IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIA REPUBLICAN PARTY, INC., NATIONAL REPUBLICAN SENATORIAL COMMITTEE, PERDUE FOR SENATE, and GEORGIANS FOR KELLY LOEFFLER,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his official capacity as the Secretary of State of Georgia, REBECCA N. SULLIVAN, in her official capacity as the Vice Chair of the State Election Board, DAVID J WORLEY, MATTHEW MASHBURN, and ANH LE, in their official capacity as Members of the State Election Board,

Defendants,

and

DEMOCRATIC PARTY OF GEORGIA and DSCC,

Intervenor-Defendants.

Case No. 1:20-cv-05018-ELR

INTERVENOR-DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION AND INCORPORATED MEMORANDUM OF LAW

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I. INTRODUCTION

Less than two weeks before Georgia begins processing absentee ballots for its January 5, 2021 runoff election, Plaintiffs ask this Court to upend a signature matching regime that has been on the books for nearly a decade and related guidance that has been in place for well over eight months (and used without incident in the prior three elections). Plaintiffs seek to use the power of this Court to revise the rules of Georgia's elections to ensure that more lawful voters are indiscriminately disenfranchised. Similar efforts have rightfully been rejected by other federal courts. *See generally Wood v. Raffensperger*, No. 1:20-cv-04651-SDG, 2020 WL 6817513 (N.D. Ga. Nov. 20, 2020) ("*Wood I*"), *aff'd*, No. 20-14418, 2020 WL 7094866 (11th Cir. Dec. 5, 2020) ("*Wood II*"); Tr. of Motions Hearing, *Pearson v. Kemp*, No. 1:20-CV-4809-TCB (N.D. Ga. Dec. 7, 2020) ("*Pearson* Tr.") (attached as Ex. 1). This effort should fail, too. As a threshold matter, Plaintiffs lack standing to bring their claims. But even if they could clear that jurisdictional hurdle, they have failed to satisfy any of the requirements necessary to justify the extraordinary injunctive relief they seek: (1) they are not likely to succeed on the merits, as Georgia's signature matching procedures do not burden Plaintiffs' right to vote, are not fundamentally unfair, and do not deprive Plaintiffs of any liberty interests; (2) they have failed to establish that absent an injunction they will suffer irreparable harm, relying instead

on the same kind of rank speculation about potential fraud that federal courts have repeatedly found insufficient to even sustain jurisdiction, much less justify injunctive relief; and (3) the balance of the equities and public interest both weigh heavily against their requested relief. The U.S. Supreme Court has continually and vehemently cautioned federal courts against doing exactly what Plaintiffs ask this Court to do here—upend the rules of an election just weeks before ballots will be counted. Plaintiffs have provided no basis for this Court to deviate from this repeated admonition. The motion should be denied.

II. BACKGROUND

A. Signature Matching in Georgia

Since 2012, Georgia law has provided that upon receipt of an absentee ballot,

> [T]he registrar or clerk shall . . . compare the signature or mark on the oath with the signature or mark on the absentee elector's voter registration card or the most recent update to such absentee elector's voter registration card and application for absentee ballot or a facsimile of said signature or mark taken from said card or application, and shall, if the information and signature appear to be valid and other identifying information appears to be correct, so certify by signing or initialing his or her name below the voter's oath.

O.C.G.A. § 21-2-386. If the signature does not appear valid, then it is rejected. *Id*.

On November 6, 2019, Intervenor-Defendants Democratic Party of Georgia, Inc. ("DPG") and DSCC, among others, sued Defendant Brad Raffensperger, Georgia's Secretary of State (the "Secretary"), and members of the State Election

Board (together with the Secretary, "Defendants"), in *Democratic Party of Ga., Inc. v. Raffensperger*, No. 1:19-cv-5028-WMR (N.D. Ga. Nov. 6, 2019), challenging Georgia's signature matching laws under the First and Fourteenth Amendments to the U.S. Constitution on the grounds that they burdened the right to vote by arbitrarily and unjustifiably disenfranchising lawful Georgia voters. After several weeks of arms-length negotiations, the parties publicly filed a settlement agreement with the Court on March 6, 2020 (the "Settlement Agreement").

That Settlement Agreement did not modify Georgia law. Instead, the Secretary and the State Board agreed to exercise their ordinary powers to issue rules and guidance to help ensure the uniform and fair treatment of voters within the existing statutory framework. Subsequently, on May 1, the Secretary issued an Official Election Bulletin ("OEB"), which required review of allegedly mismatched signatures by two additional registrars, deputy registrars, or absentee ballot clerks. It also required counties to continue to verify absentee voters' identities by comparing signatures as required by Georgia law. *See* Ex. 2, at 1. The OEB was widely publicized and was in place for each of the state's 2020 elections, including the June 9 primary, August 11 primary runoff, and November 3 general and special U.S. Senate elections. Accordingly, officials in Georgia rejected absentee ballots for signature mismatches under these rules and the Election Code during these elections.

B. Plaintiffs' Suit

On November 3, Georgia held its election and special U.S. Senate elections. Georgia law requires a winning candidate to receive "a majority of the votes cast." O.C.G.A. § 21-2-501(a)(1). If no candidate surpasses the 50 percent threshold, then the state holds a runoff election between the two candidates that received the highest vote totals. *Id*. Because no candidate for either U.S. Senate seat won a majority, Georgia will hold a runoff election on January 5, 2021. *See* Pls.' Mot. for TRO and Prelim. Inj. ("Mot."), ECF No. 2-1, at 1.

Plaintiffs initiated this challenge to Georgia's signature matching process on December 10, 2020—only 11 days before processing of absentee ballots for the runoff election was set to commence. *See* Verified Compl. ("Compl."), ECF No. 1, ¶ 12. Voting in the election is already well underway. Advance voting began on Monday and, as of two days ago, roughly 1.2 million voters had requested absentee ballots, with more than 200,000 already returned. *See* Alexa Corse, *Georgia Senate Runoffs Early Voting Begins as Requests for Mail-in Ballots Top 1 Million*, Wall St. J. (Dec. 14, 2020), https://www.wsj.com/articles/georgia-senate-runoffs-early-voting-begins-as-requests-for-mail-in-ballots-top-1-million-11607953020.

Plaintiffs' complaint alleges three claims for relief: an undue burden on the right to vote in violation of the First and Fourteenth Amendments, Compl. ¶¶ 77–

89; violation of the Due Process Clause, *id.* ¶¶ 90–98; and violation of the Equal Protection Clause, *id.* ¶¶ 99–107. Plaintiffs also filed their motion for immediate injunctive relief on December 10, asking this Court to direct:

> (1) Georgia election officials to conduct a meaningful signature matching process; (2) that three election officials review the voter's signature on the absentee ballot to ensure that it matches the voter's reference signatures so that there is sufficient assurance that a lawful ballot has been cast; and (3) require that observers from the parties participating in the election be permitted to view the signature matching process by a means and in a manner sufficient to meaningfully observe signature matching and report any irregularities in the process.

Mot. 2–3.

III. LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008), and "should not be granted unless the movant clearly carries the burden of persuasion," *Canal Auth. v. Callaway*, 489 F.2d 567, 573 (11th Cir. 1974). The moving party must show:

> (1) a substantial likelihood that he will ultimately prevail on the merits; (2) a showing that he will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to him outweighs the harm the injunction may cause the opposing party; and (4) a showing that granting the injunction would not be adverse to the public interest.

Duke v. Cleland, 954 F.2d 1526, 1529 (11th Cir. 1992); *see also Wood I*, 2020 WL 6817513, at *4 (noting identical standards for TRO and preliminary injunction).

IV. ARGUMENT

A. Plaintiffs fail to allege any injury sufficient for standing.

As a threshold matter, Plaintiffs are unlikely to succeed on their claims here because the Court lacks jurisdiction to hear them due to Plaintiffs' lack of standing. To demonstrate Article III standing, a plaintiff must have suffered an injury in fact. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Plaintiffs equal protection, due process, and undue burden claims boil down to four alleged injuries, none of which is sufficient for standing. This Court should reject their motion on that basis alone.

First, Plaintiffs' claim that they are injured because Georgia's signature matching process results in more unlawful votes being counted, thereby diluting the lawful votes of their members, is not cognizable. *See* Mot. 20. The purported injury of vote-dilution-through-unlawful-balloting has been repeatedly rejected as a viable basis for standing, and for good reason: supposed vote dilution caused by counting supposedly improper votes would affect *all* Georgia voters, not just Plaintiffs' members, making it no more than a generalized grievance. *See, e.g.*, *Bognet v. Sec'y of Commonwealth*, 980 F.3d 336, 354–56 (3d Cir. 2020) ("Th[e] conceptualization of vote dilution—state actors counting ballots in violation of state election law—is not a concrete harm under the Equal Protection Clause of the Fourteenth Amendment."); *Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-CV-1445

JCM (VCF), 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) (finding vote-dilution theory too speculative to confer standing); *Martel v. Condos*, No. 5:20-cv-131, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020) (concluding vote-dilution theory amounted to generalized grievance that could not confer standing); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926–27 (D. Nev. 2020) (similar).

Plaintiffs purport to rely upon the Eleventh Circuit's recent decision in *Wood v. Raffensperger*, 2020 WL 7094866 ("*Wood II*"), to support their vote-dilution theory, *see* Mot. 20, but that case actually undermines their position. While the Eleventh Circuit noted that vote dilution *could* be a basis for standing, it explained that this theory requires a basis of comparison, such as in the contexts of racial gerrymandering and malapportionment, *see id.* at *5—a requirement that is not present here. The court *rejected* almost the exact same theory of standing Plaintiffs offer here—that Georgia's signature matching procedures dilute votes—explaining that, in contrast to malapportionment and racial gerrymandering cases, "'no single voter is specifically disadvantaged' if a vote is counted improperly, even if the error might have a 'mathematical impact on the final tally and thus on the proportional effect of every vote.'" *Id.* (quoting *Bognet*, 980 F.3d at 356). Thus, the court concluded that a theory of vote-dilution injury like Plaintiffs' "is a 'paradigmatic generalized grievance that cannot support standing.'" *Id*. (quoting *Bognet*, 980 F.3d

at 356). This conclusion applies not only to voters, but also to the organizations and campaigns that purport to represent them and seek their votes, like Plaintiffs here. *See, e.g.*, *Cegavske*, 2020 WL 5626974, at *4 (concluding that candidate and political party lacked standing based on vote-dilution theory).

Second, Plaintiffs' claim that disparate implementation of signature matching in Georgia's counties constitutes a sufficient harm, *see* Mot. 20–21, but it is well-established that this type of allegedly differential treatment is not by itself a cognizable harm. Importantly, Plaintiffs have *not* alleged that they or their members were prevented from voting or had their votes denied based on signature matching. Nor do Plaintiffs allege that any voters were treated differently because of a suspect classification or that disparate treatment caused a deprivation of a fundamental right. Instead, they merely claim an injury because "the state is *not* imposing a restriction on *someone else's* right to vote." *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078, 2020 WL 6821992, at *12 (M.D. Pa. Nov. 21, 2020) (quoting *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5997680, at *44 (W.D. Pa. Oct. 10, 2020)), *aff'd sub nom. Donald J. Trump for President, Inc. v. Sec'y of Commonwealth*, No. 20-3371, 2020 WL 7012522 (3d Cir. Nov. 27, 2020). The mere fact of some differential treatment of voters within a state does not alone constitute an injury absent resulting harm to Plaintiffs.

Third, Plaintiffs' alleged diversion of resources to combat the speculative vote dilution they believe results from Defendants' conduct does not confer standing. *See* Mot. 21. Spending money to combat a speculative injury cannot alchemize that expenditure into a cognizable injury for Article III purposes, since a plaintiff "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013). Vote dilution is a prototypical speculative harm, and spending money to combat it does not morph it into a concrete harm for Article III standing. *See Cegavske*, 2020 WL 5626974, at *5.

Fourth, any purported harm to Plaintiffs' candidates' electoral prospects also fails to provide a basis for standing. *See* Mot. 20–21. This harm is based on the same speculative vote-dilution theory that courts nationwide have repeatedly rejected as sufficiently concrete to demonstrate injury. Plaintiffs have provided no evidence whatsoever for this contention and do not even *explain* why their candidates would be harmed electorally, let alone prove it. Absent evidence to the contrary, it is just as likely that unlawfully cast ballots would *help* their candidates as harm them.

B. Plaintiffs cannot succeed on the merits.

Even if Plaintiffs had standing to assert their causes of action, they have failed to demonstrate that they are likely to succeed on the merits of their claims.

1. Plaintiffs cannot demonstrate any burden on the right to vote.

Plaintiffs' right to vote claim—which, "like Frankenstein's Monster, has been haphazardly stitched together from two distinct theories in an attempt to avoid controlling precedent," *Boockvar*, 2020 WL 6821992, at *4—is an unwieldy amalgamation of vote dilution and fundamental unfairness, neither of which is applicable to their alleged circumstances. *See* Mot. 11–15.

Plaintiffs suggest that "[t]he failure to prevent the imminent counting of unlawful absentee ballots will result in the dilution of the lawfully cast ballots of Plaintiffs' members." Mot. 10. But vote dilution is a viable basis for Equal Protection Clause claims only in certain contexts, such as when laws structurally devalue one community's votes over another's—a fundamental fact underscored by *Reynolds v. Sims*, on which Plaintiffs incorrectly rely. *See* 377 U.S. 533, 568 (1964) ("[A]n individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."); *see also, e.g.*, *Bognet*, 2020 WL 6686120, at *11 ("[V]ote dilution under the Equal Protection Clause is concerned with votes being weighed differently."). A court in this District has already rejected a purported vote dilution claim nearly identical to Plaintiffs'. *See Wood I*, 2020 WL 6817513, at *8–10. Such an injury is not "cognizable in the equal protection framework." *Id* at 10.

Plaintiffs cannot identify a single apposite precedent adopting their theory.[1] This is unsurprising: the claim of vote dilution based on fears of potential fraud is speculative and applies to all voters equally, making it an ill-fit for an equal protection challenge. *Cf. Mays v. LaRose*, 951 F.3d 775, 785 (6th Cir. 2020) ("All binding authority to consider the burdensome effects of disparate treatment on the right to vote has done so from the perspective of only affected electors—not the perspective of the electorate as a whole."). And there is no authority for transmogrifying the vote-dilution line of cases into a requirement that the federal judiciary manage election procedures and disenfranchise lawful voters based on a plaintiff's (speculative) claims of unlawful balloting. "That is not how the Equal Protection Clause works." *Bognet*, 2020 WL 6686120, at *11; *cf. Short v. Brown*, 893 F.3d 671, 677–78 (9th Cir. 2018) ("Nor have the appellants cited any authority

[1] *Roe v. Alabama ex rel. Evans*, 43 F.3d 574 (11th Cir. 1995) (per curiam), on which Plaintiffs rely throughout their briefing, is readily distinguishable. There, the Eleventh Circuit considered the constitutionality of a state court order that permitted the counting of contested absentee ballots after an election; in other words, "a retroactive change in the election laws" that would have "constitute[d] a post-election departure from previous practice." *Id.* at 578–79, 581. It was on *this* distinguishable basis that the court determined that "counting ballots that were not previously counted would dilute the votes of those voters who met the requirements" of Alabama's election laws, *id.* at 581—*not* on the theory that unlawfully cast ballots *might* be cast and counted in a future election.

explaining how a law that makes it easier to vote would violate the Constitution.").[2] Instead, courts have rejected such efforts. *See Minn. Voters All. v. Ritchie*, 720 F.3d 1029, 1031–32 (8th Cir. 2013); *Partido Nuevo Progresista v. Perez*, 639 F.2d 825, 827–28 (1st Cir. 1980); *Boockvar*, 2020 WL 5997680, at *67–68.

Moreover, although Plaintiffs incorrectly and inexplicably include a substantive due process argument premised on fundamental unfairness as a component of their right to vote claim, *see* Mot. 11–13, for the reasons discussed in Section IV.B.2 *infra*, Plaintiffs have demonstrated no such violation. At most, the harms they complain of are no more than "garden variety election irregularities [that] do not violate the Due Process Clause," as at least two courts considering similar claims challenging Georgia's signature matching regime have concluded in recent weeks. *Wood I*, 2020 WL 6817513, at *12 (quoting *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998)); *see also Pearson* Tr. at 41:15-42:15.

In short, Plaintiffs have failed to plead or prove *any* infringement of their right

[2] Indeed, "if dilution of lawfully cast ballots by the 'unlawful' counting of invalidly cast ballots 'were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's "interest" in failing to do more to stop the illegal activity.'" *Bognet*, 2020 WL 6686120, at *11 (quoting *Boockvar*, 2020 WL 5997680, at *46).

to vote,[3] and the two theories they invoke are not viable under these circumstances.

