IN THE COURT OF APPEALS
STATE OF GEORGIA

WARREN MATHEW SCHMITZ, JR. and JEFFREY ALAN KUNKES, Petitioners-Appellants, v. FULTON COUNTY BOARD OF REGISTRATION AND ELECTIONS, *et al.*, Respondents-Appellees.	Appeal No. A21A0595

BRIEF OF *AMICUS CURIAE* THE NEW GEORGIA PROJECT IN SUPPORT OF APPELLEES

Marc E. Elias*
Amanda R. Callais*
Jacob D. Shelly*
PERKINS COIE LLP
700 Thirteenth Street, N.W.,
Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6200
Facsimile: 202.654.6211
melias@perkinscoie.com
acallais@perkinscoie.com

Joyce Gist Lewis (Bar No. 296261)
Adam M. Sparks (Bar No. 341578)
KREVOLIN AND HORST, LLC
One Atlantic Center
1201 W. Peachtree Street, NW,
Ste. 3250
Atlanta, GA 30309
Telephone: (404) 888-9700
Facsimile: (404) 888-9577
jlewis@khlawfirm.com
sparks@khlawfirm.com

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INTEREST OF *AMICUS CURIAE*

The New Georgia Project ("NGP") is a nonpartisan, community-based nonprofit organization based in Fulton County dedicated to registering Georgians to vote and to helping them become more civically engaged citizens.[1] Since its inception, NGP has registered nearly 500,000 Georgia voters, primarily young voters and voters of color, including over 75,000 voters in Fulton County. NGP considers individuals who it has registered to vote to be a core part of its constituency and has an interest in ensuring that its constituents remain registered and eligible to vote in the upcoming January 5 run-off election and future Georgia elections. Because of that, they have an interest in ensuring that Appellants are not able to proceed with their challenges and that the Superior Court's ruling is upheld. To that end, NGP submits this brief to assist the Court by providing additional information about the state and federal laws as well as constitutional principles supporting the Superior Court's dismissal of Appellants' action below.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants Warren M. Schmitz, Jr., and Jeffrey A. Kunkes ask this Court to reverse the Superior Court's sound decision that 1) Georgia law does not require the

[1] *See* NGP's [Corrected] Motion to Intervene as Respondent, filed September 28, 2020 on the Superior Court docket below, for a full statement of NGP's interests. NGP moved to intervene and participated in the September 28 Rule Nisi hearing, but the Court denied NGP's motion to intervene as moot upon granting the named defendants' motion to dismiss.

Fulton County Board of Registration and Elections and its board members (collectively, the "Board") to conduct "immediate" hearings on Appellants' residency-based mass challenge to 14,346 voters' registration status, and 2) even if it did, such hearings would be prohibited by, among other legal authority, the National Voter Registration Act ("NVRA"). The lower court's decision was a correct interpretation of state and federal law, and the result is additionally required by the federal constitution.

Appellants seek to remove 14,346 registered Fulton County voters (the "Targeted Voters") from the registration rolls, largely based on alleged postal service change-of-address data, under the registration and voter challenge procedures prescribed in O.G.C.A. §§ 21-2-229 and 21-2-230. But Appellants' brief merely recycles their failed arguments below, which suffer again from all the same problems. Neither of the two Georgia statutes that Appellants cite requires "immediate" hearings; the NVRA imposes strict limitations on registration removals for alleged change of residency that are impossible to reconcile—at all times, and especially in the 90 days before federal elections—with the mass purge that remains Appellants' ultimate goal; and the hearings that Appellants' contemplate are foreclosed by the First and Fourteenth Amendments (and possibly the Fifteenth Amendment, depending on the identity of the voters at issue and the motivation for targeting them). Embarking on Appellants' requested course would set a dangerous

precedent, inviting voter challenges like these close to or even after the registration deadline to prevent lawful, eligible voters from voting. For any and all of these reasons, this Court should affirm.

ARGUMENT

I. The Superior Court correctly determined that Appellants have no clear right to mandamus relief.

With the benefit of briefing and oral argument, the Superior Court dismissed Appellants' mandamus petition on October 1, 2020. The Court held:

1. O.C.G.A. § 21-2-229 imposes no time limit on the Board to conduct the requested challenge hearings, and the Board's July 2020 correspondence indicating it would take any necessary action on the voter challenges after the January 2021 federal elections satisfied the statutory requirements;
2. O.C.G.A. §§ 21-2-229 and 21-2-230 are preempted by 52 U.S.C. § 20507 with respect to the requested challenge hearings;
3. Mandamus is inappropriate because the requested hearings would constitute an act of futility; and
4. The petition is dismissed "for any [and] all other proper reasons allowable under Georgia law."

