, *Constitutional False Positives and the Populist Moment*, 81 Notre Dame L. Rev. 821 (2006); James Gray Pope, *Why Is There No Socialism in the United States? Law and the Racial Divide in the American Working Class, 1676-1964*, 94 Tex. L. Rev. 1555, 1585 (2016); Burton D. Wechsler, *Black and White Disenfranchisement: Populism, Race, and Class*, 52 Am. U.L. Rev. 23, 26 (2002).

all designed to weaken the political power of the Populist Party and other parties that opposed the ruling Democrats.[9]

2. This Court's Opinion

In *Tanner*, the Democratic superintendents in Coffee County refused to proceed with certification of the 1898 general election due to a dispute over whether to certify the returns of one precinct, the McDonald precinct. Exclusion of the McDonald precinct returns would have enabled the Democratic candidates for representative and sheriff to win by a handful of votes.[10] The Democrats claimed a majority of the county election managers agreed not to count the McDonald precinct, while the Populists claimed this was not true and the vote was a tie. *Tanner*, 33 S.E. at 833.

During the dispute, the Democratic superintendents met without their Populist colleagues present, in direct violation of a court order, and

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[9] In the words of J. Morgan Kousser, note 8, *supra* at 46-47, "The stuffing of Southern ballot boxes became a national scandal. Senator Samuel D. McEnery of Louisiana stated that his state's 1882 election law 'was intended to make it the duty of the governor to treat the law as a formality and count in the Democrats.' . . . A leader of the 1890 Mississippi [constitutional] convention declared that 'it is no secret that there has not been a full vote and a fair count in Mississippi since 1875.'" To beat Tom Watson, the Populist Congressional incumbent candidate in Georgia's Tenth District, in 1892, election officials recorded nearly twice the total number of legal voters in Augusta. These "votes" were enough to elect Watson's Democratic opponent. *See* Woodward, note 7, *supra*, at 241-42.

[10] Miller & Wilder, note 2, *supra*, at 29 n. 192.

attempted to count and certify the returns without the votes from the disputed McDonald precinct. *Id.* at 833-34. This Court rejected the Democratic superintendents' arguments that an absent Populist superintendent's failure to sign the required certificates justified refusing to count lawful votes, explaining:

> Were the law otherwise, it would be within the power of one superintendent to withdraw from his duties or refuse to sign the certificate and thus render illegal and void the election in that precinct. If he were a violent partisan and saw the election going against his party, he might refuse to discharge his duty and by this conduct perhaps defeat the will of the people in his district, or in his county, or possibly even in his State.

Id. at 834.

Even though the list of voters did not accompany the returns as required by law, the Court nevertheless held:

> [T]he superintendents had no right or power to reject this list of voters or to refuse to consolidate the returns from the McDonald precinct. The list was omitted from the returns by mere inadvertence or mistake, and it would be wrong, on such a technicality, to deprive the voters of the entire district of their franchises. The right to vote is one of the highest privileges possessed by the citizens of this country, and no mere irregularity of this character, unattended by fraud, should deprive them of this right.

Id. at 835.

The Court issued a writ of mandamus requiring the superintendents to reassemble and certify the returns, including the returns from the McDonald precinct. It explained:

> While it is true that courts should not by mandamus compel a body to do anything in regard to which its members have the right to exercise a discretion, yet we think in a case like this it is the duty of the court to instruct the superintendents whether or not a certain return, about which they have been divided in opinion, should be included in their consolidation.

Id.

Citing a legal treatise, the Court stated:

> A mandamus may issue compelling the board to include such returns notwithstanding that supposed defect, leaving it for the election tribunal, upon the report of the board, to decide whether the defect is fatal. Though the command to include these might be considered to be a command to do a particular act—make the canvass—in a particular way, yet that is no objection to the mandamus, since here the manner of doing is of the essence of the deed, and is regulated by statute, *and not left to the discretion of the party performing*.