2. Plaintiffs cannot succeed on their due process claim.

Next, Plaintiffs suggest that Georgia's signature verification process violates their due process rights. *See* Mot. 15–18. But they have neither pleaded nor proved a viable due process violation, either substantively or procedurally.

Sealing Plaintiffs' fate is the fact that just *a few weeks ago*, another judge in this very District—in considering almost identical claims concerning the efficacy of Georgia's signature matching regime—found that the plaintiff's allegations of "fundamental unfairness" and "speculat[ion] as to wide-spread impropriety" amounted to no more than "'garden variety' election dispute[s]" and, as such, failed to establish a viable substantive due process claim. *Wood I*, 2020 WL 6817513, at *12. Accordingly, Plaintiffs' woefully inadequate due process claim is a nonstarter; their inability to succeed on the merits has already been adjudicated in this District.

Even setting aside this significant precedent, Plaintiffs cannot succeed on either a procedural or substantive due process claim. A procedural due process claim raises two inquires: (1) "whether there exists a liberty or property interest which has

[3] Although Plaintiffs suggest that the *Anderson-Burdick* balancing test applies to this claim, *see* Mot. 11, that framework is only implicated "[i]f a fundamental right is implicated," *Wood I*, 2020 WL 6817513, at *8—which is not the case here, since Plaintiffs do not allege any sort of infringement on the right to vote.

been interfered with by the State," and (2) "whether the procedures attendant upon that deprivation were constitutionally sufficient." *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). Although Plaintiffs identify "voting [as] a protected liberty interest," Mot. 17, they never allege an infringement or barrier in their supporters' right to vote. Instead, their procedural due process claim is actually premised on the alleged "depriv[ation] of equal or consistent standards in how absentee ballot signatures are verified." *Id.* at 15. But Plaintiffs do not have a liberty or property interest in enforcing state election procedures where, as here, the right to vote is not curtailed or even affected in any way by those procedures. *See Wood I*, 2020 WL 6817513, at *11 ("[T]he circuit court has expressly declined to extend the strictures of procedural due process to 'a State's election procedures.'" (quoting *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020)). Plaintiffs therefore have not alleged a viable procedural due process claim.

Furthermore, Plaintiffs cannot succeed on their substantive due process claim premised on fundamental unfairness. "Federal courts should not 'involve themselves in garden variety election disputes.'" *Serpentfoot v. Rome City Comm'n*, No. 4:09-CV-0187-HLM, 2010 WL 11507239, at *16 (N.D. Ga. Mar. 3, 2010) (quoting *Roe v. Alabama ex rel. Evans*, 43 F.3d 574, 580 (11th Cir. 1995) (per curiam)); *accord Curry v. Baker*, 802 F.2d 1302, 1314 (11th Cir. 1986) ("Only in extraordinary

circumstances will a challenge to a state election rise to the level of a constitutional deprivation."); *Wood I*, 2020 WL 6817513, at *12 (same). Indeed, "[t]he Constitution is not an election fraud statute," *Minn. Voters All. v. Ritchie*, 720 F.3d 1029, 1031 (8th Cir. 2013) (quoting *Bodine v. Elkhart Cnty. Election Bd.*, 788 F.2d 1270, 1271 (7th Cir. 1986)), and it "d[oes] not authorize federal courts to be state election monitors." *Gamza v. Aguirre*, 619 F.2d 449, 454 (5th Cir. 1980); *see also Pettengill v. Putnam Cnty. R-1 Sch. Dist.*, 472 F.2d 121, 122 (8th Cir. 1983) (per curiam) (finding no cases "which authorize a federal court to be the arbiter of disputes . . . over alleged irregularities in the transmission and handling of absentee voter ballots"); *Shipley v. Chi. Bd. of Election Comm'rs*, 947 F.3d 1056, 1062 (7th Cir. 2020) (noting that even "a deliberate violation of state election laws by state election officials does not transgress against the Constitution" (quoting *Kasper v. Bd. of Election Comm'rs*, 814 F.2d 332, 342 (7th Cir. 1987)).[4]

[4] Notably, the Fifth Circuit *rejected* a due process claim based on a similar slew of alleged irregularities, including "complaints about missing signatures, ballots that should have been mailed rather than hand-delivered, and six fraudulent votes"—*even though the contested ballots were enough to decide the election*—explaining that such claims implicated only "'garden variety' election disputes" for which "states," not federal courts, "are primarily responsible." *Welch v. McKenzie*, 765 F.2d 1311, 1317 (5th Cir. 1985). This and other courts have rejected constitutionalizing every election dispute. *See, e.g.*, *Gamza*, 619 F.3d at 453; *Powell v. Power*, 436 F.2d 84, 86 (2d Cir. 1970).

Instead, it is only where "a pervasive error [] undermines the integrity of the vote" that the Constitution is implicated; specifically, as the Ninth Circuit explained after considering cases where election irregularities rose to the level of constitutional violations, where "two elements are present: (1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and (2) significant disenfranchisement that results from a change in the election procedures." *Bennett*, 140 F.3d at 1226–27; *cf. id.* at 1227 n.3 (noting that wholesale disenfranchisement of "entire electorate [] when legally required election did not occur" and "outrageous racial discrimination" might rise to level of "fundamental[] unfair[ness]" (quoting *Griffin v. Burns*, 570 F.2d 1065, 1080 (1st Cir. 1978))). In other words, the sort of unconstitutional irregularity that courts have entertained consists of widescale disenfranchisement—and Plaintiffs' allegations and evidence fall far short of such extreme circumstances. Plaintiffs do not allege *dis*enfranchisement at all; their due process theory is based on the alleged *en*franchisement of voters whose signatures might not have been properly verified. But "the due process clause . . . offer[s] no guarantee against errors in the administration of an election," *Powell*, 436 F.2d at 84, and absent allegations (let alone evidence) of widescale disenfranchisement, Plaintiffs cannot prevail on their substantive due process claim. *See Wood I*, 2020 WL 6817513, at *12.

3. Plaintiffs cannot succeed on their equal protection claim.

Finally, Plaintiffs' equal protection claim fails as well. *See* Mot. 18–20. The gravamen of this claim is Plaintiffs' contention that "standards for accepting or rejecting signatures on absentee ballots var[y] from county to county." Mot. 18. The primary authority on which they rely for this claim—*Bush v. Gore*, 531 U.S. 98 (2000) (per curiam)—does not provide the support they need.[5]

In *Bush*, the U.S. Supreme Court considered "whether the use of standardless manual recounts" by some, but not all, Florida counties violated the Equal Protection Clause. *Id.* at 103. The Court specifically clarified that it was *not* deciding "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id.* at 109. Instead, it was addressing a situation which lacked even "minimal procedural safeguards." *Id*.

Here, by contrast, Georgia law and the Secretary's uniform guidance on signature matching provide the standards required by *Bush*. Whatever deviation might exist between counties in their application of these standards does not, under *Bush*'s, constitute a constitutional violation. Courts must

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[5] Plaintiffs also cite *Moore v. Ogilvie*, 394 U.S. 814 (1969), and *Gray v. Sanders*, 372 U.S. 368 (1963), *see* Mot. 18, but these cases involved unequal distribution of voting power across counties in violation of the "one person, one vote" principle—*not*, as alleged here, misapplication of state law by certain counties.

> recognize a distinction between state laws and patterns of state action that systematically deny equality in voting, and episodic events that, despite non-discriminatory laws, may result in the dilution of an individual's vote. Unlike systematically discriminatory laws, isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause.

Gamza, 619 F.2d at 453; *see also Boockvar*, 2020 WL 5997680, at *60 (rejecting equal protection claim where "[t]he Secretary's guidance . . . is uniform and nondiscriminatory" and "applies equally to all counties, and by extension, voters").

Even *if* such differentiation could amount to an equal protection claim, Plaintiffs have failed to demonstrate that any purported noncompliance or deviation from statewide requirements exists. Plaintiffs' entire case rests on a report by Dr. Jason Sorens that claims that certain counties in Georgia have anomalously low rates of signature matching rejections, *see* Mot. Ex. A, and a report by Scott Gessler, a former Secretary of State of Colorado, which asserts that Georgia's rate of signature rejections is low compared to other states, *see id.* Ex. B. But as the expert report of Dr. Jonathan Rodden demonstrates, *see* Ex. 3 ("Rodden Rep."), neither assertion holds up to even the most cursory of inspections. The distribution of signature rejections across counties in Georgia—where the vast majority of counties reject zero or very few ballots, and a small handful of counties reject many—is "ubiquitous" in states that have signature matching laws and says nothing about the efficacy or inefficacy of Georgia's signature matching regime. Rodden Rep. at 3.

Furthermore, Dr. Sorens's method for concluding that some counties' rates are "too low"—which involves, "without any other information, simply [] observing cross-county distributions of rejections"—"makes no sense." *Id.* at 4. There is no plausible reason for counties to converge around some average rate of rejection.

Similarly, Georgia's average rate of rejection statewide does not stand out when conducting a proper cross-state comparison. Colorado—the state which Mr. Gessler chooses as a comparator—has a particularly aggressive signature match regime. *See id.* at 9-10. In contrast, most other states have less aggressive rejection rates; Georgia's rejection rate is closer to the median state rejection rate, and was *above* that rate in 2016 and 2018. *Id.* at 10. Moreover, Georgia's declining rejection rate from 2014 to 2018 does not warrant the suspicion Dr. Sorens expresses, as this "is in line with a national trend toward lower rejection rates over the same period." *Id*. Simply put, there is nothing in the data, properly analyzed, to suggest that certain counties in Georgia are rejecting ballots at an anomalously low rate, or that Georgia is rejecting ballots at a substantially lower rate than the average state.

C. Plaintiffs have not demonstrated irreparable harm.

"A showing of irreparable harm is 'the *sine qua non* of injunctive relief.'" *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) (quoting *Frejlach v. Butler*, 573 F.2d 1026, 1027 (8th

Cir. 1978)). "[T]he absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000). Such injury must be "actual and imminent," not "remote [or] speculative." *Id.* (quoting *Gen. Contractors*, 896 F.2d at 1285).

Plaintiffs have failed to establish that they will suffer any harm, much less irreparable harm, if their requested relief is denied. The only bases for harm cited by Plaintiffs are inapposite. *First*, they claim that they "will suffer irreparable injury [] through the diversion of resources from supporting its candidates." Mot. 22. But any such harm is a self-inflicted effort to fight vote dilution that is insufficient for standing or irreparable harm. *See supra* Section IV.A. *Second,* Plaintiffs contend that they will be suffer harm "from the competitive injury their members will suffer absent relief." Mot 22. But as discussed in Section IV.A *supra*, Plaintiffs theory here is based on the same underlying vote-dilution rationale repeatedly rejected by courts nationwide. Plaintiffs do not even *explain* why their candidates would be harmed electorally, let alone prove it, and it is just as likely that unlawfully cast ballots would *help* their candidates as harm them. *Third*, Plaintiffs note that "[a] restriction on the fundamental right to vote constitutes irreparable injury." Mot 22. But they have neither alleged nor proved any abridgment of the right to vote.

D. Neither the balance of the equities nor the public interest favor Plaintiffs.

In election cases, courts often consider the remaining two factors—the balance of equities and public interest—together. *See, e.g.*, *Curling v. Kemp*, 334 F. Supp. 3d 1303, 1326 (N.D. Ga. 2018). Both factors militate against injunctive relief.

First, Plaintiffs' case is untimely. Plaintiffs waited until the eve of early voting in this high-profile election to bring their claims, the factual underpinnings of which have been known to them for several months—more likely, several years. At a minimum, this constitutes an unreasonable delay in filing, which greatly prejudices the administration of the election and is furthermore barred by the equitable doctrine of laches. *See, e.g.*, *Smith v. S.C. Election Comm'n*, 874 F. Supp. 2d 483, 498 (D.S.C. 2012) (considering laches under balance of equities prong of preliminary injunction standard); *Wood I*, 2020 WL 6817513 (denying a request for a temporary injunction related to Georgia's signature matching procedures because laches barred similarly delayed claims).[6] Nor do Plaintiffs' assertions that they could not bring this suit until after the November 3 election save them. Indeed, as Dr. Rodden's analysis

[6] Such an inexcusable delay also weakens any claim to irreparable injury. *See, e.g.*, *GTE Corp. v. Williams*, 731 F.2d 676, 679 (10th Cir. 1984) ("A preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect the plaintiff's rights. By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action . . ." (quoting *Gillette Co. v. Ed Pinaud, Inc.*, 178 F. Supp. 618, 622 (S.D.N.Y. 1959))).

demonstrates, Georgia's rate of rejecting signatures—the purported impetus for this suit—has been steadily declining for several years and did not just suddenly begin declining in November. *See* Rodden Rep. at 10. Moreover, even if that were not the case, Georgia's signature matching rejection rates for the November 2020 election have been known since early November, and at least four other lawsuits invoking them have been brought (and dismissed) well before Plaintiffs' December 10 filing. *See generally Wood I*, 2020 WL 6817513; *Pearson* Tr.; *Boland v. Raffensperger*, No. 2020CV343018 (Ga. Super. Ct. Dec. 8, 2020) (attached as Ex. 4); *Wood* v. *Raffensperger*, No. 2020-CV-342959 (Ga. Super. Ct. Dec. 8, 2020) (attached as Ex. 5). Accordingly, it is plain that Plaintiffs could have and should have raised their claims much earlier, and that they have no excuse for their delay.

Second, Plaintiffs have failed to demonstrate how their preferred remedies will benefit the voters of Georgia. "[A]llowing for easier and more accessible voting for all segments of society serves the public interest." *League of Women Voters of Fla., Inc., v. Detzner*, 314 F. Supp. 3d 1205, 1224 (N.D. Fla. 2018). The public interest is best "served by ensuring that qualified absentee voters have the opportunity to vote and, more importantly, have their votes counted." *Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1347 (N.D. Ga. 2018). Plaintiffs' lawsuit is in direct opposition to these principles; their requested relief

would, in fact and by design, cause irreparable injury to voters, as the rejection of more absentee ballots appears to be precisely what Plaintiffs seek. And as this Court recently explained, "[i]t is well-settled that an infringement on the fundamental right to vote amounts in an irreparable injury." *New Ga. Project v. Raffensperger*, No. 1:20-CV-01986-ELR, 2020 WL 5200930, at *26 (N.D. Ga. Aug. 31, 2020).

E. The principles animating the Supreme Court's recent elections jurisprudence counsel against an injunction here.

Relatedly, even if Plaintiffs had pleaded and proved legitimate constitutional claims (they have not), they filed a case asking a federal court to issue an injunction that would drastically alter state voting procedures *less than one week* before the state was set to begin using those procedures. This very action blatantly ignores the U.S. Supreme Court's repeated admonition that such late-hour disruptions should be scrupulously avoided. While the Supreme Court's decision in *Purcell v. Gonzalez* certainly does not *prohibit* the federal judiciary from interceding close to elections to defend the Constitution, it advises federal courts to tread carefully when deciding whether to do so. *See* 549 U.S. 1, 5–6 (2006) (per curiam) (staying injunction due to "the imminence of the election and the inadequate time to resolve the factual disputes" in order to allow election to proceed with settled rules). Here, granting an injunction would inject confusion for administrators and voters. Even if Plaintiffs' constitutional claims were not woefully insufficient, the weight of recent precedent

clearly demonstrates that an injunction would be inappropriate in this case.

Indeed, one need only look at the Supreme Court's election jurisprudence in the last eight months to see repeated warnings to tread carefully close to elections. The Court has invoked this principle to stay remedial injunctions even when confronted with demonstrable constitutional violations. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1206 (2020); *Andino v. Middleton*, No. 20A55, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020). And it has also affirmed district courts' decisions to stay their hands when asked to invalidate procedures announced by states' election officials. *See, e.g.*, *Moore v. Circosta*, No. 20A72, 2020 WL 6305036, at *1 (U.S. Oct. 28, 2020) (affirming district court's denial of injunction against consent decree entered by Secretary of State). The Court has emphasized that "federal courts ordinarily should not alter state election rules in the period close to an election." *Andino*, 2020 WL 5887393, at *1 (Kavanaugh, J., concurring). Plaintiffs' provide no basis to derogate from that principle.

V. CONCLUSION

The Court should deny Plaintiffs' motion for a preliminary injunction.

Dated: December 16, 2020

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIA REPUBLICAN PARTY, INC., NATIONAL REPUBLICAN SENATORIAL COMMITTEE, PERDUE FOR SENATE, and GEORGIANS FOR KELLY LOEFFLER,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his official capacity as the Secretary of State of Georgia, REBECCA N. SULLIVAN, in her official capacity as the Vice Chair of the State Election Board, DAVID J WORLEY, MATTHEW MASHBURN, and ANH LE, in their official capacity as Members of the State Election Board,

Defendants.

Case No. 1:20-cv-05018-ELR

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document has been prepared in accordance with the font type and margin requirements of L.R. 5.1, using font type of Times New Roman and a point size of 14.

Dated: December 16, 2020.