See Final Order Granting Mot. to Dismiss Without Prejudice at 3 (Oct. 1, 2020). The Superior Court was correct at every turn.

A. The Board is not required to take any action beyond what it has already taken to comply with O.C.G.A §§ 21-2-229 and 21-2-230.

As the Superior Court correctly held, Appellants' demand that the Board comply with O.C.G.A §§ 21-2-229 and 21-2-230 requires no relief because the Board is already complying with both statutes. Despite Appellants' assertion to the contrary, the plain text of the statutes does not require or even contemplate *immediate* hearings for voter challenges.

As an initial matter, Section 21-2-229(a) states that any challenge to an individual's qualifications to register must "specify distinctly the grounds of the challenge." But Appellants have failed to so specify. Due to the en-masse nature of their challenge, Appellants have not identified a clear basis for challenging the residency of any particular Targeted Voter. Indeed, they do not even appear to specify which residency challenges apply to each voter—some they claim have moved residence generally, others they claim have simply moved away from Fulton County. *See* Pet., Exs. A, B. And it is wholly unclear which source of information, i.e., the National Change-of-Address list or other purported proofs, serves as the basis for their challenges. Thus, it is little wonder that the Board (even outside of its NVRA obligations) is engaging in its own, independent review before scheduling hearings. *See* Pet., Exs. D, F. Accordingly, the Board has complied with the requirements of the statute.

More fundamentally, Section 21-2-229(b) does not provide a specific timeframe within which the hearing must be held.[2] *See* O.C.G.A. 21-2-229(b) ("[u]pon such challenge being filed with the board of registrars, the registrars shall set a hearing on such challenge. Notice of the date, time, and place of the hearing shall be served [and] [t]he person being challenged shall receive at least three days' notice of the date, time, and place of the hearing."). The only timing strictures placed on the Board are that the challenged voter must receive *at least* three-days' notice. Thus, the Board's indication that it will set hearings as necessary after completing its initial review is wholly in line with the statute and, as such, there was nothing for the Superior Court to issue a writ of mandamus for as the Board was (and remains) in compliance with all statutory requirements.

The absence of such a timeframe is precisely why Appellants try to reverse-engineer a deadline by grafting immediacy language from another statutory section. Petitioners requested a writ of mandamus compelling the Board to set "an immediate hearing on Petitioners' challenge" under Sections 21-2-229 and 21-2-230. Pet. ¶ 6. Section 21-2-229(b) does provide for hearings upon a challenge to a voter's registration eligibility, but the section does not require that hearings be held "immediately." And so Petitioners borrow from Section 21-2-230(b), which

[2] This is unsurprising given that the prospect of an upcoming federal election, as discussed *infra* at Part I.B.2, would change the timeframe within which such a hearing could legally be held.

provides for "immediate consideration" of challenges to a person's right to vote (as opposed to registration eligibility), but does not provide for hearings.[3] Rather, the Board is required initially only to "*consider* such challenge and determine whether probable cause exists to sustain such challenge." *Id.* (emphasis added). Here, the Board has initiated a procedure to *consider* the Petitioner's challenge to Targeted Voters under Section 21-2-230 by reviewing vital records to determine voter qualifications. Pet., Ex. D. This search allows it to "determine whether probable cause exists to sustain such a challenge," as the statute provides. § 21-2-230(b).

Thus, contrary to Appellants' representations and consistent with the Superior Court's ruling, the Board is acting wholly in line with Sections 21-2-229 and 21-2-230 and has never refused to hold the hearings Appellants demand. What the Board did decline to do, however, was initiate a massive witch hunt on the basis of an enormous list, of suspect provenance, targeting voters just weeks before the November general election, and now before the January run-off, who may or may not have moved out of Fulton County. Such voter intimidation is not required by

[3] The need for "immediate consideration" is specific to challenges to the right to vote because these challenge may be brought as the challenged elector attempts to cast a ballot, requiring contemporaneous resolution. Indeed, the only requirement for an immediate hearing applies in the narrow circumstances where a challenged individual's vote will imminently be cast or counted. *See, e.g.*, O.C.G.A. § 21-2-230(h) ("If the challenged elector appears at the polls to vote and it is practical to conduct a hearing on the challenge prior to the close of the polls, the registrars shall conduct such hearing and determine the merits of the challenge.").

either Section 21-2-229 or Section 21-2-230 and the Superior Court was correct in so finding.