Id. (emphasis added). The Court added that "[t]hese superintendents were not selected for their knowledge of the law, and even had they been lawyers they might have disagreed among themselves as to the questions of law." *Id.*

In a separate decision issued just months earlier in the same case, *Deen v. Tanner*, 32 S.E. 368 (Ga. 1899), this Court similarly confirmed the

mandatory nature of the duty to certify and underscored the risks of weaponizing the certification process:

> It certainly can not be doubted that if there was a total failure on the part of the election superintendents of the county to take any action towards consolidating the vote, the writ of mandamus to compel the performance of this duty would have to be directed to all the superintendents by whom the election for the county was held. This must be so, because no reason can be suggested for seeking to compel the performance of this duty as against any one or more superintendents rather than as against others of them or all of them. *Indeed, it might lead to most pernicious results to allow a person interested in the performance of this duty to select at his pleasure the superintendents upon whom he wished the mandamus to operate;* for it might be an easy matter to choose out of the whole number those apparently willing to consolidate the returns in accordance with the desires of the petitioner, and therefore not disposed to vigorously defend the proceeding against them or present to the court reasons why the returns should not be made in accordance with the petitioner's wishes.

Id. at 369-370 (emphasis added).

B. *Davis v. Warde*, 118 S.E. 378 (Ga. 1923).

1. Historical Background

The 19th Amendment to the United States Constitution was ratified and went into effect in 1920. "[I]mmediately upon its becoming operative all females were entitled to vote, provided they complied with the regulations surrounding voter's qualifications in the State of their residence." *Hawthorne v. Turkey Creek Sch. Dist.*, 134 S.E. 103, 106 (Ga. 1926). The Amendment led

to uncertainty and potential chaos as Georgia and other states sought to comply with its new requirements under existing state voting regimes.[11]

State officials in Georgia and throughout the South grappled with how to deal with the massive expansion of the electorate, while maintaining white supremacy and gender hierarchy. This was a moment of social upheaval and disruption of the social order, as the 19th Amendment upended the power structures of the South. States had imposed various means, such as poll taxes and literacy tests, to prevent Black men from voting despite the requirements of the 14th and 15th Amendments. With the enactment of the 19th Amendment, states sought to continue this discrimination while disenfranchising women who did not have financial independence, through

[11] *See* Ronnie L. Podolefsky, *The Illusion of Suffrage: Female Voting Rights and the Women's Poll Tax Repeal Movement After the Nineteenth Amendment*, 73 Notre Dame L. Rev. 839, 843 (1998) ("On election eve in the general elections of 1920 in Georgia, for instance, women were still uncertain whether they could vote. At issue was how they would register under a law that required payment of the poll tax at least six months prior to an election. Since the Nineteenth Amendment was ratified less than three months before the election, it was impossible to comply. *The New York Times* reported that "'[it] was said that managers of some precincts might… permit women to vote, while others might reject such ballots"… The ambiguity of the laws led to several early court challenges as women found this ambiguity used in attempts to keep them from exercising their new vote.'").

tactics such as expanding the poll tax to all eligible voters rather than repealing it.[12]

2. This Court's Opinion

Following the 1922 municipal election in Albany, Georgia, local officials attempted to alter election results by eliminating ballots cast by women. The Georgia Legislature had passed an act changing Albany's form of government. Unless a majority of the people voted against it on December 4, 1922, the Mayor/City Council form of government would change to a City Manager/Commission form. Predictably, the Mayor and City Council opposed this change. After the vote was tallied, the Mayor initially announced that the act was ratified by the voters. However, he then ordered his clerk of council to review the voter registration lists. The clerk purged 314 names, claiming that they were not legally registered. This action tipped the results, and the Mayor rescinded his earlier announcement, declaring his own victory with the act's defeat. Of the 314 names purged, 257 were women.

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12 *See* Sarah Wilkerson-Freeman, *The Second Battle for Woman Suffrage: Alabama* White *Women, the Poll Tax, and V.O. Key's Master Narrative of Southern Politics,* 68 Journal of Southern History 333-74 (2002) (describing the discriminatory effect of the poll tax on white women and the role of women in later efforts to repeal the tax); Ellen D. Katz, *Mary Lou Graves, Nolen Breedlove, and the Nineteenth Amendment*, 20 Geo. J.L. & Pub. Pol'y 59, 62-71 (2022) (describing the use of the poll tax in Alabama to maintain the racial order).

These women were removed from the registration books under the pretext that they had not paid their poll taxes.

This Court, however, held that the Mayor and City Council were acting as a canvassing board, and therefore had no discretion to investigate voter qualifications. In this important case establishing women's right to vote in Georgia, the Court also found that women were not required to pay the tax at the time of the election and were therefore eligible to vote and to have their votes counted. The Court ordered their votes validated, defeating the Mayor/City Council form of government. This Court held as follows:

> We think that the duties of the mayor and council here defined are those of a canvassing board, and that the board can not go outside of the official returns and receive evidence as to the qualifications of voters, or act in any way in connection therewith except to declare the result of the election on any evidence except the official returns.