Adam M. Sparks
Counsel for Proposed Intervenor-Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIA REPUBLICAN PARTY, INC., NATIONAL REPUBLICAN SENATORIAL COMMITTEE, PERDUE FOR SENATE, and GEORGIANS FOR KELLY LOEFFLER,

Plaintiffs,

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Defendants.

Case No. 1:20-cv-05018-ELR

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2020, I electronically filed this document with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

Dated: December 16, 2020

Adam M. Sparks
Counsel for Proposed Intervenor-Defendants

Exhibit 1

United States District Court
Northern District Of Georgia
Atlanta Division

Coreco Jaqan Pearson, et al.,
Plaintiff,
vs.
Brian Kemp, et al.,
Defendant.

Civil Action
File No. 1:20-CV-4809-TCB

Atlanta, Georgia
Monday December 7, 2020
10:00 a.m.

Transcript of Motions Hearing
Before The Honorable Timothy C. Batten, Sr.
United States District Judge

APPEARANCES:

FOR THE PLAINTIFFS: Sidney Powell
Harry MacDougald
Attorneys at Law

FOR THE DEFENDANTS: Carey Allen Miller
Joshua Barret Belinfante
Charlene Swartz McGowan
Melanie Leigh Johnson
Attorneys at Law

Lori Burgess, Official Court Reporter
(404) 215-1528

Proceedings recorded by mechanical stenography, transcript produced by CAT.

THE COURT: Good morning. I would like to point out that this hearing is being audio streamed nationally, so whatever you say near your microphones will be picked up for the world to hear, so you might want to be discreet in what you have to say this morning with the microphones. Also, I would ask that -- each of y'all should have some plastic bags. As you leave the lectern, take the bag with you, and the next person who comes up should put a new bag. You all have bags, right? Okay. So that is what we are going to do. All right.

In this case, the Plaintiffs are a group of disappointed Republican presidential electors. They assert that the 2020 presidential election in Georgia was stolen, and that the results, Joe Biden winning, occurred only because of massive fraud. Plaintiffs contend that this massive fraud was manifest primarily, but not exclusively, through the use of ballot stuffing. And they allege that this ballot stuffing has been rendered virtually invisible by computer software created and run by foreign oligarchs and dictators from Venezuela to China to Iran.

The defendants deny all of Plaintiffs' accusations. They begin in their motions to dismiss by rhetorically asking what a lot of people are thinking, why would Georgia's Republican Governor and Republican Secretary of State, who were avowed supporters of President Trump, conspire to throw the election in favor of the Democratic candidate for

President.

We are going to turn now to the legal arguments. We have several motions today, but primarily they are grouped into two. First we have a motion to dismiss that has been filed by the State Defendants, the original defendants in the case, and then we have another motion to dismiss filed by the Intervening Defendants in the case. The Plaintiffs of course oppose both of these motions. They've been fully briefed, and I have read everything that has been filed in this case by the Plaintiffs and everything pertaining to these motions. If the Defendants are not successful on those motions to dismiss, we will proceed to hear argument on the substantive merits of the complaint and the claims in the complaint. The way that time is going to be -- well let me begin it this way. In their legal arguments the Defendants contend that Plaintiffs lack standing to bring this suit, which is pretty much what the 11th Circuit just held in Mr. Woods's own separate suit against the State on Saturday. The Defendants further argue that under Georgia law this kind of suit, one for election fraud, should be filed in State Court, not Federal Court. This too is what the 11th Circuit held in a separate but similar case recently. And next, Defendants assert that Plaintiffs waited too long to file this suit which seeks an order decertifying the election results. The Secretary of State has already certified the election result, and there is

no mechanism that the Court is aware of of decertifying it, but that is that the Plaintiffs seek.

And finally, the law is pretty clear that a party cannot obtain the extraordinary remedy of injunctive relief unless he acts quickly. And Defendants contend that the Plaintiffs have failed to do that, pointing out that all of Plaintiffs' claims about the Dominion voting machines, the ballot marking devices, could have been raised months ago, and certainly prior to the November 3 election, and certainly before Plaintiffs filed this suit over three weeks after the election took place.

So these are the procedural arguments that the Defendants are making today, or at least the main ones, I believe. And then the question is, assuming the Plaintiffs can survive these procedural hurdles, what is the relief that they want? They want me to agree with their allegations of massive fraud. And what do they want me to do about it? They want me to enter injunctive relief, specifically the extraordinary remedy of declaring that the winner of the election in Georgia was Donald Trump and not Joe Biden. They ask me to order the Governor and the Secretary of State to undo what they have done, which is certify Joe Biden as the election winner. We will get to those merits if the Plaintiffs survive the motion to dismiss.

At this time we're going to begin with the motion to

dismiss, and the time allotment will be as follows: The State Defendants have 20 minutes -- let me back up. Each side gets 30 minutes. The Plaintiffs get all 30 of their minutes, and the Defendants' 30 minutes are divided among the two sets of Defendants. The State Defendants -- the State Defendants get 20 minutes, and then the Intervening Defendants get 10 minutes, following which we will hear the Plaintiffs' response. They have up to 30 minutes. And then whatever time was saved in -- reserved for rebuttal, the State Defendants and Intervening Defendants will then have.

But before we go forward, is there any way we can stop this fuzzy sound that is coming through up here? I don't know if it is coming through in the whole courtroom. I don't think has anything to do with my microphone. (pause). All right, is that better? I think it was the speaker, one of the two speakers up here on the bench. I talk loud enough and I think the lawyers talk loud enough that I can hear what they are going to say. I don't need a microphone. So at this time I will turn the matter over to the State Defendants.

MR. MILLER: Good morning, Your Honor. Carey Miller on behalf of the State Defendants. I am joined today by Josh Belinfante, Charlene McGowan, and Melanie Johnson. Mr. Belinfante will be handling the motion to dismiss. I do want to raise with the Court, to the extent that we get there, State Defendants would like to renew their motion to alter the

TRO that is in place at this point. I understand that we can address that in that section.

THE COURT: All right. Thank you, sir.

MR. BELINFANTE: I am not checking email, I am trying to keep my time.

THE COURT: Okay.

MR. BELINFANTE: I would ask this. Would the Court allow me to speak without the mask? Or do you prefer I keep the mask on to speak?

THE COURT: I think I need to have everybody keep the mask on.

MR. BELINFANTE: I'll be happy to do it. Good morning, Your Honor. I think you have hit the nail on the head in terms of what the issues are. This case simply does not belong in this Court. The relief that Plaintiffs seek is, as the Court described, extraordinary. It is to substitute by judicial fiat the wishes of the Plaintiffs over presidential election results that have been certified, that have been audited, that have been looked over with a hand-marked count. There is zero authority under the Federal law, under the Constitution of the United States, or even under Georgia law for such a remedy.

If the Plaintiffs wanted the relief they seek, they are not without remedies. They could do what the campaign of the President has done, which is file a challenge in Georgia

court under Georgia law challenging election irregularities. There are three currently pending. I have with me two Rule Nisi orders. One will proceed today at 3:30 in the Cobb Superior Court sitting by designation. Another I believe is Wednesday. And the President's, as I understand it, is to proceed on Friday. That is where these claims should be brought.

To the extent that the claims are about something else, the Court need only look at what has happened in Georgia since roughly 2019 and the passage of House Bill 316. It was at that time that the Georgia legislature completely redid Georgia election law. And there had been suit after suit after suit, many of which brought by the Defendant interveners, their allies, and others who question election outcomes. And in every suit no relief has been ordered that has been upheld by the 11th Circuit. In fact, no court has ordered relief. And to the extent that two have, the *Curling* case and the *New Georgia Project* case on discrete issues, the 11th Circuit stayed those because it concluded that there was a strong likelihood of reversible error.

So what does this tell you? It tells you that Georgia laws are constitutional, Georgia elections are constitutional, and Georgia machines are constitutional. The constitutional that the legislature has set forward is constitutional. Now, that's where the Plaintiffs have backed

themselves into a corner from which they cannot escape. In their reply brief, the claims, from the State's perspective, got significantly crystallized. It became much clearer. And they're relying heavily on *Bush v. Gore*. The problem is that they are turning *Bush v. Gore* on its head.

In *Bush v. Gore* the challenge was that a Florida Supreme Court decision was going to, as the Plaintiffs repeat often, substitute its will for the legislative scheme for appointing presidential elections. That is exactly what they are asking this Court to do, substitute this Court for the Florida Supreme Court, and you have *Bush v. Gore* all over again. And that manifests itself in various different forms that the Court has seen in our brief and the Court has already identified. I will not go through all of them. I will try to hit the high notes on some, but we will rely on our briefs. We're not dropping or conceding arguments, but we will rely on our briefs for those that I don't address expressly.

Let's talk briefly about what the complaint is, because that has been I think significantly clarified with the reply brief. One, the parties are presidential electors. And they argue that that makes a significant difference. But what are the acts of the State? Not Fulton County, not mullahs in Iran, not dictators in Venezuela. What are the acts of the State that are at issue? And it's in the discussion about traceability and the *Jacobson* decision in the 11th Circuit

where that gets fleshed out really for the first time in the reply brief, and there are three. And they tell you, and I will keep coming back to it, on Page 20 of their reply brief.

The Plaintiffs, describing the State, say they picked the Dominion system. Their policies led to de facto abolition of the signature match requirement, their regulations to permit early processing of absentee ballots is unlawful and unconstitutional. Those are the three acts of the State. Everything else is happening at a county level, period. And from that they raise what appears to now be four claims. One is the Elections and Electors Clause citing the absentee ballot opening rule, I will refer to it as, the settlement agreement. They raise equal protection claims saying that the violation of the Election Clause has led to a vote dilution and discrimination against Republican voters. They argue that due process is violated because they have a property interest in lawful elections, again, under the Elections and Electors Clause. And finally, they raise a pure State claim in Federal Court under a voter election challenge.

What is the relief they seek? The Court has identified it. Why do they seek it? The Court is informed of this on Page 25 of the reply brief. And it is -- if the Court will not order a different result than what a certified election has, they seek it through another means. They say on Page 25 that allowing the electors to be chosen by the

legislature under the plenary power granted to them for this purpose by the elections and election laws. One way or the another, the relief they seek is judicial fiat, changing certified election results. And to evaluate these claims the Court does need to consider aspects of State law. And this is where the problem lies. I am going to keep going until you tell me to stop.

(noise from courtroom audio system).

THE COURT: I am sorry, Mr. Belinfante. I don't know what the issue is. We just have to bear through it unless or until somebody fixes it. I've got six kids. It doesn't bother me.

MR. BELINFANTE: I have three, I understand. I also have the loudest dog in America. In any case, to evaluate the claims, you have to look at State law. And because the Plaintiffs raise Code Section 21-2-522 and the statutes that surround it, it's those cases that are important. It allows a challenge based on these grounds - in fact some are pending now - misconduct, fraud, irregularity, illegal votes, and error are all grounds to challenge an election in Georgia. All of these issues can be brought in in those cases. Those election challenges have to be decided promptly under 21-2-525. And, and this is critical, the relief sought is not to declare someone else a winner, it is to have another election. This goes to the point that there is simply no

authority for the relief that they seek.

Turning first, with that factual predicate in mind, to standing. There has been a fair amount of briefing on whether the status as a presidential elector guarantees standing. The 8th Circuit said yes, the 3rd Circuit said no. And I think the 3rd Circuit's analysis is more persuasive. And to the extent that the Plaintiffs say the 3rd Circuit did not consider their status as an electorate, that is true, but the electorate is not what gives you unique status, it's if the electorate is a candidate. And that is expressly what the 3rd Circuit considered in the *Bognet* decision, and we would suggest that that is the more persuasive one that we rely on in our briefs.

But I do want to address two other aspects of standing that are more particularized. One is that when they are seeking to invalidate a State rule or a consent decree that the State has entered into, or anything truly under the Elections Clause, the *Bognet* case speaks to this as well. And it says that because Plaintiffs are not the General Assembly, nor do they bear any conceivable relationship to the State law-making process, they lack standing to sue over the alleged usurpation of the General Assembly's rights under the Elections and Electors Clauses. That is absolutely true here. The *Wood* court, the 11th Circuit *Wood* opinion, says the same, citing *Walker,* because Federal Courts are not constituted as

freewheeling enforcers of the Constitution and laws. And that is the injury that underlies all of their claims, which is why they lack standing.

I am not going to get into traceability as much because I think the most useful aspect of the traceability issue is the crystallizing of Plaintiffs' complaints, and as I've indicated, the isolating of the State acts in particular.

On sovereign immunity, I only want to highlight that a decision just came out in Michigan seeking very similar relief. We will get you the cite. It is Michigan -- it is against Whitmer, *King versus Whitmer*, in the Eastern District of Michigan. Walks through all of the issues in this case and rejects the claims, denies the relief. On sovereign immunity they raise the point that under *Young*, you can only get prospective injunctive relief. That is not decertification, that is a retrospective. And so sovereign immunity would bar that. They do seek to prevent the Governor from mailing the results; that can be prospective, but there is just no relief for it. So that is all I will says on sovereign immunity.

On laches, the Michigan Court also joined in with Judge Grimberg on laches in the *Wood* case and said that there is time that is inexcusable. The Court is well-aware of the elements, was there a delay, was it not excusable, and did the delay cause undue prejudice. Judge Grimberg has already looked at this argument in the context of the *Wood* case and

the challenge to the consent order and said laches applied. And it does here for all of the Plaintiffs' arguments, and all you need to do, again, is go back to that Page 20 and see why. They say that their policies, the State's policies, led to a de facto abolition of the signature requirement. The complaint at Paragraph 58 acknowledges in Exhibit A that that happened in March of this year. There has been plenty of time that they thought the Secretary overstepped his bounds to bring a challenge in that case or to bring a challenge even afterwards, challenge the OEB. They did not.

They say on Page 20 that they, the State, picked the Dominion system. They tell you on Paragraph 12 that happened in 2019. There has been significant litigation over the Dominion system. Nothing has been held in order that the Dominion system is unconstitutional, is flawed, or anything else that has stuck.

Third, they said that their regulation, the absentee ballot regulation, permitted absentee ballots as unlawful and unconstitutional. They tell you in Paragraph 60 that happened in April of 2020. Georgia law, in the Administrative Procedures Act, specifically allows you to challenge rules, 50-13-10. That wasn't done. They certainly could have. And you don't need the fraud, as they allege, to happen first, because their argument is not based on the fraud, it is based on usurpation of power by the Executive Branch. That can be

challenged when the rule has been promulgated, when the order is out, and when the Dominion machines were selected.

We raise in our brief several forms of abstention. And truly, Your Honor, they all kind of get to the same place under different theories. And again, the reply brief made this point to the clearest. I think at the end of the day, while we will rely on our briefs in terms of why those matter, and the Michigan court found that *Colorado River* abstention should apply, there are parallel proceedings in State Court --

THE COURT: Did they even argue why it shouldn't?

MR. BELINFANTE: They argued that in voting rights cases the 11th Circuit does not typically abstain. And those cases are slightly different. They are challenging an underlying statute, for the most part. *Siegel* is a slightly -- it's a different case. But they are mostly challenging underlying statutes. And there is not a pending election challenge on the same thing in State Court. It's like the other cases that we have seen that we've defended since the gubernatorial election in 2018. So no, I don't think so. But I think the *Bush v. Gore* analysis is the one that is most critical, and it is that simply the Secretary -- the legislative scheme for electing presidential electors is set forth in the Code in Title 21, it has a means of challenging fraudulent illegal votes, it has a means of allowing the Secretary to address various issues, the State Election Board

to pass regulations. All of that authority has been delegated by, first, Congress to the Georgia Legislature, and then to the Executive Branch. That is the scheme that is put in place, and that is exactly what they seek to turn on its head. And what the three justice concurrence on which they rely says, makes that impossible. Because the Supreme Court said at Page 120, for the Court, in that case the Florida Court, to step away from this established practice prescribed by the Secretary, the State official charged by the Legislature with the responsibility to obtain and maintain uniformity in the application, operation, and interpretation of election laws was to depart from the legislative scheme.

Read the proposed order. That is exactly what the Plaintiffs seek here, and that is exactly what their own authority says the Court cannot issue in terms of relief, and that would actually trump the remaining claims because it would violate the Elections Clause in order to arguably save some other vague right in terms of due process.

Turning to that, let me talk briefly about the absentee ballot regulation, the return of the ballots. There is nothing that is inconsistent with that, number one, because if you look in the Election Code, there are five times that the General Assembly said something cannot occur earlier than X date. This doesn't say that. This says beginning on this date they can do this, but it doesn't say it can only happen.

And the five times elsewhere in the Code would suggest that the legislature knew how to change it if they wanted. That is 121-2-132, 133, 153, 187, and 384. They are simply reading the regulation to create the conflict, when every piece of Federal and State law says you should read it to avoid the conflict. In terms of the settlement agreement itself, I think Judge Grimberg has sufficiently analyzed that. And it fills the gap. There is no conflict. They can't point to any language that it does. And at the end of the day it is an OEB, an Official Election Bulletin, not a statute and not a regulation of the State Election Board anyway.