B. The NVRA preempts O.C.G.A. §§ 21-2-229 and 21-2-230, foreclosing the requested challenge hearings.

The Superior Court's second basis for dismissing the petition was also correct: the NVRA restricts the removal of voters from registration rolls for change-of-address and plainly preempts the challenge hearings that Appellants demand for that very purpose.

As relevant here, state law is preempted (1) to the extent it actually conflicts with federal law, and compliance with both state and federal law is impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143, (1963), or (2) when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67, (1941)).

In enacting the NVRA, Congress found that:

(1) the right of citizens of the United States to vote is a fundamental right;

(2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and

(3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

52 U.S.C. § 20501(a).

Consistent with these findings, Congress's purposes for enacting the NVRA were:

> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
>
> (2) to make it possible for Federal, State, and local governments to implement this chapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;
>
> (3) to protect the integrity of the electoral process; and
>
> (4) to ensure that accurate and current voter registration rolls are maintained.

Id. § 20501(b).

The hearings Appellants request are preempted by the NVRA because they would frustrate the accomplishment of these purposes and are in direct conflict with NVRA sections 8(d) and 8(c).

1. Section 8(d) of the NVRA preempts the requested hearings.

Because Appellants' challenges are based on alleged changes of residence, they are preempted by Section 8(d) of the NVRA. Section 8(d) expressly provides that "[a] State *shall not remove* the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant changed residence *unless*" it follows the procedures set out therein, which require that: (1) the Board receive written confirmation from the voter of change of address, or (2) the voter fails to respond to a postcard notice, and also fails to vote in at least two subsequent federal general election cycles. 52 U.S.C.A. § 20507(d) (emphasis

added). Because the NVRA renders Appellants' requested relief impossible, the immediate residency-based purge that Appellants demand is forbidden and the Superior Court was correct in finding as much.

This is far from a novel position. In similar cases evaluating voter list maintenance procedures, courts have routinely determined that the removal procedures set out in Section 8(d) of the NVRA are unequivocal. *See, e.g., Common Cause Ind. v. Lawson*, 937 F.3d 944, 959 (7th Cir. 2019) (explaining NVRA "forbids" removal of a voter for residency reasons outside of the procedures set out therein); *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 381 (6th Cir. 2008) (holding "[s]tates may not remove registrants" from voter rolls based on a change in residence unless the NVRA procedures are met). These same principles have also been applied to challenge cases markedly similar to this one, with courts finding that removing voters for residency reasons pursuant to a state-authorized elector challenge violates the NVRA where its procedures are not followed. *See N.C. State Conf. of NAACP v. Bipartisan Bd. of Elections & Ethics Enf't*, 1:16CV1274, 2018 WL 3748172, at *8 (M.D.N.C. Aug. 7, 2018) (finding three counties violated Section 8 of NVRA by removing voters from voter rolls on residency grounds during federal election cycle without adhering to the process set out therein); *Mont. Democratic Party v. Eaton*, 581 F. Supp. 2d 1077, 1082 (D. Mont. 2008) ("Because the federal [NVRA] makes it illegal to deny an elector his or her vote based on a

change of address, subject to limited exceptions not implicated here, if Montana county election officials are required, or even allowed, to compel an elector challenged on the basis of change-of-address information to prove anything, there is a violation of federal law."). For this very reason, rather than litigate a challenge case, another Georgia county, Hancock, recently entered into a consent decree acknowledging that the NVRA governed its removal of several voters from the voter rolls pursuant to a challenge. *Ga. State Conf. of NAACP v. Hancock Cnty. Bd. of Elections & Registration*, 5:15-CV-00414 (CAR), 2018 WL 1583160, at *1 (M.D. Ga. Mar. 30, 2018) (granting joint consent decree requiring Hancock County to follow NVRA procedures for residency-based voter removal and establishing five-year monitoring).

Appellants have not alleged that a single individual on their list of 14,346 Targeted Voters confirmed a change of address in writing to the Board or received official notice from the Board and failed to vote in two subsequent general elections. Accordingly, the NVRA prohibits their removal from the registration rolls and preempts any state law that would provide otherwise. The Superior Court's dismissal was correct.