118 S.E. at 391.

The Court quoted with approval from a treatise and a number of decisions from other jurisdictions emphasizing the ministerial nature of election certification:

> It is settled beyond controversy that canvassers can not go behind the returns. The returns provided for by law are the sole and exclusive evidence from which a canvassing board, or official, can ascertain and declare the result. The canvassers are not authorized to examine or consider papers or documents which are transmitted to them with the returns, or as

> returns, but which under the statutes do not constitute part of the returns. Neither are they at liberty to receive and consider extrinsic evidence.
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> * * *
>
> The canvassing board can not go behind the returns of the election officers to determine the results of an election … *The duties of canvassers are purely ministerial; they perform the mathematical act of tabulating the votes of the different precincts as the returns come to them* … The determination as to the result of an election by a canvass of the returns by the city council is not a judicial act, but is purely a matter of calculation.

Id. at 391-392 (citations omitted) (emphasis added).

C. *Bacon v. Black*, 133 S.E. 251 (Ga. 1926)

In 1924, in a case that presaged recent partisan efforts to sabotage the certification process, the losing candidate for Tattnall County sheriff challenged election results based on alleged fraud. Similar to the arguments made in favor of the SEB rules at issue in this appeal, the losing candidate argued that "when fraud or mistake is brought to the attention of the consolidating superintendents of election returns of the county, they have the right, while the ballots are in their possession, to examine the same, ascertain if the precinct return corresponds with the ballots, if necessary recount the ballots, and correct either fraudulent errors or mistakes, should such be discovered." *Bacon*, 133 S.E. at 253.

This Court expressly rejected this argument, explaining that:

> [T]he weight of authority ... hold[s] that *the superintendents who consolidate the vote of a county in county elections have no right to adjudicate upon the subject of irregularity or fraud which will permit them to examine the ballots and review the returns of the district managers in order to ascertain whether the district returns are in fact correct or incorrect. The duties of the managers or superintendents of election who are required by law to assemble at the court-house and consolidate the vote of the county are purely ministerial. The determination of the judicial question affecting the result in such county elections is confined to the remedy of contest as provided by law.*
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> * * *
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> [T]he board of consolidating superintendents must ascertain the number of votes cast for each candidate from the certificates returned by the election managers of each district. They can not go behind these returns, except in the instance specified, that is, where votes have been cast by persons who have not paid their taxes … In declaring the result of the election the consolidation managers are governed by the returns made by the superintendents of the several local precincts as to the number of votes cast, and for whom cast; and if these returns be in due form, *they have no power to go behind them* and ascertain the qualification of the voters, except in the instance specified, *or otherwise inquire into the irregularity of the election. Their duty is simply to count the votes of the several precincts, as the same are shown in the certified returns, and declare the result. They have no power to count the ballots themselves.*

Id. at 253-254 (emphasis added).

D. *Thompson v. Talmadge*, 41 S.E.2d 883 (Ga. 1947)

1. Historical Background

Thompson resolved the infamous "Three Governors" controversy.[13] On December 21, 1946, Eugene Talmadge, the Governor-elect of Georgia, died before taking office. The state Constitution did not specify who would become Governor in such a situation, so three men made claims to the governorship: Ellis Arnall, the outgoing Governor; Melvin Thompson, the Lieutenant Governor-elect; and Herman Talmadge, Eugene Talmadge's son.

Eugene Talmadge won the Democratic primary election for Governor, which ensured his victory in the general election. However, when his deteriorating health and hospitalization became apparent in the Fall of 1946 before the election, his supporters believed the General Assembly could choose between the second- and third-place candidates in case of his death. They organized write-in votes for his son Herman Talmadge in the event of Eugene's death. Eugene Talmadge died on December 21, 1946, after winning the general election but before his swearing-in.

The General Assembly met to certify the 1946 election on January 14, 1947. When the election returns were first opened and counted, the deceased

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13 For a fulsome recitation of the underlying facts, see Lucian Dervan, *Georgia's Noble Revolution: Three Governors, Two Armies, the Georgia Supreme Court, and the Gubernatorial Election of 1946*, 15 Journal of Southern Legal History 167 (2007).