On the Dominion machines, I think we will rely on -- Mr. Miller is going to talk about that a good deal, but also they argue that the audit somehow doesn't save it because of *Prohm* and that we are estopped from raising *Prohm.* There are two problems with that. One, estoppel doesn't apply. There has been no final order. They're not estopped from doing anything. That's the *Community State Bank vs. Strong* decision from the 11th Circuit applying Georgia law 2011. And two, there has not been an order in *Curling* saying that the machines are unconstitutional. There have been nine preliminary injunctions filed, no standard relief, and it ignores -- the entire premise of the argument ignores that when a voter gets a ballot from the machine they can read who they voted for. And when the hand count took place, they

didn't scan it back in, they looked at what the ballot said and who they voted for and that is why things were put in different boxes. Their own affidavits talk about that provision of separating the boxes by hand. It resolves the issue.

The remaining theories fail -- again, I want to be cognizant of time and save some time for rebuttal. We rely on our briefs in terms of the merits of those, but the equal protection and due process allegations I think are addressed in *Wood* from the 11th Circuit. On procedural due process, to the extent that that is the due process claim, they don't challenge the Georgia election means of correcting as somehow invalid or insufficient. In fact, they raised it. And so you can't have a procedural due process claim if you have a remedy. You can't have a substantive due process claim if it doesn't shock the conscience, which having to use the remedy here, they can do. Your Honor, with that, unless there are questions, I would will reserve the rest of my time for rebuttal.

THE COURT: Thank you, sir.

MS. CALLAIS: Good morning, Your Honor. I am Amanda Callais on behalf of Intervenor Defendants, the Democratic Party of Georgia, the DSCC and the DCCC, and I am mindful of many of the points Mr. Belinfante just made, and I will not repeat them, but for the record, Your Honor, I would just like

to say that for the statements that we've made in our motion to dismiss, this case should be dismissed. The Plaintiffs in this case lack standing. They bring their claims and assert only generalized grievances. This Court also lacks jurisdiction to hear their claims because this case is moot now that the election has been certified, which is what the 11th Circuit found just this past Saturday in the *Wood v. Raffensperger* case. And then Plaintiffs have also failed to state any cognizable claim under the Election and Elections Clause, Equal Protection Clause, and Due Process Clause.

Where I would like to begin though is where Mr. Belinfante started, and I would like to bring us back to this point about where we are in terms of Georgia elections and with the remedy asked for in this case. Over a month ago five million Georgians cast their ballots in the 2020 presidential election with the majority of them choosing Joseph R. Biden, Jr. as their next President. Those votes, both the ballots that were cast on Dominion machines and the ballots that were cast by absentee were counted. Almost immediately after that count took place, those votes were counted again by hand, and then almost immediately after that count finished, the recount began again, a third time, by machine. Each and every one of those counts has confirmed Georgia voters' choice. Joe Biden should be the next President of The United States. At this point there is simply

no question that Joe Biden won Georgia's presidential election and with it all of Georgia's 16 electoral votes. Despite that, Plaintiffs have come to this Court eight months after a settlement agreement they challenged was entered, three weeks after the election is over, and days after certification took place, and they asked this Court to take back that choice, to set aside the choice that Georgia voters have made, and to choose the next president by decertifying the 2020 presidential election results and ordering the governor to appoint a new slate of electors.

THE COURT: Speaking of taking back, how do the Intervening Defendants respond to the Plaintiffs' point in their complaint that many people, including Stacey Abrams, affiliated with the Democratic Party, opposed these machines from the beginning and said that they are rife with the possibility of fraud?

MS. CALLAIS: I think, Your Honor, that the key there is that when we talk about a possibility of fraud, that does not mean that fraud has actually occurred. And here Plaintiffs come after an election has taken place and they say on very -- as we will talk about if we get to the TRO portion -- on very limited specious evidence that there is a possibility of fraud. A possibility of fraud does not mean that fraud has actually occurred. And truthfully, Your Honor, that is what the Plaintiffs would need to show to get some

sort of -- the relief that they are requesting here, that there has been actual fraud. And that is just not in their complaint, it is not in their evidence. It makes no difference whether there has been a possibility of fraud or issues with the machines. That is a case that is in front of Judge Totenberg and that she is deciding. But that is not the evidence that they have presented here, and it certainly does not support their claims.

So with that, Your Honor, as the 3rd Circuit explained just a little over a week ago when denying an emergency motion to stop certification in a case similar to this one brought by Donald J. Trump's campaign, voters not lawyers choose the President. Ballots not briefs decide elections. Plaintiffs' request for sweeping relief in this case is unprecedented. It is unprecedented anywhere, and it is particularly unprecedented in Georgia where the ballots have been counted not once, not twice, but three times, and the vote has been confirmed. Their request for relief is not just unprecedented, but also provides a separate and independent grounds for this Court to dismiss this case.

As we explained in our motion to dismiss, granting Plaintiffs' remedy in and of itself would require the Court to disenfranchise over 5 million Georgia voters, violating their constitutional right to vote. Post-election disenfranchisement has consistently been found to be a

violation of the Due Process Clause throughout the courts. For example, in *Griffin v. Burns* the 1st Circuit found that throwing out absentee votes post election that voters believed has been lawfully cast would violate the Due Process Clause. Similarly, in *Marks v. Stinson*, a number of years later, the 3rd Circuit found the same thing in their finding where they found even if there is actual evidence of fraud, discarding ballots that were legally cast or that voters believed to be legally cast violates the Due Process Clause and is a drastic remedy. This is precisely what would happen here if this Court were to order the requested relief. That order would violate the Due Process Clause. And because of that, this Court cannot grant the remedy that Plaintiffs seek and the Court should dismiss this suit.

In finding that the Court can't grant this relief, this Court would not be alone, it would be in actually quite good company, not just from the 1st Circuit and the 3rd Circuit in *Griffin* and *Stinson,* but also from more recent cases. In 2016 in *Stein v. Cortes*, the District Court declined to grant Jill Stein's request to a recount because, quote, it would well insure that no Pennsylvania vote counts, which would be outrageous and unnecessary. Just this cycle, in *Donald J. Trump for President v. Boockvar* the Plaintiffs sought to invalidate 7 million mail ballots under the Equal Protection Clause, and the Court explained that it has been

unable to find any case in which a plaintiff has sought such drastic remedy in the contest of an election in terms or the sheer volume of votes asked to be invalidated. The Court also promptly dismissed there.

Just this last Friday in *Law v. Whitmer* in Nevada State Court, which actually would have the ability to hear a contest, found that it would not decertify the election in Nevada. And the list goes on, Your Honor. We could talk about findings in State Court in Arizona on Friday. There have been over 30 challenges to this election that have been repeatedly dismissed since -- basically since election day. Since election day.

So the Court is in good company, and it's not just in company good company nationwide, but it is in good company with the judge right down the hall from here who, just two weeks ago, in a case nearly identical to this one, found a request to disenfranchise nearly 1 million absentee voters in Georgia to be extraordinary. Judge Grimberg explained that to prevent Georgia certification of the votes cast in the general election after millions of people have lawfully cast their ballots, to interfere with the results of an election that has already concluded would be unprecedented and harm the public and in countless ways. Granting injunctive relief here would breed confusion, undermine the public's trust in the election, and potentially disenfranchise over 1 million Georgia voters.

Viewed in comparison to the lack of any demonstrable harm, this Court finds no basis in fact or law to grant Plaintiff the relief he seeks.

That same reasoning applies here. And in fact, it applies here even more because most of the claims that were brought in front of Judge Grimberg are the same, but the amount of votes that Plaintiffs here seek to decertify are far greater in scope.

On this last point, Your Honor, about the inability of the Court to order the remedy, I wanted to respond to something that Plaintiffs raised in their brief last night. In their brief last night they react to the briefing on mootness that we included in our TRO and note that this Court -- this case would not be moot because the Court can decertify an election. And that *Wood v. Raffensperger* that came out by the 11th Circuit didn't discuss decertification of the election, only halting certification.

And I would just like to point out that if this Court were to decertify the election and specifically to point a new slate of electors, which is what is asked, that in and of itself would also violate the law. The U.S. Constitution empowers State Legislatures to choose the manner of appointing presidential electors, and that is the Electors Clause that Plaintiffs actually challenge. And pursuant to that clause, the Georgia General Assembly has chosen to appoint electors

according to popular vote. Those are certified by the governor through certificate of ascertainment. That popular vote has already taken place, Your Honor, and if this Court were to order a new slate of electors to be appointed, that would -- that would violate the Electors Clause.

In addition, Congress has also provided that electors shall be appointed in each and every state on the Tuesday next after the first Monday in November in every 4th year as also known as Election Day, which this year took place on November 3rd. Georgia has held that election on Election Day, and if this Court were to now, months after the -- over a month after the election, to go and order that a new slate be appointed, it would be violating that statute as well. So for the very reasons that the Plaintiffs -- the very relief that Plaintiffs ask is actually what prevents this Court from issuing any relief in this case, and precisely why it should be dismissed.

THE COURT: All right. Thank you. All right, I will hear from the Plaintiffs.

MS. POWELL: May it please the Court. Sidney Powell and Harry MacDougald for the Plaintiffs. We are here on a motion to dismiss which requires the Court to view the pleadings and all the facts alleged in the light most favorable to the Plaintiff. In my multiple decades of practice I have never seen a more specifically pled complaint

of fraud, and replete with evidence of it, both mathematical, statistical, computer, expert, testimonial, video, and multiple other means that show abject fraud committed throughout the State of Georgia.

Forget that this machine and its systems originated in Venezuela to ensure the election of Hugo Chavez and that it was designed for that purpose. Look just at what happened in Georgia. Let's start, for example, with the language, "the insularity of the Defendants' and Dominion's stance here in evaluation and management of the security and vulnerability of the system does not benefit the public or citizens' confident exercise of the franchise. The stealth vote alteration or operational interference risk posed by malware that can be effectively invisible to detection, whether intentionally seeded or not, are high once implanted, if equipment and software systems are not properly protected, implemented, and audited. The modality of the system's capacity to deprive voters of their cast votes without burden, long wait times, and insecurity regarding how their votes are actually cast and recorded in the unverified QR code makes the potential constitutional deprivation less transparently visible as well; at least until any portions of the system implode because of system breach, breakdown, or crashes" -- all of which the State of Georgia experienced -- "the operational shortcuts now in setting up or running election equipment or software

creates other risks that can adversely impact the voting process."

THE COURT: You don't have to get into any of the evidence or any of the statements or averments of the complaint because I have read it. And all these statements, I am assuming that every word of it is true. My question -- the first question I have for you, for the Plaintiffs in the case, is why -- first of all, whether you can or cannot pursue these claims in State Court, specifically in Georgia Superior Courts. Just the question is, can you?

MS. POWELL: No, Your Honor, we can't. These are exclusively Federal claims with the exception of the election contest allegation. They are predominantly Federal claims, they are brought in Federal Court for that purpose. We have a constitutional right to be here under the Election and Electors Clause. I was not reading evidence. What I was reading to the Court was the opinion of Judge Totenberg that was just issued on 10-11-20 which defeats any allegation of laches or lack of concern over the voting machines. This has been apparent to everyone who has looked at these machines or discussed them in any meaningful way or examined them in any meaningful way, beginning with Carolyn Maloney, a Democratic Representative to Congress back in 2006 who objected to them being approved by CFIUS. Judge Totenberg went on to say that "the Plaintiffs' national cybersecurity experts convincingly

present evidence that it's not a question of might this actually ever happen but, quote, when will it happen, especially if further protective measures are not taken. Given the masking nature of malware in the current systems described here, if the State and Dominion simply stand by and say we have never seen it, the future does not bode well." And sure enough, exactly the fears articulated in her 147 page opinion, and all the means and mechanisms and problems discussed in that three day hearing she held have now manifested themselves within the State of Georgia in the most extreme way possible.

THE COURT: She did not address the question before the Court today though as to the propriety of bringing this suit in this Court, did she?

MS. POWELL: There is no other place to bring this suit of Federal Equal Protection claims and the electors.

THE COURT: You couldn't bring all of these claims in State Court? Is that your position?

MS. POWELL: We are entitled to bring these claims in Federal Court, Your Honor. They are Federal constitutional claims.

THE COURT: What do you do with the 11th Circuit's holding in *Wood* on Saturday that we cannot turn back the clock and create a world in which the 2020 election results are not certified?

MS. POWELL: Actually we can, but we don't need to because we are asking the Court to decertify.

THE COURT: Where does that exist?

MS. POWELL: *Bush v. Gore*. *Bush v. Gore* was a decertification case. There are other cases we've cited in our brief that allow the Court the decertify. And at the very minimum this Court should order a preliminary injunction to allow discovery and allow us to examine the forensics of the machines. For example, we know that already in Ware County, which is a very small precinct, there were 37 votes that were admittedly flipped by the machines from Mr. Trump to Mr. Biden. That is a 74 vote swing. That equates to approximately the algorithm, our experts also believe, was run across the State that weighed Biden votes more heavily than it did Trump votes. That is a systemic indication of fraud that Judge Totenberg was expressing concern about in her decision just weeks before the election. We have witness after witness who have explained how the fraud can occur within the machines. We know for example that there were crashes, just like she feared in the decision, and everybody expressed concern about. We know machines were connected to the internet which is a violation of their certification requirements and Federal law itself. We could not have acted more quickly. In fact, the certification issue wasn't even ripe until it was actually certified.

THE COURT: But you weren't limited in your remedies to attacking the certification, you could have attacked the machines months ago.

MS. POWELL: That is what happened in the Totenberg decision, and that is why I read it to the Court. The machines were attacked by parties, and the election was allowed to go forward. And we have come forward with our claims as fast as is humanly possible. This is a massive case, and of great concern not just to the nation and to Georgia, but to the entire world, because it is imperative that we have a voting system that people can trust.

They talk about disenfranchising voters, well there are over a million voters here in Georgia that will be disenfranchised by the counting of illegal ballots that render theirs useless. It's every legal vote that must be counted. Here we have scads of evidence. And the vote count here is narrow. I mean, the disparity now is just a little over 10,000 votes. Just any one of our categories of that we have identified require decertification. For example, 20,311 nonresidents voted illegally. Between 16,000 and 22,000 unrequested absentee ballots were sent in in violation of the legislative scheme. Between 21,000 and 38,000 absentee ballots were returned by voters but never counted. 32,347 votes in Fulton County were identified to be statistically anomalous. And the vote spike for Mr. Biden, that is

completely a mathematical impossibility, according to multiple expert affidavits we provided, shows that it was like 120,000 Biden votes all of a sudden magically appear after midnight on election night. That happens to coincide with the time we have video of the Fulton County election workers running the same stack of rather pristine-looking ballots through the machine multiple times. And as for the recounts, that makes no difference because if you recount the same fake ballots, you achieve -- in the same machines, you achieve the same results. That is why the hand count in Ware County that revealed the 74 swing is so important and indicative of the systemic machine fraud that our experts have identified, and why it is so important that we at least get access for the Department of Defense even, or our own experts, or jointly, to examine the machines in Fulton County and the ten counties that we requested in our protective order, or our motion for --

THE COURT: How is this whole case not moot from the standpoint of even if you were to win, and win Georgia, could Mr. Trump win the election?

MS. POWELL: Well fraud, Your Honor, can't be allowed by a Court of Law to stand --

THE COURT: That is not what I am asking. I am not saying that there may not be other issues that need to be addressed, and that there might not be questions that need to

be investigated, I am asking, as a practical matter, in this particular election, can Mr. Trump even win the election even if he wins Georgia?

MS. POWELL: Yes, he can win the election.

THE COURT: How would that happen?

MS. POWELL: Because there are other states that are still in litigation that have even more serious fraud than we have in Georgia. It is nowhere near over. And it doesn't affect just the presidential election. This fraud affects senate seats, congressional seats, gubernatorial seats, it affects even local elections. Another huge statistic that is enough by itself to change the result is the at least 96,000 absentee ballots that were voted but are not reflected as being returned. All of these instances are violations of Federal law, as well as Georgia law. And in addition, Mr. Ramsland's report finds that the ballot marking machine appears to have abnormally influenced election results and fraudulently and erroneously attributed between thirteen thousand seven hundred and twenty-five thousand and the 136,908 votes to Mr. Biden just in Georgia. We have multiple witnesses who just saw masses of pristine ballots appearing to be computer marked, not hand marked, and those were repeatedly run through machines until votes were injected in the system that night without being observed by lawfully required observers in violation of Georgia and Federal law that

resulted in the mass shoot-up spike of votes for Mr. Biden. Mr. Favorito's affidavit is particularly important. He talks about the Ware County Waycross City Commission candidate who reported that the Ware County hand audit is flipped those 74 votes. That is a statistically significant swing for a precinct that small, and there is no explaining for it other than the machine did it. We have testimony of witnesses who saw that their vote did not come out the same way it was. Mr. Favorito is a computer tech expert. He said that the vote flipping malware was resident on the county election management system of possibly one or more precinct or scanners. There was also an instance where it came out of the Arlo system changed, and there was no way to verify the votes coming out of the individual precincts versus coming out of Arlo because apparently they didn't keep the individual results so that they can be compared. So there was a vote swapping incident through the Arlo process also.