2. Section 8(c) of the NVRA preempts the requested hearings.

Even if Section 8(d) of the NVRA did not foreclose Appellants' requested relief, Section 8(c) would do so because the challenge Appellants lodge was made within 90 days of a federal election and, in large part, based on generic National Change of Address database searches and mass mailings, failing to provide the necessary individualized inquiry to protect Fulton County citizens' right to vote. According to Appellants, the overwhelming majority of Targeted Voters—a full 13,542 of the 14,346—were identified as potentially having moved through the National Change of Address database. Pet., Ex. B. As such, Section 8(c) of the NVRA further supports the Superior Court's dismissal of Appellants' mandamus request.

Section 8(c) provides that "[a] State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters." 52 U.S.C.A. § 20507(c)(2)(A). This section of the NVRA has been interpreted to apply not just to regular voter list maintenance programs, but also to voter challenges like those sought here. For example, a North Carolina federal court recently reviewed voter challenges across four counties and found that, where a county's removal of voters "lack[s] individualized inquiry," rests on "generic evidence" such as mass mailings, and occurs within 90 days of a federal

election, it violates Section 8(c) of the NVRA. *See N.C. State Conf. of NAACP*, 2018 WL 3748172, at *6-7. The court relied heavily on the Eleventh Circuit's NVRA analysis in *Arcia v. Florida Secretary of State*, 772 F.3d 1335, 1346 (11th Cir. 2014), which held that "the NVRA's prohibition on systematically removing voters within 90 days of the general election 'is designed to carefully balance these four competing purposes in the NVRA . . . by limiting its reach to programs that 'systematically' remove voters from the voter rolls' but allowing removals 'based on individualized information at any time.'" *N.C. State Conf. of NAACP*, 2018 WL 3748172, at *6 (quoting *Arcia*, 772 F.3d at 1346). This is because, while "[a]t most times during the election cycle, the benefits of systematic programs outweigh the costs because eligible voters who are incorrectly removed have enough time to rectify any errors[,] . . . [e]ligible voters removed days or weeks before Election Day will likely not be able to correct the State's errors in time to vote." *Arcia*, 772 F.3d at 1346.

Here, Appellants' initial challenge was based largely on matching to the National Change of Address database, "proof" of registration in another district, or conversations with individuals other than the voter. Pet., Exs. A-B. Their first request to the Board was submitted approximately a month before the August 11 run-off election (which included run-off elections for U.S. House of Representative candidates), with the next federal election following on its heels and well within the 90-day "quiet period" prescribed by the NVRA. Their Petition was not filed until

August 13, a mere 82 days before the November 3 election. Thus, Appellants' request was foreclosed by Section 8(c) when it was first lodged, and the Superior Court's application of the NVRA on October 1 was correct as a matter of law.

Due to the run-off elections for two U.S. Senate seats on January 5th, Fulton County remains within that 90-day window. Because the registration deadline for that election has passed, even if any hearings could be ordered before the election on remand (which they cannot), the timing alone will guarantee that none of the challenged voters will be able to re-register should they be erroneously removed from the voter rolls. This is precisely what the NVRA seeks to protect against, further demonstrating that Appellants have no clear right to relief and cautioning against any grant of mandamus relief. Thus, Appellants' mandamus request should be dismissed.

3. Appellants' arguments against preemption fail.

Appellants suggest that the NVRA does not preempt challenge hearings because these hearings "are separate from and independent of" the NVRA's list maintenance requirements, Br. at 15-16, but it is impossible to disentangle the relief Appellants seek—the mass invalidation of voter registrations for change of residency on the eve of a federal election—from the NVRA's command. Because the NVRA would prevent the registration removals that Appellants ultimately aim to accomplish through these hearings, the Superior Court correctly recognized that

"challenges at this time would constitute an act of futility." Order at 3. The Board could not be compelled to hold futile show hearings that would have served only to intimidate thousands of voters in the weeks and days before an election (and would continue to do so now).