Eugene Talmadge was first, Democrat James Carmichael was second, Republican Talmadge Bowers was third, and Herman Talmadge was fourth.[14] The strongly pro-Talmadge General Assembly briefly adjourned and then reconvened after 58 additional write-in votes were supposedly "discovered" for Herman Talmadge from his home county of Telfair (with identical handwriting and with names of some deceased "voters"), which moved him up to second in the official results, behind his deceased father and six votes ahead of Carmichael.[15]

The General Assembly declined to certify Eugene Talmadge as the winner because of his death. It immediately proceeded to an election between the top two living candidates. Realizing that the die was cast, Carmichael declined to participate; Herman Talmadge opponents voted "present" out of protest; and Herman Talmadge prevailed in the General Assembly by a vote of 161-87 on January 15, 1947.[16]

Both outgoing Governor Arnall and Lieutenant Governor-elect Thompson refused to accept the vote by the General Assembly, claiming it was not authorized by the state Constitution. Arnall physically refused to

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14 *Dervan*, note 13, *supra*, at 172 and 225 n.28.

15 *Id.* at 173 and 225 n.28.

16 Patrick Novotny, *This Georgia Rising – Education, Civil Rights, and the Politics of Change in Postwar Georgia* at 233 (2007).

leave the Governor's office and barricaded himself inside. Herman Talmadge went to the Capitol proclaiming himself to be Governor and was accompanied by 8,000-10,000 supporters. Those Talmadge supporters broke down the door to the Governor's office, causing a fight that resulted in numerous injuries.[17] Arnall fled from the Governor's office but continued to assert that he was still the Governor. Talmadge took control of the Governor's office on January 16, 1947 and arranged to have the locks changed so Arnall could not re-enter.

Unable to regain access to the Governor's office, Arnall conducted business at a desk in the Capitol rotunda but had to abandon that makeshift office after it was targeted by firecrackers tossed by Talmadge supporters.[18] Talmadge mobilized Georgia's National Guard, which was loyal to him, while Arnall mobilized the State Guard, which supported him, and both units were positioned around the Capitol.[19] On January 18, Arnall relented and formally relinquished any claim to the Governor's office in favor of Thompson.

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17 *Dervan*, note 13, *supra*, at 173 and 226 n.33, 34; *Novotny,* note 16, *supra*, at 234 n. 59.

18 *Dervan,* note 13, *supra*, at 173.

19 *Id.* at 174 ("At one point, tragedy seemed inevitable as Talmadge's soldiers seized furniture from Arnall's secretary and stenographer and took control of the Capitol's switchboard."); *Id.* at 227-228 n.43 ("In anticipation of possible bloodshed, the major radio networks sent their war correspondents to cover this riveting story in Atlanta").

Talmadge arrived to work on his first day as the ostensible Governor with a .38 caliber Smith & Wesson handgun in his pocket.[20]

2. This Court's Opinion

In March 1947, this Court ruled that Eugene Talmadge's death did not change the fact that a majority of the public's votes had been cast for him, and held that the General Assembly's actions had violated the Georgia Constitution. It declared that the General Assembly's role in certification was the same as that of a canvassing board in that it was purely ministerial, and the Constitution did not give the Legislature any discretion in the process, including considering the death of a candidate.

> The Court held as follows:
>
> [I]n publishing the returns and declaring the results the members of the General Assembly were performing a strict and precise duty identical in character with that which rests upon any and all persons who are merely authorized to canvass. *They were not, while performing that duty, exercising or authorized to exercise any discretion, but were simply performing the ministerial act of disclosing to the public the official election returns that had been prepared by the election managers*... This canvassing of the returns and declaration of the result were constitutional directives to the General Assembly, and its failure to observe them ought not to defeat the right of the person elected or the franchise of the voters who elected him.

[20] *Id.* at 173.

* * *

> *The General Assembly, as canvassers of the election returns in this case, were subject to the general, if not indeed the universal, rule of law applicable to election canvassers. That rule is that they are given no discretionary power except to determine if the returns are in proper form and executed by the proper officials and to pronounce the mathematical result, unless additional authority is expressed. They can neither receive nor consider any extraneous information or evidence, but must look only to the contents of the election returns.*

41 S.E. 2d at 892-893 (emphasis added). In support of this holding, the Court quoted from its earlier decisions in *Davis v. Warde* and *Bacon v. Black*.