There was a misalignment of results, according to Mr. Favorito, among all three presidential candidates. Rather than just a swapping of the results for two candidates, in other words, they would sometimes put votes into a third-party candidate and take those out and put them in Mr. Biden's pile. The system itself according to its own technological handbook explains that it allows for votes to be put in, it can scan to set or overlook anything it wants to overlook, put those in an

adjudication pile, and then in the adjudication process, which apparently was conducted in top secret at the English Street warehouse, where all kinds of strange things were going on, were just thrown out. They could just literally drag and drop thousands of votes and throw them out. That is why it is so important that we at least get temporary relief to examine the systems and to hold off the certification or decertify or ask the Court to halt the proceedings continuing right now until we can have a few days to examine the machines and get the actual evidence off the machines and look at the ballots themselves, because we know there were a number of counterfeit ballots that were used in the Fulton County count that night. It would be a simple matter to examine 100,000 or so ballots and look at which ones are fake. It is possible to determine that with relative ease.

This is not about who or which government officials knew anything was wrong with the machine. It's entirely possible that many people did not know anything was wrong with them. But it is about ensuring the integrity of the vote and the confidence of the people that the will they expressed in their vote is what actually determines the election. Very few people in this country have any confidence in that level right now. Very few.

The standard is only preponderance of the evidence. We have shown more than enough for a prima facie case to get

to -- meet the standard required -- this Court is required to apply. It is crucial that we decertify and stop the vote. We need to have discovery. It's so important to the American people, particularly in a country that is built on the rule of law, to know that their election system is fair and honest.

THE COURT: But that rule of law limits where these suits can be filed and who can bring them. Specifically on the standing issue, how does your -- how do your clients survive the motion to dismiss with respect to the standing issue if I don't follow the 8th Circuit's case opinion in *Carson*?

MS. POWELL: Even the Court's decision in *Wood* is so distinguishable it should make clear electors have standing. In that case, for example, the State could not even say who did have standing. But under the Constitution, electors clearly do.

THE COURT: But Georgia, unlike Minnesota, differentiates between candidates and Presidential electors. Right?

MS. POWELL: I am not sure about that. But we also have the Cobb County Republican Party official who is suing, and the electors themselves are part of the Constitutional Clause that entitles them to standing.

THE COURT: I just think you have a pretty glib response to what the 11th Circuit has held regarding these

cases. I mean, the 11th Circuit has basically said, you know, we are not -- the Federal Courts are courts of limited jurisdiction and we are not open 24/7 to remedy every freewheeling constitutional issue that comes up. They have made it clear, the Appellate Courts have made it clear, they don't want District Courts handling this matter, they want State Courts handling State election disputes, even regarding in Federal elections. The Federal Government has nothing to do with the State election and how it is conducted. As you said, it is the Secretary of State who is the chief election officer, and decides it. Why shouldn't the State of Georgia investigate this? Why should it be a Federal judge?

MS. POWELL: Because we raise Federal constitutional issues that are paramount to --

THE COURT: They raised Federal constitutional issues in *Wood*.

MS. POWELL: -- to equal protection. He did not request decertification. That is one of the things that distinguished that case. He was not an elector or representative of a county. He was simply an individual. And I am not sure that decision is correct because, in that case, they were also wondering who could challenge it. Well obviously the Federal Equal Protection Clause and the constitutional issues we have raised here give this Court Federal question jurisdiction. This Court's one of the

primary checks and balances on the level of fraud that we are experiencing here. It is extremely important that this Court exercise its jurisdiction as a gatekeeper on these issues. There were numerous departures from the State statute, including the early processing of votes, and the de facto abolition of signature matches that give rise to Federal Equal Protection claims.

THE COURT: Well, back to the standing question. You know, the Plaintiffs allege that their interests are the same, basically one in the same, as any Georgia voters. In Paragraph 156 of the complaint they aver that Defendants diluted the lawful ballots of Plaintiffs and of other Georgia voters and electors. Further, Defendants allege that -- the Plaintiffs allege that Defendants further violated Georgia voters's rights, and they allege, the Plaintiffs, that quote, all candidates, political parties, voters, including without limitation Plaintiffs, have a vested interest. It doesn't sound like your clients are special, that they have some unique status that they enjoy that allows them to bring this suit instead of anyone else. How do they have standing?

MS. POWELL: They have the unique status of being the Presidential electors selected to vote for Donald Trump at the electoral college. They were not certified as -- and decertification is required to make sure they can do their jobs that they were selected to do.

THE COURT: Under the 3rd Circuit case, does your theory survive?

MS. POWELL: Our theory is -- I think the 3rd Circuit decision is wrong, the 8th Circuit decision is correct. There is no circumstance in which a Federal elector should not be able to seek relief in Federal Court, thanks to our Constitution. It is one of our most important principles.

There were multiple means of fraud committed here. We have also the military intelligence proof of interference in the election, the Ware County 37 votes being flipped, the video of the Fulton City vote count, they lied about the water leak, they ran off observers, they brought in unusually packaged ballots from underneath a table. One person is seen scanning the same QR code three different times in the machine and big batch of ballots which would explain why the same number of ballots gets injected repeated into the system. That corresponds with the math and the algorithms showing a spike of 26,000 Biden votes at that time. After Trump's lead of 103,997 votes there were mysteriously 4800 votes injected into the system here in Georgia multiple times, the same number, 4800 repeatedly. That simply doesn't happen in the absence of fraud. All of the facts we have laid out in our well-pleaded complaint require that this Court decertify the election results or at least, at the very least, stop the process now in a timely fashion and give us an opportunity to

examine the machines in ten counties and get further discovery, particularly of what happened in Fulton County. Those things need to be resolved before any citizen of Georgia can have any confidence in the results of this election.

Allowing voters to cast ballots that are solely counted based on their voting designations and not on an unencrypted humanly unverifiable QR code that can be subject to external manipulation and does not allow proper voter verification and ballot vote auditing cannot withstand the scrutiny of a Federal Court and cannot pass muster as a legitimate voting system in the United States of America. For those reasons, we request the Court to deny the motion to dismiss, allow us a few days, perhaps even just five, to conduct an examination of the machines that we have requested from the beginning, and find out exactly what went on and give the Court further evidence it might want to rule in our favor, because the fraud that has happened here has destroyed any public confidence that the will of the people is reflected in their vote, and just simply cannot stand.

THE COURT: Thank you, ma'am. All right, rebuttal? This is Josh Belinfante.

MR. BELINFANTE: Just briefly, Your Honor. Your Honor, just a few points. One, I want the get back to *Colorado River* abstention. There was a means and a process to do that. You had asked earlier about their response. I did

go back and check. The *Siegel* case they rely on cites to only *Burford* and *Pullman* abstention, not *Colorado River*. It is appropriate in this case, and as the Michigan Court concluded, the *Moses Cone* case which establishes it says that there is really not a reason not to do so when you have concurrent jurisdiction.

And that is one of the problems with the Plaintiffs' argument. They keep telling you that they can't go to State Court because they have Federal constitutional claims. Those can be litigated in State Court pursuant to 1983. They also say on laches that -- it is interesting, they have cited to you and read to you numerous aspects of the *Curling* case, and they say that going back to 2005 somebody thought that there was something wrong with these machines. Well if that's the case, then it makes the laches argument even stronger. These are the arguments that they are about the machines. They certainly could have been litigated prior to after the certification of the election.

The other big problem that they raise is that the *Curling* case, everything that was read was stayed by the 11th Circuit, presuming that it is reading the part of the opinion that I think it is. If it is going back to a prior opinion, that is about old machines which aren't even used anymore. And then in Ware County, that was provided in an affidavit that was new as part of the reply brief, it should not be

counted. There is authority for that, *Sharpe v. Global Security International* from the Southern District of Alabama, from 2011. But even still, that can be brought in the State Court under the challenge mechanisms set.

You asked what is the authority for decertifying the election. The citation was *Bush v. Gore*. *Bush v. Gore* stayed a Florida recount, it did not decertify the election. But most importantly, what *Bush v. Gore* said is, when there is a State process, the Elections Clause says that has to continue. And they have not shown you that the State process is insufficient, invalid, whatsoever. On standing, they find themselves in a bind. If they are candidates as electors, the State election code says you can bring a challenge under 21-2-522. If they are not candidates and the 3rd Circuit reasoning applies, then the 11th Circuit in *Wood* would apply too, and say that when you are not a candidate you don't have standing. So either way, they find themselves out of Federal jurisdiction on these arguments.

Just a few points on closing. They tell you that the voters lack confidence in the election system. Well, since 2018 candidates that were not successful have tried to overturn the rule of voters in the Courts. Since 2018 courts have stayed with the State of Georgia and upheld Georgia's election laws and Georgia's election machines. This Court should do the same. The State is doing what it can to enhance

public confidence. That is why we went the extra step of a hand count, not that pushes ballots through a machine, but that looks at what the ballot says, and when the voter had access to that ballot they could see too. And if they voted for Donald Trump it will show it on the ballot; if they voted for Joe Biden it will show it on the ballot. And if not, they can correct it right there. That is the actions that instill confidence, not this. And if they want to challenge those election results, the State Courts are open for them to do it, there are hearings scheduled now, and those hearings should proceed and not this one. Thank you.

THE COURT: Thank you, sir. Ms. Callais, did you have anything else?

MS. CALLAIS: No, Your Honor.

THE COURT: All right. Thank you very much. I have considered the entire record in the case and I find that, even accepting as true every averment of the complaint, I find that this Court must grant the Defendants' motions to dismiss, both of the motions to dismiss, beginning with the proposition that Federal Courts are courts of limited jurisdiction; they are not the legal equivalent to medical hospitals which have emergency rooms that are open 24/7 to all comers. On the contrary, the 11th Circuit has specifically held that Federal Courts don't entertain post election contests about vote counting and misconduct that may properly be filed in the

State courts. So whether the Defendants have been subjected to a Federal claim, which is Equal Protection, Due Process, Elections Clause and Electors Clause, it does not matter. The 11th Circuit has said these claims in this circuit must be brought in State court. There is no question that Georgia has a statute that explicitly directs that election contests be filed in Georgia Superior Courts, and that is what our Federal Courts have said in this circuit, it is that is exactly right.

Sometimes Federal judges are criticized for committing the sin of judicial activism. The appellate courts have responded to that and said enough is enough is right. In fact, enough is too much. And the courts have convincingly held that these types of cases are not properly before Federal Courts, that they are State elections, State courts should evaluate these proceedings from start to finish.

Moreover, the Plaintiffs simply do not have standing to bring these claims. This Court rejects the 8th Circuit's nonbinding persuasive-value-only holding in *Carson vs Simon* and I find that the Defendants -- excuse me -- the Plaintiffs don't have standing, because anyone could have brought this suit and raised the exact same arguments and made the exact same allegations that the Plaintiffs have made in their complaint. The Plaintiffs have essentially alleged in their pleading that their interests are one and the same as any Georgia voter. I do not believe that the 11th Circuit would

follow the reasoning of the 8th circuit in *Carson*.

Additionally, I find that the Plaintiffs waited too late to file this suit. Their primary complaint involves the Dominion ballot marking devices. They say that those machines are susceptible to fraud. There is no reason they could not have followed the Administrative Procedure Act and objected to the rule-making authority that had been exercised by the Secretary of State. This suit could have been filed months ago at the time the machines were adopted. Instead, the Plaintiffs waited until over three weeks after the election to file the suit. There is no question in my mind that if I were to deny the motions to dismiss, the matter would be brought before the 11th Circuit and the 11th Circuit would reverse me. The relief that the Plaintiffs seek, this Court cannot grant. They ask the Court to order the Secretary of State to decertify the election results as if such a mechanism even exists, and I find that it does not. The 11th Circuit said as much in the *Wood* case on Saturday.

Finally, in their complaint, the Plaintiffs essentially ask the Court for perhaps the most extraordinary relief ever sought in any Federal Court in connection with an election. They want this Court to substitute its judgment for that of two-and-a-half million Georgia voters who voted for Joe Biden, and this I am unwilling to do.

The motion for temporary restraining order that was

entered on November 29 is dissolved. The motions to dismiss are granted. And we are adjourned.

(end of hearing at 11:07 a.m.)

* * * * *

REPORTER'S CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____

Lori Burgess
Official Court Reporter
United States District Court
Northern District of Georgia

Date: December 8, 2020

Exhibit 2

OFFICIAL ELECTION BULLETIN

May 1, 2020

TO: County Election Officials and County Registrars

FROM: Chris Harvey, State Elections Director

RE: Absentee Ballot Signature Review Guidance

Verifying that a voter's signature on his or her absentee ballot matches his or her signature on the absentee ballot application or in the voter registration record is required by Georgia law and is crucial to secure elections. Ensuring that signatures match is even more crucial in this time of increased absentee voting due to the COVID-19 crisis. The purpose of this OEB is to remind you of some recent updates to Georgia law and regulations regarding verifying signatures on absentee ballots and to make you aware of the procedures that should be followed when a signature on an absentee ballot does not match. HB 316, which passed in 2019, modified the absentee ballot laws and the design of the oath envelope. The State Election Board also adopted Rule 183-1-14.13 this year, which addresses how quickly and by what methods electors need to be notified concerning absentee ballot issues. What follows are the procedures that should be followed when the signature on the absentee ballot does not match the voter's signature on his or her application or voter registration record:

> **County registrars and absentee ballot clerks are required, upon receipt of each mail-in absentee ballot, to compare the signature or mark of the elector on the mail-in absentee ballot envelope with the signatures or marks in eNet and on the application for the mail-in absentee ballot. If the signature does not appear to be valid, registrars and clerks are required to follow the procedure set forth in O.C.G.A. § 21-2-386(a)(1)(C).**

When reviewing an elector's signature on the mail-in absentee ballot envelope, the registrar or clerk must compare the signature on the mail-in absentee ballot envelope to each signature contained in such elector's voter registration record in eNet and the elector's signature on the application for the mail-in absentee ballot.[1] If the registrar or absentee ballot clerk determines that the voter's signature on the mail-in absentee ballot envelope does not match any of the voter's signatures on file in eNet or on the absentee ballot application, the registrar or absentee ballot clerk must seek review from two other registrars, deputy registrars, or absentee ballot clerks.

A mail-in absentee ballot shall not be rejected unless a majority of the registrars, deputy registrars, or absentee ballot clerks reviewing the signature agree that the signature does not match any of the voter's signatures on file in eNet or on the absentee ballot application. If a determination is made that the elector's signature on the mail-in absentee ballot envelope does not match any of the voter's signatures on file in eNet or on the absentee ballot application, the registrar or absentee ballot clerk shall write the names of the three elections officials who conducted the signature review across the face of the absentee ballot envelope, which shall be in addition to writing "Rejected" and the reason for the rejection as required under OCGA 21-2-386(a)(1)(C). Then, the registrar or absentee ballot clerk shall commence the notification procedure set forth in O.C.G.A. § 21-2-386(a)(1)(C) and State Election Board Rule 183-1-14-.13.

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[1] Once the registrar or clerk verifies a matching signature, they do not need to continue to review additional signatures for the same voter.

RULE 183-1-14-.13 Prompt Notification of Absentee Ballot Rejection

When a timely submitted absentee ballot is rejected, the board of registrars or absentee ballot clerk shall send the elector notice of such rejection and opportunity to cure by mailing written notice, and attempt to notify the elector by telephone and email, if a telephone number or email is on the elector's voter registration record or absentee ballot application, no later than the close of business on the third business day after receiving the absentee ballot. However, for any timely submitted absentee ballot that is rejected within eleven days of Election Day, the board of registrars or absentee ballot clerk shall send the elector notice of such rejection and opportunity to cure by mailing written notice, and attempt to notify the elector by telephone and email, if a telephone number or email is on the elector's voter registration record or absentee ballot application, no later than close of business on the next business day.

Exhibit 3

December 16, 2020

***Georgia Republican Party, Inc., et al. v. Raffensperger, et al.*, Case No. 1:20-CV-05018-ELR**

United States District Court for the Northern District of Georgia

Expert Report of Jonathan Rodden, PhD

Jonathan Rodden, PhD

I. INTRODUCTION AND SUMMARY

On December 12, I received two declarations related to the practice of signature-matching in Georgia. First, based on his personal experience with Colorado, Mr. Scott Gessler argued that Georgia's signature-matching rate is "impossibly low." Second, in a separate report, Dr. Jason Sorens examined the distribution of ballots rejected for non-matching signatures across Georgia's counties. Specifically, he noted that some of Georgia's larger counties had rejection rates well below the statewide rate, while some small counties had rates that were well above—a pattern that he refers to as anomalous.