Appellants' invocation of *Bell v. Marinko*, 367 F.3d 588 (6th Cir. 2004), and similar cases for their argument that the NVRA permits registration removals for change of residency is also unavailing. *See* Br. at 16-17. *Bell* permitted the termination of voter registrations where the affected individuals had *never* resided in the precinct where they were registered, and therefore "were improperly registered in the first place." 367 F.3d at 592. Here, Appellants make no allegation that the challenged individuals did not reside at their listed address when they registered to vote. Because there is no suggestion, let alone evidence, that these individuals "were improperly registered in the first place," *Bell* is off the mark. Appellants also cite *United States v. Florida*, 870 F. Supp. 2d 1346 (N.D. Fla. 2012), where a court held the NVRA did not prohibit Florida from removing an improperly registered noncitizen. Br. at 16. Again, Appellants here do not challenge noncitizens or individuals whose initial registration was otherwise improper. *Florida* explains the importance of this distinction, undercutting Appellants' entire argument: "[W]hat Congress had in mind when it drafted" section 8 of the NVRA, the court explained, "was removing a person on grounds that typically arise *after* an initial proper

registration." 870 F. Supp. 2d at 1350. Unlike removal from the registration rolls for non-residence or non-citizenship at the time of registration, which *Bell* and *Florida* held a state may correct at any time, removal for *change* of residence after a valid initial registration may proceed only pursuant to the precautions ordered by the NVRA.

These precautions are crucial because the fact that a voter moves temporarily or requests mail to be forwarded to another address—the primary basis for Appellants' challenges—does not in any way render the voter ineligible to vote. While the place that a person receives significant mail, such as personal bills, may be evidence of the person's residency for voter registration purposes, O.C.G.A. § 21-2-217(15), both the Election Code and federal law enumerate legitimate reasons that individuals may change their mail address, even out of state, without forfeiting their eligibility to vote. These reasons include: moving for temporary purposes, § 21-2-217(a)(2); moving to engage in government service, § 21-2-217(a)(11); and intending to move without actually moving, § 21-2-217(a)(9). *See also* 52 U.S.C. § 20302(a)(1) (providing for voting by absent uniformed voters and overseas voters); O.C.G.A. § 21-2-216(e) (permitting a citizen who begins residence in another state within 30 days of an election to vote in Georgia if the person is not admitted to vote in the new state).

Thus, any voters who temporarily relocated during the pandemic to be closer to family or care for someone ill, or who moved for a few months to take college classes, or to work a summer job, or for any other number of perfectly valid reasons, may request to receive mail at an address other than where they registered to vote without forfeiting their right to vote in Georgia. Appellants' allegations make no mention of when or why any voter actually moved, which would be critical for any threshold determination of the voter's eligibility. There is nothing irregular or unusual about voting while outside of one's voting jurisdiction; indeed, the availability of absentee voting accommodates exactly that. *See* O.C.G.A. § 21-2-380(b).

Importantly, if any person could ambush county boards of elections at any time with allegations that thousands of registered voters changed their mailing address, then boards would be overrun and prevented from focusing their attention and resources on election administration; countless voters would be intimidated from exercising their right to vote upon the imposition of official hearings; and any voters who were unable to defend their status at the hearings or otherwise were purged based on unreliable data would have no ability to remedy the error once the registration deadline has closed. Thus, the requested hearings would decrease, rather than increase, "the number of eligible citizens who register to vote in elections for Federal office," and impede, rather than enhance, "the participation of eligible

citizens as voters in elections for Federal office." 52 U.S.C. § 20501(b)(1) and (2). Because the challenge hearings that Appellants request conflict with federal law, *Florida Lime & Avocado Growers, Inc.* 373 U.S. at 142–143, and "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *ARC Am. Corp.*, 490 U.S. at 101, they are preempted, and the Superior Court's dismissal of Appellants' request was and is sound.

II. Other sources of law also support the Superior Court's decision.

The U.S. Constitution and federal statutes provide additional bases to affirm the Superior Court's decision. In addition to dismissing the Petition based on the Superior Court's interpretation of the NVRA and O.C.G.A. §§ 21-2-229 and 21-2-230, the court below also dismissed the Petition "for any [and] all other proper reasons allowable under Georgia law." Order at 3. Federal law provides such additional proper reasons. *See* U.S. Const. Art. VI cl. 2 (Supremacy Clause).

A. Mandamus relief at this late hour would violate the U.S. Constitution's Due Process Guarantees.

Due process requires that all voters in Georgia be afforded meaningful notice before being removed from the voter registration rolls. As the Supreme Court recognized in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and

afford them an opportunity to present their objections." *See also Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (emphasizing the right to notice and a hearing "is no new principle of constitutional law," and although "due process tolerates variances in the form of a hearing 'appropriate to the nature of the case,' . . . the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect") (quoting *Mullane*, 339 U.S. at 313, and *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971)). It was clear from the inception of this lawsuit that there was simply no way the Board could properly notice over 14,000 individual hearings, much less hold them, in the tight window before the voter registration period closed, meaning that the hearings would necessarily take place after that registration deadline had passed, barring any wrongfully removed voters from re-registering in time to vote in the coming election.