The Court then resolved the controversy of who should have been Governor after certification in favor of Arnall. Since the Constitution defined the gubernatorial term as four years but stipulated it did not expire until a successor was "chosen and qualified," and since a dead person is not "qualified," the Court held Arnall had the right to continue serving as Governor. However, he had voluntarily relinquished any claim to the Governor's office to make way for Thompson. At that point, the Court held that under the Georgia Constitution, Thompson, as the duly elected Lieutenant Governor, was entitled to serve as Governor.

The "Three Governors" controversy demonstrates that where political partisanship is particularly intense, there can be a potential for violence. That risk is greatly exacerbated where the governmental body charged with

election certification goes beyond its limited ministerial duty and purports to exercise discretionary powers not authorized by the Georgia Constitution or Election Code. As aptly stated by this Court in 1923, in words that still apply with equal force today, "it would be a monstrous doctrine that would subject the public will and the public voice, thus expressed [through the ballot box], to be defeated by either the ignorance or the corruption of any board of canvassers. The duties of these boards are simply ministerial." *Houser*, 120 S.E. at 625-626.

E. This Court's Precedents Discussed Above Remain Good Law

Although this Court's decisions discussed above predate the current version of the Election Code, they remain controlling law unless and until "they have been changed by express statutory enactment or by necessary implication." *Fortner v. Town of Register*, 604 S.E.2d 175, 177 (Ga. 2004). Moreover, "the Legislature is presumed to know the condition of the law and to enact statutes with reference to it," and "the legal backdrop against which a statute is enacted is often a key indicator of a statute's meaning." *Ford Motor Co. v. Cosper*, 893 S.E.2d 106, 115 (Ga. 2023); *see also Dove v. Dove*, 680 S.E.2d 839, 842 (Ga. 2009) ("[O]ur Legislature is presumed to enact statutes with full knowledge of existing law, including court decisions."); *City of Guyton v. Barrow*, 828 S.E.2d 366, 371 (Ga. 2019) (statutory interpretation

requires consideration of "decisional law that forms the legal background of the written [statutory] text").

Nothing in the current Election Code displaces the well settled legal principles outlined above. Rather, the Legislature has kept in place the "general, if not indeed the universal, rule of law applicable to election canvassers" that "they are given no discretionary power except to determine if the returns are in proper form and executed by the proper officials and to pronounce the mathematical result, unless additional [statutory] authority is expressed." *Thompson*, 41 S.E.2d at 893.

To be sure, the Election Code does "express[]" some "additional authority" that county superintendents lacked in the early 20th century, including limited discretion to conduct a pre-certification recount or recanvass to address certain numerical discrepancies, *see, e.g.*, O.C.G.A. §§ 21-2-493(b), (c). But the Legislature has given superintendents no authority—none—to withhold or delay certification, even if there are allegations of fraud or error. Rather, the Election Code commands that the superintendent "shall" certify and transmit to the Secretary of State the consolidated returns by no later than 5:00 P.M. on the sixth day after election day, with no room for discretion. *Id.* § 21-2-493(k). "If any error or fraud is discovered, the superintendent *shall compute and certify the votes justly*, *regardless of any fraudulent or erroneous returns presented to him or her*, and

shall report the facts to the appropriate district attorney for action," and if "the results of an election contest change the returns so certified, a corrected return shall be certified and filed by the superintendent which makes such corrections as the court orders." *Id.* §§ 21-2-493(i), (l) (emphasis added). These statutory provisions mirror this Court's decisions discussed above. *See, e.g.*, *Bacon*, 133 S.E. at 253 (agreeing that "it was the duty of the superintendents" to "consolidate the vote of the county … regardless of … any charges of irregularities or fraud," that their duties were "purely ministerial," and that "[t]he "determination of the judicial question affecting the result in such county elections is confined to the remedy of contest as provided by law").

In other words, it is the province of the courts—not election superintendents—to adjudicate allegations of voter fraud or error. That has been the law in Georgia for 125 years, and it remains the law today.

CONCLUSION

For the reasons set forth above, amici respectfully submit that the Court should affirm the decision of the Superior Court.