I was asked by Counsel for the Intervenors in this matter to review the claims made in these reports. First, I examine cross-state data from 2012 to the present, and discover that among the roughly 30 states that conduct some form of signature-matching and for which data are available, Georgia's absentee ballot rejection rate is quite typical. If anything, it is slightly more stringent than the median state. On the other hand, Colorado is an outlier, with one of the highest rejection rates in the country.

Next, I address Dr. Sorens' notion of "statistical anomalies" among Georgia's counties. In order to characterize the distribution of a set of observations as somehow unusual, or to characterize a set of specific observations as anomalous, one must understand the data generating process, and use that knowledge to explain what a

typical distribution *should* look like. For instance, since signature-matching is ostensibly used for fraud detection, one must articulate a theory about the cross-county incidence of fraud. Alternatively, if signature-matching is—as suggested by Dr. Sorens—primarily a way of disenfranchising voters who make mistakes, one must explain why mistakes should be distributed in a specific way across counties.

In addition, in determining the "correct" distribution of rejections across counties, one must consider the difficulty of the task of signature-matching, especially given the low quality of signatures on file, and the prospect that the quality likely varies from one county to another. If we give 159 individuals, or groups of individuals, the opportunity to rather arbitrarily throw out ballots according to vague criteria, what type of distribution of rejections should we expect?

Dr. Sorens has not addressed any of these questions, and has provided no theory whatsoever about what the cross-county distribution of ballot rejections *should* be. Thus, he provides no basis for calling into question the shape of the distribution of ballot rejections across counties in Georgia or any other state, and no basis for characterizing specific observations as "too high" or "too low."

In fact, Georgia's distribution of ballot rejections across counties is very similar to distributions in other states. This pattern—where the vast majority of counties reject zero or very few ballots, and a small handful of counties reject a sizable number—is ubiquitous. It could be explained by actual patterns of fraud, the

geographic distribution of voter mistakes, the geographic distribution of "sticklers" among county-level officials, or any number of other factors.

In short, without any other information, simply from observing cross-county distributions of rejections, it makes no sense to characterize ballot rejection rates as "too low" in the counties with very low rejection rates, or to call for increased rejections that would bring them up to the average level as Dr. Sorens has done—especially since that average is driven by a handful of counties with relatively high rates. Likewise, based purely on observing cross-state data, it makes little sense to argue, as Mr. Gessler has done, that Georgia as a whole should attempt to "catch up" with the rejection rates of unusually aggressive states like Colorado.

II. QUALIFICATIONS

I am currently a tenured Professor of Political Science at Stanford University and the founder and director of the Stanford Spatial Social Science Lab ("the Lab")—a center for research and teaching with a focus on the analysis of geo-spatial data in the social sciences. In my affiliation with the Lab, I am engaged in a variety of research projects involving large, fine-grained geo-spatial data sets including ballots and election results at the level of polling places, individual records of registered voters, census data, and survey responses. I am also a senior fellow at the Stanford Institute for Economic Policy Research and the Hoover Institution. Prior to my employment at Stanford, I was the Ford Professor of Political Science at the

Massachusetts Institute of Technology. I received my Ph.D. from Yale University and my B.A. from the University of Michigan, Ann Arbor, both in political science. A copy of my current C.V. is included as an Appendix to this report.

In my current academic work, I conduct research on the relationship between patterns of political representation, geographic location of demographic and partisan groups, and the drawing of electoral districts. I have published papers using statistical methods to assess political geography, balloting, and representation in a variety of academic journals including *Statistics and Public Policy*, *Proceedings of the National Academy of Science*, *American Economic Review Papers and Proceedings*, the *Journal of Economic Perspectives*, the *Virginia Law Review*, the *American Journal of Political Science*, the *British Journal of Political Science*, the *Annual Review of Political Science*, and the *Journal of Politics*. One of these papers was recently selected by the American Political Science Association as the winner of the Michael Wallerstein Award for the best paper on political economy published in the last year, and another received an award from the American Political Science Association section on social networks.

I have recently written a series of papers, along with my co-authors, using automated redistricting algorithms to assess partisan gerrymandering. This work has been published in the *Quarterly Journal of Political Science*, *Election Law Journal*, and *Political Analysis*, and it has been featured in more popular publications like the

Wall Street Journal, the *New York Times*, and *Boston Review*. I have recently completed a book, published by *Basic Books* in June of 2019, on the relationship between political districts, the residential geography of social groups, and their political representation in the United States and other countries that use winner-take-all electoral districts. The book was reviewed in *The New York Times*, *The New York Review of Books*, *Wall Street Journal*, *The Economist*, and *The Atlantic*, among others.

I have expertise in the use of large data sets and geographic information systems (GIS), and conduct research and teaching in the area of applied statistics related to elections. My PhD students frequently take academic and private sector jobs as statisticians and data scientists. I frequently work with geo-coded voter files and other large administrative data sets, including in recent papers published in the *Annals of Internal Medicine* and *The New England Journal of Medicine*. I have developed a national data set of geo-coded precinct-level election results that has been used extensively in policy-oriented research related to redistricting and representation.[1]

I have been accepted and testified as an expert witness in six recent election law cases: *Romo v. Detzner*, No. 2012-CA-000412 (Fla. Cir. Ct. 2012); *Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, No. 4:2014-CV-02077

[1] The dataset can be downloaded at http://projects.iq.harvard.edu/eda/home.

(E.D. Mo. 2014); *Lee v. Va. State Bd. of Elections*, No. 3:15-CV-00357 (E.D. Va. 2015); *Democratic Nat'l Committee et al. v. Hobbs et al.*, No. 16-1065-PHX-DLR (D. Ariz. 2016); *Bethune-Hill v. Virginia State Board of Elections*, No. 3:14-cv-00852-REP-AWA-BMK (E.D. Va. 2014); and *Jacobson et al. v. Lee*, No. 4:18-cv-00262 (N.D. Fla. 2018). I also worked with a coalition of academics to file Amicus Briefs in the Supreme Court in *Gill v. Whitford*, No. 16-1161, and *Rucho v. Common Cause*, No. 18-422. Much of the testimony in these cases had to do with geography, voting, ballots, and election administration. I am being compensated at the rate of $500/hour for my work in this case. My compensation is not dependent upon my conclusions in any way.

III. DATA SOURCES

I have used individual-level absentee voting data from the Georgia Secretary of State to calculate the rate at which absentee ballots were rejected in Georgia's counties in recent elections. I have also consulted data on absentee ballots cast and rejections from the Election Administration and Voting Surveys (EAVS) for each general election from 2012 to 2018. These are surveys of state and county election officials in each state, carried out by the U.S. Election Assistance Commission in conjunction with each general election.

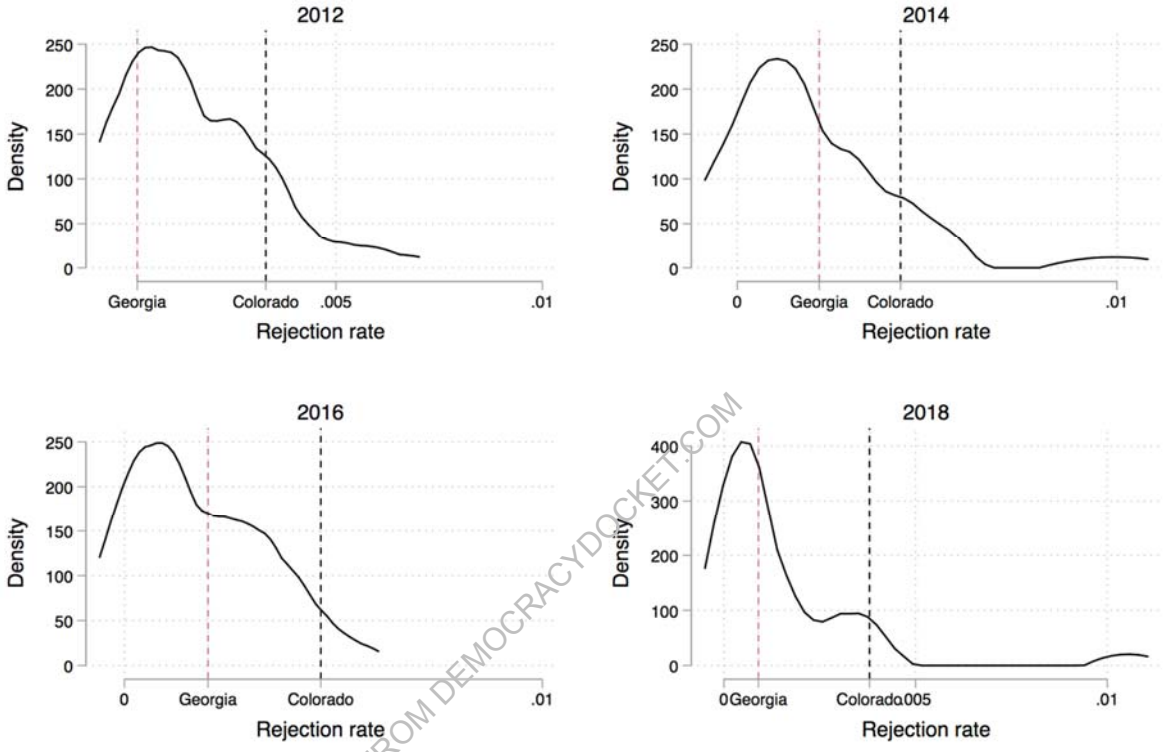
IV. DOES GEORGIA REJECT FEWER ABSENTEE BALLOTS FOR NON-MATCHING SIGNATURES THAN OTHER STATES?

Mr. Gessler's analysis in this case is drawn from his firsthand experience in Colorado, and although he cited no sources, he also mentioned a statistic about recent ballot rejections in Nevada. Based on this comparison with two other states, Mr. Gessler concluded that Georgia's rate of absentee ballot rejections due to non-matching signatures is "impossibly low."

It is not clear why two Western states are chosen as Mr. Gessler's comparison set. In fact, it is possible to do a much broader investigation. The Election Assistance Commission conducts surveys associated with each general election, and among many other things, collects data on absentee ballot rejections. I have consulted the reports and associated data sets for the elections of 2012, 2014, 2016, and 2018, with the goal of calculating, for each state in each election, absentee ballots rejected due to non-matching signature as a share of all absentee ballots submitted for counting. In each election, some states do not provide one or both of these variables, either because data are unavailable or because the state does not reject ballots due to non-matching signatures. This leaves 31 states in 2012, 32 in 2014, 32 in 2016, and 33 in 2018. The 2020 EAVS report is not yet available.

The comparative data suggest that since 2012, Georgia has been a very typical state. Colorado, on the other hand, has consistently demonstrated unusually high rejection rates.

Figure 1: Kernel Densities of Absentee Ballots Rejected for Non-Matching Signature as Share of Absentee Ballots Submitted, U.S. States, 2012-2018



In Figure 1, I use kernel densities to represent the distribution of rejection rates across the states for which data were available. A kernel density is a smoothed histogram that allows for the visualization of the shape of the distribution. In this case, we can see that the distribution of rejection rates across states is skewed, such that it has a long right tail. The "peak" of the histogram on the left side of each graph gives us an indication of the rejection rate where many states cluster, and in the tail of each distribution on the right are a handful of states with unusually high rejection

rates. The red dashed line corresponds to the rejection rate in Georgia, as reported by Dr. Sorens. The black dashed line corresponds to the rejection rate in Colorado.

The rate at which Georgia rejected absentee ballots for non-matching signature was relatively low compared to other states in 2012. Even in that year, however, 7 states had lower rates than Georgia. In 2014, Georgia's rejection rate increased substantially, bringing it well above the median state. The same pattern continued in 2016 and 2018. In each of those years, Georgia's rejection rate was higher than the median state. Note that Georgia's declining rejection rates from 2014 to 2018—mentioned in Dr. Sorens' report as an indicator of growing laxity in signature-matching—is in line with a national trend toward lower rejection rates over the same period.

Figure 1 also clarifies that Colorado—the comparison state highlighted in Mr. Gessler's report—has consistently been in the tail of the distribution. That is to say, it is among a small handful of states with unusually high rejection rates. Among all states, Colorado's rejection rate ranked 4th in 2012, 6th in 2014, 2nd in 2016, and 3rd in 2018. It is not clear why Georgia—a relatively typical state—should alter its ballot rejection practices in order to mimic the practices of an unusually aggressive state.

Clearly, it is not possible to support the claim that Georgia is exceptionally lax in its rejection of absentee ballots for non-matching signatures. In fact, in each of the last three elections, it has demonstrated higher rejection rates than the median

state. Although we do not yet have 2020 data for a broad group of states, the comparative data are also useful in assessing the claim that Georgia's 2020 rate—reported as .0005 by Dr. Sorens—is "impossibly low." Among the sample of around 30 states that actually engage in signature-matching and provide data, there were 13 states with lower rates in 2012, 10 in 2014, 9 in 2016, and 13 in 2018. Given the overall downward trend in rejections of this kind, it is very likely that a substantial number of states had lower rejection rates than Georgia in 2020 as well, and that Georgia is once again somewhere right in the middle of the national distribution.

In any case, there is no good reason to believe that a low or declining rejection rate is a bad thing, or indicative of laxity on the part of election administrators that might facilitate fraud. On the contrary, it is quite plausible that as Georgia and other states adopt more careful procedures for rejecting ballots, a declining rejection rate indicates a reduction in the number of ballots that are inappropriately flagged as non-matching.

V. DOES THE DISTRTIBUTION OF ABSENTEE BALLOT REJECTIONS IN GEORGIA REVEAL "ANOMALIES?"

While Mr. Gessler examines statewide aggregate numbers, Dr. Sorens focuses his analysis not on the overall statewide share of absentee ballots rejected for non-matching signature, but rather, on the distribution of those rejections across Georgia's counties. He displays a histogram of rejection rates, and as with the state-level graphs above, he demonstrates that there is a pronounced right skew in

rejection rates across Georgia's counties. Of 159 counties, 100 do not reject a single ballot. Another 38 counties reject less than two tenths of a percent of their ballots. In the tail of the distribution are 15 counties with rejection rates above three tenths of a percentage point. These include the majority-minority counties specifically identified by Dr. Sorens as having unusually high rejection rates: Dougherty, Gwinnett, Henry, and Liberty.

It is important to note that when a distribution has a pronounced right skew, the mean is much larger than the median. In this case, the median county actually rejects zero ballots. The statewide average is driven by relatively high values in the outlier counties in the right tail of the distribution. Given that so many of Georgia's counties reject zero ballots, it is odd to characterize a handful of non-zero counties as "statistical anomalies" for their low rates while 100 counties with zero rejections are considered not to be anomalous.

Given Dr. Sorens' approach, these small counties cannot be classified as anomalous in their under-provision of rejections, simply because they are too small. By applying a statewide rate of .0005, Dr. Sorens expects that throughout Georgia, for every 2000 absentee ballots, we should see one rejection. There were 73 counties that received fewer than 2000 absentee ballots. Thus it is not possible for these counties to be viewed as "anomalous" even though they reject zero ballots. On the low side, Dr. Sorens is thus searching for "anomalies" only among larger counties.

To better understand Dr. Sorens' characterizations, consider the counties of Muscogee and Cherokee. Muscogee had 24,430 absentee ballots, which would lead Dr. Sorens to expect 12 rejections, where in fact there were zero. So according to Dr. Sorens, Muscogee fell short of expectation by 12 rejections. Cherokee County had 37,488 absentee ballots, which would lead Dr. Sorens to expect 18 rejections, while in fact there was only one. According to Dr. Sorens, Cherokee County fell short of expectations by 17 rejections.

To classify these counties as anomalous, without much explanation of his logic, he suggests that the distribution of rejections across counties should resemble a statistical distribution known as the Poisson distribution, and he then uses this rather arbitrary benchmark to classify some counties as having rejection rates that are either "too high" or "too low."

But Dr. Sorens never explains why we should expect a normal, uniform, Poisson, or any other type of distribution of absentee ballot rejections across counties. Nor does he explain how tight the distribution should be around the mean, or why we should be surprised by the right-skewed shape of the distribution displayed in his report. In the parlance of statistics, he is completely silent about the data generating process. That is to say, he does not explain what the anticipated, reasonable distribution of rejections should look like and why. For this type of

statistical analysis, it is only sensible to characterize values as "extreme" if one has provided this type of explanation. Above all, Dr. Sorens does not explain why he believes each county should look like "a random draw from the statewide population" (p. 4).