The relief Appellants seek fails to provide adequate process several times over. *First*, the Board must provide adequate notice of the challenge to every individual. While Section 21-2-229(b) requires the Board to provide by mail "at least three days' notice of the date, time, and place" of any hearing, given the preciousness of the right at stake, a single mailing noticing a hearing three days in advance is likely insufficient. Indeed, under normal circumstances the U.S. Postal Service has indicated that election-related mail takes at least a week to be delivered. *See*, *e.g.*,

U.S. Postal Service, *New for the 2018 Election Cycle*, https://about.usps.com/postal-bulletin/2018/pb22498/html/cover_006.htm (last visited Dec. 10, 2020) (recommending voters mail their ballots at least one week before the due date). Given this, it was likely to take far longer for mail concerning any scheduled hearing to arrive when the Superior Court ruled, meaning that many Targeted Voters would have been unlikely to receive their notice in time for any hearing scheduled before the November election. And the right to vote may not be conditioned on voters' maintenance of a regular mailing address, fastidious and immediate review of every piece of mail received, or their flexibility to drop everything in their regular life to defend their registration at an administrative hearing. Indeed, it is precisely for this reason that the NVRA mandates that systemic purges of voters not take place within 90 days of an election. *See supra* at Part I.B.2. The Due Process Clause does not permit hearings that could result in the removal of voters from registration rolls with only the scant notice that Appellants appear to contemplate.

Second, the Board must provide meaningful, individualized review. *See, e.g.*, *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (holding "[a] fundamental requirement of due process is 'the opportunity to be heard' . . . which must be granted at a meaningful time and in a meaningful manner"). If the Board spends only a single minute reviewing the qualifications of each of the 14,346 challenged individuals and holds continuous challenge hearings 24 hours a day, it would still take 10 days for

the Board to complete the hearings requested by Appellants. Thus, it is fanciful to assume the hearings could have been completed in the furious run-up to the November election, or that they could be completed now upon remand before the impending January 5 run-off elections. Of course, if the Board were to rush through hearings without the voter's participation and revoke the right to vote based on cursory acceptance of third-party assertions, the procedural violation would be undeniably egregious. And yet this appears to be precisely the outcome that Appellants have sought and continue to seek to compel.

Third, notwithstanding the rights to notice and a hearing, given the rights at stake if a voter were erroneously removed from the voter rolls—a common occurrence with voter challenges and purges—there would also have been no time to cure the error, nor would there be going forward. Even if the Superior Court had granted relief (which likewise would have been subject to appeal), only four days remained until the October 5 close of registration for the November election. Any relief entered on remand before January 5 would be at least as grievous, as the registration deadline for the run-off election passed on December 7. As discussed, it is for this very reason that the NVRA reflects the commonsense recognition that no procedures are sufficient to fairly resolve residency-based challenges to voter qualifications in the frantic weeks before an election. The procedures prescribed by the NVRA—a 90-day hold on systemic list maintenance and a two-step process for

residency removals outside of that timeframe, *see supra* at Part I.B.—recognize that anything less would risk serious mischief that could rob eligible citizens of their right to vote. Such mischief—of the very sort that Appellants seek to initiate here—runs directly counter to the Fourteenth Amendment. Thus, there is little question that voters will be wholly deprived of their fundamental liberty interest in their right to vote without due process of law if the requested writ of mandamus issues, further demonstrating Appellants lack any clear right to relief and, in fact, proving just the opposite.

B. Mandamus relief would unduly burden the right to vote in violation of the First and Fourteenth Amendments.

Appellants' requested mandamus relief also threatens to unconstitutionally burden the right to vote of over 14,000 Fulton County voters. Under the First and the Fourteenth Amendments, a state cannot utilize election practices that unduly burden the right to vote. When addressing a challenge to state election practices, courts balance the character and magnitude of the burden the law causes on any First and Fourteenth Amendment rights the voters seek to vindicate against the justifications offered in support of the challenged practice. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). "However slight th[e] burden may appear, … it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford v.*

Marion Cnty. Election Bd., 553 U.S. 181, 191 (2008) (Stevens, J., controlling op.) (quotation marks omitted).