This brief is 5,602 words and thus does not exceed Rule 20(5)'s word-count limit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2025 I caused to be served a true and accurate copy of the foregoing Brief of Amici Curiae History Professors in Support of Appellees to all counsel of record via electronic mail based on the agreement of the parties to this action:

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Orville Vernon Burton is the inaugural Judge Matthew J. Perry Distinguished Chair of History and Professor of Pan-African Studies, Sociology and Anthropology at Clemson University, and emeritus University Distinguished Teacher/Scholar and Professor of History, African American Studies, and Sociology at the University of Illinois. He is a prizewinning author/editor of more than twenty books and nearly 300 articles; a recent book, co-authored with Armand Derfner, is *Justice Deferred: Race and the Supreme Court.* He received the John Hope Franklin Lifetime Achievement award from the Southern Historical Association.

J. Morgan Kousser is Professor of History and Social Science, Emeritus at California Institute of Technology. He is the author of *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* and *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction*, as well as 47 scholarly articles, 83 book reviews or review essays, 26 entries in encyclopedias and dictionaries, 45 papers at scholarly conventions, and 74 talks at universities. *Colorblind Injustice* was co-winner of the 1999 Lillian Smith Award of the Southern Regional Council and of the Ralph J. Bunche Award of the American Political Science Association. Most of his work has concerned minority voting rights, the history of education, and the legal and political aspects of race relations

in the 19th and 20th centuries. From 2000 through 2012, he was the executive editor of the journal *Historical Methods*. He has served on the editorial boards of *The Journal of American History, The Journal of Interdisciplinary History, Social Science History*, and *Historical Methods*. Professor Kousser has also served as an expert witness or consultant in over 60 federal or state voting rights cases, and he testified before a subcommittee of the U.S. House of Representatives in 1981 and 2019 about the renewal of the Voting Rights Act. In 2008, he published the first comprehensive history of Section 5 of the Voting Rights Act, a 108-page article in the Texas Law Review, and in 2015, an analysis of the largest database ever collected on voting rights cases. In 2011, he became the first professor from the Humanities and Social Sciences Division to win the Richard P. Feynman Teaching Award at Caltech.

Allan J. Lichtman became an Assistant Professor of History at American University in 1973 and a Full Professor in 1980, and a Distinguished Professor in 2011. He has published eleven books and several hundred popular and scholarly articles. He has lectured in the US and internationally and provided commentary for major US and foreign networks and leading newspapers and magazines across the world. He has been an expert witness in some 100 civil and voting rights cases. His book, *White Protestant Nation: The Rise of the American Conservative Movement* was a

finalist for the National Book Critics Circle Award in nonfiction. He co-authored a book with Richard Breitman, *FDR and the Jews*, which won the National Jewish Book Award Prize in American Jewish History and was a finalist for the Los Angeles Times book prize in history. His book *The Case for Impeachment* was a national independent bookstore bestseller.

Peyton McCrary retired from his position as a historian in the Civil Rights Division of the United States Department of Justice in 2016, but since leaving government service has testified as an expert witness in several voting rights cases. From 1969-1989, he taught history at the University of Minnesota, Vanderbilt, and the University of South Alabama. Before joining the government in 1990, Dr. McCrary testified as an expert witness in 14 voting rights cases, beginning in 1981 with Bolden v. City of Mobile, on remand from the Supreme Court. In 1998-99, he took leave from the government to serve as the Eugene Lang Visiting Professor at Swarthmore College, where he taught courses in voting rights law and civil rights policy in the Department of Political Science. Over the last 43 years, he has published a prize-winning book, 14 journal articles or book chapters, and 7 law review articles. His work for the Department of Justice focused on the development of expert testimony in voting rights litigation. In 2011 Dr. McCrary received the Maceo Hubbard Award for sustained commitment to the work of the Civil Rights Division.

Jason Morgan Ward is professor of history at Emory University, where he teaches modern US history. He received his bachelor's degree from Duke University and his Ph.D. in history from Yale University. He is the author of *Hanging Bridge: Racial Violence and America's Civil Rights Century* (2016) and *Defending White Democracy: The Making of a Segregationist Movement and the Remaking of Racial Politics, 1936-1965* (2011). He has published over a dozen scholarly essays, including articles in *Journal of Southern History, Journal of Civil and Human Rights, and Agricultural History,* and chapters for edited collections published by Oxford University Press, Cambridge University Press, Louisiana State University Press, and the University Press of Florida. Professor Ward has also offered commentary on racial politics, racial violence, and civil rights for *CNN, New York Times, Washington Post, Los Angeles Times, Atlanta Journal-Constitution*, and *The American Historian.*