The ostensible purpose of signature-matching is to combat fraud. If we believe that signature-matching is fulfilling this purpose, we should expect the distribution of signature-matching rejections to perfectly mirror the distribution of attempted fraud. To the extent that some nefarious, organized actors are attempting to commit fraud—as in Bladen County, North Carolina in 2018—we would expect the distribution of fraud, and hence failed signature matches, to be geographically concentrated. In other words, we would expect something quite different from a Poisson distribution of rejections across counties. We would expect some counties *not* to look like a random draw from the statewide population; we would expect them to have much larger rates than the overall statewide rate. We would also expect the overall number and geographic distribution of rejections to fluctuate from one year to another as different attempts at fraud come and go. In other words, we could not approach the data with the notion that there is a single "anticipated" distribution of rejections. Rather, we would expect the distribution to reflect the fraudulent activity that takes place in a given year, but without a good theory about the geography of

fraud, we can say very little about whether or not this is happening just by observing the distribution.

Oddly, Dr. Sorens does not even consider fraud-prevention among the *possible* explanations for the data generation process. After identifying what he refers to as "discrepancies" (counties like Cherokee that he believes are too far from the statewide rate), he considers three possible explanations. "One is that some county election boards were especially aggressive or reticent in rejecting absentee ballots, possibly in violation of state law. A second is that some county election boards may have misreported – or failed to report – ballot rejections. A third is that some counties are hugely demographically different from the rest of the state, which led their voters to make vastly fewer (or more) mistakes on their absentee ballot signatures."

This is as close as Dr. Sorens comes to explaining what he believes is the data-generating process. He seems to view geographic patterns of signature mismatches as resulting from discretionary decisions of election administrators as well as mistakes on the part of either voters or election administrators, but he does not even consider the possibility that they reflect successful fraud prevention efforts.

But even still, it is not clear why these stories about the data-generating process should lead us to expect a Poisson or any other specific distribution of rejections across counties. If rejections are driven by voter mistakes, it is not clear

why we should expect county-level proclivity to make mistakes to be tightly and symmetrically arranged around the statewide average. For instance, we might expect mistakes to be correlated with some county-level characteristics, like education and literacy, that are not evenly distributed across counties. Dr. Sorens suggests this possibility, but does not examine it empirically. More broadly, if one believes that rejected ballots are primarily driven by voter mistakes, it is unclear from what normative perspective it is desirable to "level up" the level of disenfranchisement in laggard suburban counties in order to "catch up" with leaders like Dougherty County.

To the extent that mistakes are made by election administrators, it is worthwhile to consider some of the constraints shaping those mistakes. For instance, in his report, Mr. Gessler points out that "…many signatures on the voter rolls are poor quality. Georgia has automatic voter registration, which relies heavily on signature samples obtained from motor vehicle registrations. Because these signatures are normally obtained using an electronic touchpad, they are notoriously poor quality. That means counties likely rely on motor vehicle signatures for voters who request absentee ballots online" (paragraph 25). If Mr. Gessler is correct, he points to another good reason why we might expect significant cross-county variation in rejection rates. Some counties might have better signatures on file for comparison, depending on the source they rely on for their comparison signature.

Even if two counties rely at similar rates on the DMV for their comparison signatures, one can imagine that the quality could be quite different in a county where the main DMV office had a scratched and poorly functioning touchpad than in one with new equipment. Again, if this is the reason for ballot rejections, it is not clear why it is desirable to "level up" the number of ballot rejections to catch up with the relatively poor, rural counties in the tail of the distribution that are pushing up the statewide rejection rate, quite possibly due to false mismatches.

A final unexplored aspect of the data-generating process goes to the heart of the task of signature-matching. County-level election administrators are in a very poor position to determine that one signature is similar to, inspired by, or a variation on another. County election officials are being asked to engage in a difficult task with the potential to disenfranchise voters. Even a professional handwriting analyst would require a large sample of "baseline" signatures, and even then, it is likely that experts would often disagree. Even if we accept Dr. Sorens' assumptions that 1) fraud attempts do not have any impact on the shape of the cross-county distribution of rejections and 2) voter mistakes should be similar from one county to another, and we further stipulate that election officials are acting in good faith and following uniform statewide guidance and best practices, we should expect large variation from one county to another in rejection rates purely because of the nature of the task.

Imagine a research project in which a researcher hires 159 different teams and gives each team the same task. For instance, imagine they are asked to read a set of newspaper articles about politics and determine whether the tone is positive, negative, or neutral. But there is no "right" answer, and there is no clear way of providing the research teams with airtight rules for coding. Under such conditions, we would expect the teams to provide very different answers to the same question. In the parlance of quantitative research, we would anticipate that "inter-coder reliability" is low. It would not be surprising to see that some of the teams adopted their own internal practice in which almost every story is interpreted as neutral, for example, while other teams interpreted the task differently, and developed a practice of coding almost all of the stories as negative if they contained some critical quotes or information.

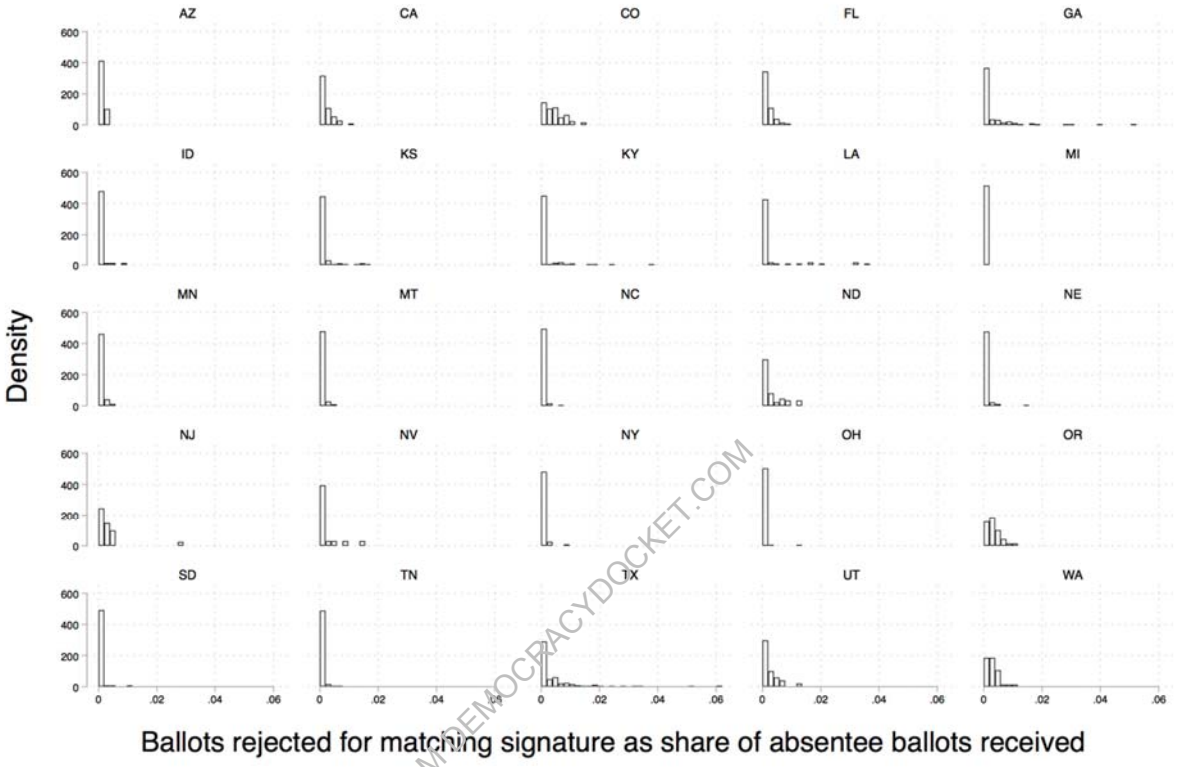
The task of signature matching is analogous, in that due to the nature of the task, we should not be surprised to see a wide range of outcomes across counties, driven purely by local variation in good-faith interpretations of the standards provided by state officials. A wrinkle in the case of signature matching, however, is that it has the potential to unfairly disenfranchise people. Thus, given the stakes of wrongly determining that signatures do not match, we might expect the vast majority of teams to develop a rather cautious approach. It should also not be surprising if a handful of teams develops a much more stringent decision rule.

In sum, whether we consider a data-generating process that is primarily driven by fraud, one that is driven by cross-county variation in mistakes made by voters, or by the difficulties of the task faced by election administrators, we would anticipate a wide range of rejection rates across counties, and under a variety of scenarios, a pronounced right skew in the distribution of rejections much like the one presented in Dr. Sorens' report. Thus, Dr. Sorens' report tells us nothing about the efficacy or deficiency of the signature matching process in Georgia except that the distribution of non-matches is precisely what we would anticipate seeing anywhere that signature matching is employed.

And indeed, this is what we see in states well beyond Georgia. We can use the responses to the 2016 EAVS survey to examine the distribution of absentee ballot rejections for signature mismatch across counties. There are a number of states that are best left out of this analysis, either because they provide no information at all about signature-matching rejections, or because a numbers or counties did not provide data on this type of rejection, or reported zero rejections in every county.[2] I also drop states (e.g. Delaware) where there are very few counties, or where towns rather than counties are the unit of analysis (Maine, New Hampshire, Rhode Island, and Wisconsin). This leaves 25 states with full county-level reporting.

[2] Zero rejections in every county were reported in Iowa, Massachusetts, Missouri, New Mexico, West Virginia, and Wyoming.

Figure 2: Cross-County Histograms of Ballots Rejected for Non-Matching Signature as Share of Absentee Ballots Received, 2016 General Election



In Figure 2, I present cross-county histograms of the rejection rate for each of these 25 states. We can see that Georgia's large density at zero, and its highly skewed distribution, are the norm in states around the country. Georgia's neighboring states—Florida and North Carolina—look rather similar, except they do not have Georgia's cluster of high-rejection counties in the right tail of the distribution. Georgia is also not alone in the fact that the median county has zero rejections. This was true in most of the states (15). In another six states, the median county had a relatively low rejection rate, well below two tenths of a percentage point (Arizona,

California, Florida, New Jersey, Texas, and Utah). In Washington, the median county had a rejection rate of two tenths of a percentage point, and in Oregon, it was three tenths of a percentage point. Once again, Colorado is an outlier: the median county had a rejection rate around four tenths of a percentage point. Note that each of these Western states with tighter, less skewed distributions and higher overall rejection rates was a state where all, or nearly all, of the ballots were cast by mail.

It is difficult to draw a normative conclusion about these skewed distributions without a better understanding of the reason for the skew. As explained above, these distributions can be explained by any number of factors. As such, they cannot teach us anything about the vigor with which election administrators pursue signature matching, or about the efficacy or appropriateness of the signature-matching process.

VI. CONCLUSION

In comparison with other states, there is nothing anomalous about the rate at which Georgia rejects absentee ballots due to non-matching signatures. Most states are similar to Georgia in that they reject relatively few signatures, but a handful of states demonstrate elevated rejection rates. Elevated rejection rates in outlier states like Colorado tell us nothing about Georgia. Likewise, there is nothing unusual about the distribution of rejection rates across counties *within* Georgia. It is quite common to see a large number of counties with zero or very few rejections, and a handful of

counties in the tail of the distribution with elevated rejection rates. There are a number of potential explanations for this pattern, and neither Mr. Gessler nor Dr. Sorens explains why this pattern might be viewed as problematic, or why a typical county—one that rejects relatively few ballots—should suddenly attempt to emulate the outliers in the tail of the distribution.

In sum, neither of these reports can be relied upon to draw valid inferences about the costs or benefits of the signature-matching process in Georgia.

Appendix

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Academic Positions

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Publications

Books

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Working Papers

Federalism and Inter-regional Redistribution, Working Paper 2009/3, Institut d'Economia de Barcelona.

Representation and Regional Redistribution in Federations, Working Paper 2010/16, Institut d'Economia de Barcelona (with Tiberiu Dragu).

Chapters in Books

Political Geography and Representation: A Case Study of Districting in Pennsylvania (with Thomas Weighill), forthcoming 2021.

Decentralized Rule and Revenue, 2019, in Jonathan Rodden and Erik Wibbels, eds., *Decentralized Governance and Accountability*, Cambridge University Press.

Geography and Gridlock in the United States, 2014, in Nathaniel Persily, ed. *Solutions to Political Polarization in America*, Cambridge University Press.

Can Market Discipline Survive in the U.S. Federation?, 2013, in Daniel Nadler and Paul Peterson, eds, *The Global Debt Crisis: Haunting U.S. and European Federalism*, Brookings Press.

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Online Interactive Visualization

Stanford Election Atlas, 2012 (collaboration with Stephen Ansolabehere at Harvard and Jim Herries at ESRI)

Other Publications

How America's Urban-Rural Divide has Shaped the Pandemic, 2020, *Foreign Affairs*, April 20, 2020.

An Evolutionary Path for the European Monetary Fund? A Comparative Perspective, 2017, Briefing paper for the Economic and Financial Affairs Committee of the European Parliament.

Representation and Regional Redistribution in Federations: A Research Report, 2009, in *World Report on Fiscal Federalism*, Institut d'Economia de Barcelona.

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Decentralization and the Challenge of Hard Budget Constraints, *PREM Note* 41, Poverty Reduction and Economic Management Unit, World Bank, Washington, D.C. (July).

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Book Review of *The Government of Money* by Peter Johnson, *Comparative Political Studies 32,7: 897-900.*

Fellowships and Honors

Fund for a Safer Future, Longitudinal Study of Handgun Ownership and Transfer (LongSHOT), GA004696, 2017-2018.

Stanford Institute for Innovation in Developing Economies, Innovation and Entrepreneurship research grant, 2015.

Michael Wallerstein Award for best paper in political economy, American Political Science Association, 2016.

Common Cause Gerrymandering Standard Writing Competition, 2015.

General support grant from the Hewlett Foundation for Spatial Social Science Lab, 2014.

Fellow, Institute for Research in the Social Sciences, Stanford University, 2012.

Sloan Foundation, grant for assembly of geo-referenced precinct-level electoral data set (with Stephen Ansolabehere and James Snyder), 2009-2011.

Hoagland Award Fund for Innovations in Undergraduate Teaching, Stanford University, 2009.

W. Glenn Campbell and Rita Ricardo-Campbell National Fellow, Hoover Institution, Stanford University, beginning Fall 2010.

Research Grant on Fiscal Federalism, Institut d'Economia de Barcelona, 2009.

Fellow, Institute for Research in the Social Sciences, Stanford University, 2008.

United Postal Service Foundation grant for study of the spatial distribution of income in cities, 2008.

Gregory Luebbert Award for Best Book in Comparative Politics, 2007.

Fellow, Center for Advanced Study in the Behavioral Sciences, 2006-2007.

National Science Foundation grant for assembly of cross-national provincial-level dataset on elections, public finance, and government composition, 2003-2004 (with Erik Wibbels).

MIT Dean's Fund and School of Humanities, Arts, and Social Sciences Research Funds.

Funding from DAAD (German Academic Exchange Service), MIT, and Harvard EU Center to organize the conference, "European Fiscal Federalism in Comparative Perspective," held at Harvard University, November 4, 2000.

Canadian Studies Fellowship (Canadian Federal Government), 1996-1997.

Prize Teaching Fellowship, Yale University, 1998-1999.

Fulbright Grant, University of Leipzig, Germany, 1993-1994.

Michigan Association of Governing Boards Award, one of two top graduating students at the University of Michigan, 1993.

W. J. Bryan Prize, top graduating senior in political science department at the University of Michigan, 1993.

Other Professional Activities

International Advisory Committee, Center for Metropolitan Studies, Sao Paulo, Brazil, 2006–2010.

Selection committee, Mancur Olson Prize awarded by the American Political Science Association Political Economy Section for the best dissertation in the field of political economy.

Selection committee, Gregory Luebbert Best Book Award.

Selection committee, William Anderson Prize, awarded by the American Political Science Association for the best dissertation in the field of federalism and intergovernmental relations.

Courses

Undergraduate

Politics, Economics, and Democracy

Introduction to Comparative Politics

Introduction to Political Science

Political Science Scope and Methods

Institutional Economics

Spatial Approaches to Social Science

Graduate

Political Economy of Institutions

Federalism and Fiscal Decentralization

Politics and Geography

Consulting

2017. Economic and Financial Affairs Committee of the European Parliament.

2016. Briefing paper for the World Bank on fiscal federalism in Brazil.

2013-2018: Principal Investigator, SMS for Better Governance (a collaborative project involving USAID, Social Impact, and UNICEF in Arua, Uganda).

2019: Written expert testimony in *McLemore, Holmes, Robinson, and Woullard v. Hosemann*, United States District Court, Mississippi.

2019: Expert witness in *Nancy Corola Jacobson v. Detzner*, United States District Court, Florida.

2018: Written expert testimony in *League of Women Voters of Florida v. Detzner* No. 4:18-cv-002510, United States District Court, Florida.

2018: Written expert testimony in *College Democrats of the University of Michigan, et al. v. Johnson, et al.*, United States District Court for the Eastern District of Michigan.