Appellants sought to compel the Board to hold challenge hearings immediately, and ultimately to remove from the voter rolls any of the 14,346 Targeted Voters unable to rebut before the November election Appellants' assertion that they are ineligible to vote at their registered address. The Superior Court appropriately denied that relief, but Appellants continue to resist the Boards' position that any necessary hearings will occur only after the January elections. The burden that these hearings would impose on the Targeted Voters is severe. Voters would be uncertain whether their registration remains valid and whether they are potentially barred from lawfully exercising their fundamental right. *Cf. Plyman v. Glynn Cnty.*, 276 Ga. 426, 427 (2003) (finding that in enacting the election contest statutes, the legislature had a "strong desire to avoid election uncertainty and the confusion and prejudice which can come in its wake. Certainly, the swift resolution of election contests is vital for the smooth operation of government"). To defeat Appellants' challenge, the Targeted Voters would have to immediately defend their qualifications before an adversarial government proceeding. If the voters failed to receive adequate notice of the hearing or were otherwise unable to attend (which is certainly likely on such a compressed timeframe)—or if they could attend but were

unable to procure necessary documents proving their residency in time—they would risk losing their right to vote in crucial federal elections.

On the other side of the scale, there has been no legitimate, much less sufficiently weighty, governmental interest to justify holding these hearings on this rushed basis so close to an election. The Board has recognized as much in declining to do so. The hearings, as previously discussed, are forbidden by federal law. But even if that were not the case, the Board has no sufficiently weighty interest in redirecting the staggering time and resources away from its many other pressing election duties as would be necessary to resolve Appellants' challenges before the election. The Board does have an interest in maintaining accurate voter rolls, but that is not what is in dispute—the only question is whether the Superior Court was required to order the Board to review the eligibility of registered voters in a manner and at a time when the risk of wrongful disenfranchisement was (and remains) at its apex. Accordingly, Appellants' request for a writ of mandamus fails for this reason as well.

C. Late voter challenge hearings threaten to violate several voter intimidation statutes.

Though Appellants had not revealed their full list of 14,346 challenged voters to the Superior Court at the time of its decision (and to *amicus*'s knowledge, still have not disclosed the full list), there is a high risk that the list contains many—and

may even be disproportionately comprised of—Georgia voters of color.[4] This Court must be vigilant to protect against any attempt to use its judicial processes to engage in efforts to disenfranchise or intimidate such voters, or the communities in which they live. The risk that this challenge—made on the eve of an election and raising the strong possibility that the only outcome if the relief were granted would be the erroneous disenfranchisement of thousands of eligible voters—was designed for such purpose, is high. It is also worth emphasizing that should Appellants have sought these hearings with the intention of intimidating voters from participating in an election, or should the activity have the effect of intimidating voters, Appellants may very well be violating federal law. *See* 18 U.S.C. § 594 (criminalizing acts intended to intimidate voters and dissuade them from voting in a federal election); 52 U.S.C. § 20511(1) (criminalizing acts intended to intimidate any person for attempting to register to vote in a federal election); 52 U.S.C. § 10307(b) (prohibiting any person from intimidating voters in participating in election, whether or not such intimidation was intended). Collectively, these statutes prohibit (and are sometimes used to punish) actors who engage in this kind of behavior. S*ee League of United Latin American Citizens of Richmond v. Public Interest Legal Foundation,* No. 1:18-cv-00432, ECF No. 63 (Va. E.D. Aug. 13, 2018) (holding plaintiffs alleged a valid

[4] *See* D'Vera Cohn, *About a Fifth of U.S. Adults Moved Due to COVID-19 or Know Someone Who Did*, Pew Rsch. Ctr. (July 6, 2020) ("Asian and Hispanic adults are more likely than white adults to have moved due to the outbreak.").

claim for voter intimidation under Voting Rights Act, 52 U.S.C. § 10307(b), where group published a list of voters who were allegedly ineligible to vote shortly before general election); *Consent Decree*, *United States v. N.C. Republican Party, et al.*, No. 91-161-Civ-5-F (E.D.N.C. Feb. 27, 1992) (consent decree entered after North Carolina Republican Party sent letters to minority voters implying they may be ineligible to vote and could face prosecution for voting during general election); *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 671 F. Supp. 2d 575, 580 (D.N.J. 2009), *aff'd*, 673 F.3d 192 (3d Cir. 2012) (describing Republican efforts in Louisiana to challenge African American voters' eligibility shortly before general election, leading to a consent decree prohibiting the RNC from engaging in such efforts for decades). Accordingly, the likelihood that Appellants have sought the requested writ of mandamus to disenfranchise or intimidate eligible, registered voters also cautioned heavily against granting Appellants' requested relief in Superior Court, and continues to caution against reversal now.

CONCLUSION

As the Superior Court correctly recognized, a writ of mandamus here would be an unwarranted use of its power to supplant its discretion for that of duly appointed election officials carrying out their duties in accordance with Georgia and federal law. Perhaps even more importantly, a writ of mandamus would further the ends of voter suppression targeting minority communities in Fulton County and

make the Court a tool of racially discriminatory voter intimidation. For the reasons stated above, the judgment below should be affirmed.

Dated: December 16, 2020

By: */s/ Adam M. Sparks*

Joyce Gist Lewis
Georgia Bar No. 296261
Adam M. Sparks
Georgia Bar No. 341578
KREVOLIN AND HORST, LLC
One Atlantic Center
1201 W. Peachtree Street, NW,
Ste. 3250
Atlanta, GA 30309
Telephone: (404) 888-9700
Facsimile: (404) 888-9577
jlewis@khlawfirm.com
sparks@khlawfirm.com

Marc E. Elias*
Amanda R. Callais*
Jacob D. Shelly*
PERKINS COIE LLP
700 Thirteenth Street, N.W.,
Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6200
Facsimile: 202.654.6211
melias@perkinscoie.com
acallais@perkinscoie.com
jshelly@perkinscoie.com

Counsel for The New Georgia Project

**Pro Hac Vice Application Forthcoming*

This submission does not exceed the word count limit imposed by Rule 24.

By:/*s/ Adam M. Sparks*

Joyce Gist Lewis
Georgia Bar No. 296261
Adam M. Sparks
Georgia Bar No. 341578
KREVOLIN AND HORST, LLC
One Atlantic Center
1201 W. Peachtree Street, NW,
Ste. 3250
Atlanta, GA 30309
Telephone: (404) 888-9700
Facsimile: (404) 888-9577
jlewis@khlawfirm.com
sparks@khlawfirm.com

IN THE COURT OF APPEALS
STATE OF GEORGIA

WARREN MATHEW SCHMITZ, JR. and JEFFREY ALAN KUNKES, Petitioners-Appellants, v. FULTON COUNTY BOARD OF REGISTRATION AND ELECTIONS, *et al.*, Respondents-Appellees.	Appeal No. A21A0595

CERTIFICATE OF SERVICE

I certify that I have this day served contemporaneously with or before filing with the Court's eFast system the within and foregoing **BRIEF OF AMICUS CURIAE THE NEW GEORGIA PROJECT IN SUPPORT OF APPELLEES** via email and U.S. first-class mail, in a properly-addressed envelope with adequate postage affixed thereon, to ensure delivery to:

Ray S. Smith, III
Smith & Liss, LLC
Five Concourse Parkway, Ste. 2600
Atlanta, GA 30328
rsmith@smithliss.com;

Cheryl M. Ringer
David R. Lowman
Eugene F. Fuller, Jr.

Kaye Woodard Burwell
Office of the Fulton County Attorney
141 Pryor Street, S.W., Ste. 4308
Atlanta, GA 30303
david.lowman@fultoncountyga.gov
eugene.fuller@fultoncountyga.gov
cheryl.ringer@fultoncountyga.gov
kaye.Burwell@fultoncountyga.gov

William V. Custer
Jennifer B. Dempsey
Christian J. Bromley
Leah Schultz
Bryan Cave Leighton Paisner LLP
One Atlantic Center | 14th Floor
1201 West Peachtree Street NW
Atlanta, GA 30309-3488
bill.custer@bclplaw.com
jennifer.dempsey@bclplaw.com
christian.bromley@bclplaw.com
leah.schultz@bclplaw.com

This 16th day of December 2020.

By:*/s/ Adam M. Sparks*

Joyce Gist Lewis
Georgia Bar No. 296261
Adam M. Sparks
Georgia Bar No. 341578
KREVOLIN AND HORST, LLC
One Atlantic Center
1201 W. Peachtree Street, NW,
Ste. 3250
Atlanta, GA 30309
Telephone: (404) 888-9700
Facsimile: (404) 888-9577
jlewis@khlawfirm.com
sparks@khlawfirm.com