2017: Expert witness in *Bethune-Hill v. Virginia Board of Elections*, No. 3:14-CV-00852, United States District Court for the Eastern District of Virginia.

2017: Expert witness in *Arizona Democratic Party, et al. v. Reagan, et al.*, No. 2:16-CV-01065, United States District Court for Arizona.

2016: Expert witness in *Lee v. Virginia Board of Elections*, 3:15-cv-357, United States District Court for the Eastern District of Virginia, Richmond Division.

2016: Expert witness in *Missouri NAACP v. Ferguson-Florissant School District*, United States District Court for the Eastern District of Missouri, Eastern Division.

2014-2015: Written expert testimony in *League of Women Voters of Florida et al. v. Detzner, et al.*, 2012-CA-002842 in Florida Circuit Court, Leon County (Florida Senate redistricting case).

2013-2014: Expert witness in *Romo v Detzner*, 2012-CA-000412 in Florida Curcuit Court, Leon County (Florida Congressional redistricting case).

2011-2014: Consultation with investment groups and hedge funds on European debt crisis.

2011-2014: Lead Outcome Expert, Democracy and Governance, USAID and Social Impact.

2010: USAID, Review of USAID analysis of decentralization in Africa.

2006–2009: World Bank, Independent Evaluations Group. Undertook evaluations of World Bank decentralization and safety net programs.

2008–2011: International Monetary Fund Institute. Designed and taught course on fiscal federalism.

1998–2003: World Bank, Poverty Reduction and Economic Management Unit. Consultant for *World Development Report*, lecturer for training courses, participant in working group for assembly of decentralization data, director of multi-country study of fiscal discipline in decentralized countries, collaborator on review of subnational adjustment lending.

Last updated: October 19, 2020

Exhibit 4

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

PAUL ANDREW BOLAND,

Plaintiff,

v.

BRAD RAFFENSPERGER, in his official capacity as Secretary of State of the State of Georgia; REBECCA N. SULLIVAN, in her official capacity as Vice Chair of the Georgia State Election Board; DAVID J. WORLEY, in his official capacity as a Member of the Georgia State Election Board; MATTHEW MASHBURN, in his official capacity as a Member of the Georgia State Election Board; and ANH LE, in her official capacity as a Member of the Georgia State Election Board,

Defendants,

and

GLORIA BUTLER, BOBBY FUSE, DEBORAH GONZALEZ, STEPHEN HENSON, PEDRO MARIN, FENIKA MILLER, BEN MYERS, RACHEL PAULE, CALVIN SMYRE, ROBERT TRAMMELL JR., MANOJ S. "SACHIN" VARGHESE, NIKEMA WILLIAMS, and CATHY WOOLARD, in their capacity as Electors for Joseph R. Biden, Jr.,

Intervenor-Defendants.

Civil Action No. 2020CV343018

Final Order

Paul Andrew Boland ("Plaintiff") filed this action on November 30, 2020, to contest the November 3, 2020, election for Presidential Electors for the State of Georgia. Plaintiff named as defendants Brad Raffensperger, the Georgia Secretary of State, and Rebecca N.

Sullivan, David J. Worley, Matthew Mashburn, and Anh Le, the members of the Georgia State Election Board ("State Defendants"). On December 3, 2020, Intervenor-Defendants filed a Motion to Intervene. A hearing was held on December 7, 2020 and the Court granted the motion.

The Court held a hearing on December 8, 2020 to address the Intervenor-Defendants' Motion to Dismiss. In attendance were counsel representing the Plaintiff, counsel representing the State Defendants,[1] counsel representing the Intervenor-Defendants, and counsel representing a party attempting to intervene in the contest as a petitioner, Shawn Still. Counsel for the State Defendants made an oral motion to dismiss the case and there was no objection by Plaintiff. The Court heard argument from the parties on the motions to dismiss by the State Defendants and Intervenors, as well as arguments on the propriety of and scope of relief sought by the Petitioner.

The Court, having reviewed the record in this matter and having considered the pending Motions to Dismiss by Defendants and Intervenors, respectively, the Memoranda of Law in support thereof, Plaintiff's opposition thereto, and argument presented by all parties at a hearing before the Court on this day, it is hereby ORDERED that Defendants' and Intervenor-Defendants' Motions to Dismiss are GRANTED on the following grounds:

First, the Court finds that, pursuant to O.C.G.A. § 21-2-520, the State Defendants are improper parties to this action. O.C.G.A. § 21-2-520 (2) defines the proper "Defendants" for purposes of an election contest as follows:

(A) The person whose nomination or election is contested;

[1] Counsel from the Georgia Attorney General's Office appeared at the hearing on behalf of the State Defendants and waived the statutory notice required under O.C.G.A.§ 9-10-2.

> (B) The person or persons whose eligibility to seek any nomination or office in a run-off primary or election is contested;
>
> (C) The election superintendent or superintendents who conducted the contested primary or election; or
>
> (D) The public officer who formally declared the number of votes for and against any question submitted to electors at an election.

O.C.G.A. § 21-2-520(2).

The Secretary of State is not one of these statutorily proscribed defendants, nor are the members of the State Election Board. They are not candidates for the office that is the subject of the contest, so neither subsections (A) nor (B) apply of O.C.G.A. § 21-2-520(2). The State Defendants are also not one or more of "the election superintendent[s]" who conducted the contested election, therefor subsection (C) does not apply.[2] Finally, because the Plaintiff has not asserted any claims regarding the constitutional amendments or the taxation issue put to the voters statewide, which were the only questions submitted to the voters statewide in the November 3, 2020 general election, subsection (D) is also inapplicable. As such, the State Defendants' motion to dismiss for failure to name the proper Defendants is GRANTED as to State Defendants.

Second, Plaintiff's claims are also barred by the equitable doctrines of laches, which bars a claim when (1) the lapse of time and (2) the claimant's neglect in asserting rights (3) prejudiced the adverse party. *Waller v. Golden*, 288 Ga. 595, 597 (2011). All three elements are satisfied here, where Plaintiff challenges the validity of the presidential election after it has already been conducted based on procedures which were adopted long before the election and upon which elections officials and voters alike relied.

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[2] The Code defines "superintendent" as one of five city or county officials/entities: (1) the judge of the probate court of a county; (2) the county board of elections; (3) the county board of elections and registrations; (4) the joint city-county board of elections; and (5) the joint city-county board of elections and registration. O.C.G.A. § 21-2-2(35)(A).

The Doctrine of Laches precludes Plaintiff from asking this Court for relief based on *post hoc* challenges to the Secretary of State's voter registration list maintenance program and to the Settlement Agreement, which were in place well before the November 2020 general election. The National Voter Registration Act provides that States shall complete their programs to remove ineligible voters from the official lists "not later than 90 days prior to the date of a primary or general election for Federal office." 52 U.S.C. § 20507(c)(2)(A). Thus, any objection Plaintiff maintained against the State's list maintenance program for the November 3 election could have been raised well before the general election, and in any event by August 5. Similarly, the Settlement Agreement was entered into six months before election day, yet Plaintiff did not seek to intervene or challenge the Settlement Agreement until November 30, 2020. *See Wood v. Raffensperger*, No. 1:20-CV-04651-SDG, 2020 WL 6817513, at *7 (N.D. Ga. Nov. 20, 2020) (rejecting virtually identical post-election challenge to Settlement Agreement as barred by laches). As a result, the Plaintiff's Complaint is DISMISSED against State Defendants and Intervenor-Defendants on this ground as well.

Third, as an individual voter, Plaintiff lacks standing to raise generalized grievances against election officials' conduct. *Wood v. Raffensperger*, No. 20-14418, 2020 WL 7094866, at *4 (11th Cir. Dec. 5, 2020) (Pryor, J.). Plaintiff is not a "Candidate" for the election he seeks to contest in this action and thus has no standing to bring this action. As a result, the Complaint is DISMISSED against Defendants and Intervenor-Defendants on this ground as well.

Fourth, even if the Court were to examine the merits of this action, Plaintiff fails to state a claim upon which relief can be granted.

Plaintiff seeks to challenge the election of presidential electors, who are the candidates selected by voters under state law. *See* O.C.G.A. § 21-2-10 ("At the November election to be

held in the year 1964 and every fourth year thereafter, there shall be elected by the electors of this state persons to be known as electors of President and Vice President of the United States."). Presidential electors are neither "federal, state, county, or municipal" officers, and therefore Plaintiff cannot bring a claim under Georgia's election contest statute to challenge their election. O.C.G.A. § 21-2-521.

Even if Plaintiff's Complaint could be brought under O.C.G.A. § 21-2-521, it also fails to state a claim upon which relief can be granted because it is based on the premise that the election is in doubt because the voter rolls were not properly maintained, and because election officials did not properly verify voter signatures. Even if credited, the Complaint's factual allegations do not plausibly support his claims. The allegations in the Complaint rest on speculation rather than duly pled facts. They cannot, as a matter of law, sustain this contest.

Count I, which alleges that 20,312 people may have voted illegally in Georgia, relies upon a YouTube video which purportedly is based upon United States Postal Service mail forwarding information. Pet. ¶ 1. Count II alleges that the signature-matching process resulting from a Settlement Agreement entered into by the State nine months ago is inconsistent with Georgia's election code, and allegedly violates the federal Constitution.[3] Pet. ¶ 17. The Court finds that Plaintiff's allegations, as pled, do not support an allegation of impropriety or a

[3] These arguments have been offered and rejected in other courts. *See Wood*, 2020 WL 6817513, at *10. Furthermore, the statutory changes put in place by the General Assembly permitting voters to cure signature issues on their ballot as a result of 2019 legislation, as well as regulatory changes adopted by the State Election Board contemporaneous with execution of the Settlement Agreement, would be expected to result in fewer signature rejections. This would not be because illegal votes are somehow evading review, but because subjecting signatures to more thorough verification and permitting voters to cure suspected errors should reduce the number of lawful ballots that are improperly thrown out.

conclusion that sufficient illegal votes were cast to change or place in doubt the result of the election.

Fifth, and finally, the Court finds that Plaintiff's complaint is moot. The results of the November 3, 2020 election have been certified by Secretary of State and the Governor as required under the Georgia Election Code, and then re-certified, and the certificate of ascertainment has been transmitted to the Archivist of the United States. Moreover, the Supreme Court of the United States has cautioned courts against jeopardizing a state's ability to meet the federal "safe harbor" deadline in 3 U.S.C. § 5. *See Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam) (explaining that "safe harbor" provision "requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by [the safe harbor date]."); *see also id.* at 114 (Rehnquist, C.J., concurring) ("[W]e must ensure that postelection state-court actions do not frustrate the legislative desire to attain the 'safe harbor' provided by § 5."). Because the November 3, 2020, election has been certified and because the mechanism available to challenge said certification is no longer available, the Court finds that Plaintiff's action is moot because the relief which he seeks in his Complaint is not available.

Accordingly, for the forgoing reasons, the motions to dismiss by the State Defendants and the Intervenor-Defendants are **GRANTED** and Plaintiff's Complaint is **DISMISSED**. In light of this, proposed Intervenor-Plaintiff Shawn Still's motion to intervene as a plaintiff is **DENIED** as moot

This 8th day of December, 2020.

Judge Emily K. Richardson
Superior Court of Fulton County

Prepared by:
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Edited by the Court.

Exhibit 5

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JOHN WOOD

Petitioner,

V.

BRAD RAFFENSPERGER, in his official capacity as Secretary of State of the State of Georgia, and BRIAN KEMP, in his official capacity as Governor of the State of Georgia

Respondents.

Civil Action No.:
2020-CV-342959

FINAL ORDER.

John Wood filed this action on November 25, 2020, to contest the November 3, 2020, election for President of the United States. Wood named as defendants Brad Raffensperger, the Georgia Secretary of State, and Brian Kemp, the Georgia Governor ("State Defendants"). The Court held a hearing on December 7, 2020. In attendance were counsel representing the Petitioner, counsel representing the State Defendants, and counsel representing the parties attempting to intervene in the election as Defendant-Intervenors ("Attempted

Intervenors"). The court heard argument from the parties on the oral motion to dismiss raised by the State Defendants, the motion to intervene and motion to dismiss filed by the Attempted Intervenors, and the propriety of and scope of relief sought by the Petitioner. Georgia law does not countenance naming as a defendant either the Governor or the Secretary of State to an election contest filed pursuant to Article 13 of Chapter 2 of Title 21.[1] To the extent that Petitioner seeks equitable relief against the State Defendants, those claims are barred by sovereign immunity. As a result, the petition must be dismissed against the only named defendants. As a result of that dismissal, all other motions before this Court are moot.

In O.C.G.A. § 21-2-520(2), the General Assembly delineated only four categories of persons subject to suit in an election contest under Article 13 of the Election Code:

> (A) the person whose nomination or election is contested;
>
> (B) the person or persons whose eligibility to seek any nomination or office in a run-off primary or election is contested;

---

[1] Of course, if the election contest concerned the re-election efforts of either the sitting Governor or Secretary of State, they would be a proper defendant under O.C.G.A. § 21-2-520(2)(A).

(C) the election superintendent or superintendents who conducted the contested primary or election; or

(D) the public officer who formally declared the number of votes for and against any question submitted to electors at an election.

The State Defendants are not candidates for the office that is the subject of the contest, nor are they eligible for a runoff for the office that is the subject of the contest, so neither (A) nor (B) are applicable. Petitioner has made no argument and brought no contest against either of the two constitutional amendments or the taxation issue put to the voters statewide, which were the only questions submitted to the voters statewide in the November 3, 2020, general election, so (D) is not applicable.

Neither of the State Defendants is an "election superintendent … who conducted the contested primary or election." For purposes of Chapter 2 of Title 21, a "superintendent" is defined at O.C.G.A. § 21-2-2(35) as:

(35) "Superintendent" means:

(A) Either *the judge of the probate court* of a county or *the county board of elections*, *the county board of elections and registration*, the *joint city-county board of elections*, or the *joint city-county board of elections and registrations*, if a county has such.

O.C.G.A. § 21-2-2(35)(A) (emphasis added). The Code defines "superintendent" as one of five possible *city* or *county* officials/entities: 1) the judge of the probate court of a county; 2) the county board of elections; 3) the county board of elections and registrations; 4) the joint city-county board of elections; and 5) the joint city-county board of elections and registration.

To the extent that Petitioner has, as his counsel claimed at the hearing, asserted claims for equitable relief[2] against the State Defendants beyond the Petition which was brought pursuant to Article 13 of Chapter 2 of Title 21, those claims are barred by sovereign immunity. The "sweep of sovereign immunity" under the Georgia Constitution is "broad." *Olvera v. Univ. Sys. of Ga.'s Bd. of Regents*, 298 Ga. 425, 426 (2016). The Georgia Supreme Court has held that sovereign immunity applies to public officials sued in their official capacities because these "are in reality suits against the state." *See Ga.*

[2] Counsel for Petitioner, under questioning by the Court, asserted only equitable claims for relief under the Court's plenary authority. Such claims do not overcome the sovereign immunity bar adopted by the people of Georgia in the state constitution when claims are brought against the state or its officials.

Dep't of Natural Resources v. Ctr. for a Sustainable Coast, 294 Ga. 593, 599 n. 4 (2014) (citing *Cameron v. Lang*, 274 Ga. 122, 126 (2001)). Petitioner sought only relief here against the State Defendants in their official capacities, seeking to prohibit official acts already completed, compel by way of injunction future official acts, and cause declaratory relief to issue against these officials.

Suits against public officials are permitted only where there is an explicit waiver of sovereign immunity by the legislature, as stated in the Georgia Constitution:

> Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can *only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.*

Ga. Const. Art. I, Sec. II, Par. IX(e) (emphasis added). "Where the sovereign has sovereign immunity from a cause of action, and has not waived that immunity, the immunity rises to a constitutional right and cannot be abrogated by any court." *Ga. Dep't of County Health v. Neal*, 334 Ga. App. 851, 854 (2015); s*ee also Sustainable Coast*, 294 Ga. at 597 ("The history of sovereign immunity in our State shows that the 1991

amendment intended to expressly reserve the power to waive sovereign immunity exclusively to the legislature.").

Georgia courts have also made clear that it is the plaintiff's (or Petitioner's) burden to demonstrate the existence of an explicit waiver of sovereign immunity to authorize the suit. *See, e.g.*, *Neal*, 334 Ga. App. at 855 ("It is axiomatic that the party seeking to benefit from the waiver of sovereign immunity bears the burden of proving such waiver."). Thus, in an election contest the petitioner must show the existence of a statute that specifically waives sovereign immunity by authorizing suits against the State Defendants in election contests under Article 13 of the Georgia Election Code. Petitioner cannot make such a showing here because the Georgia Election Code does not contain a waiver of sovereign immunity against the State Defendants within Article 13.

The plain language of the Georgia Election Code thus makes clear that the State Defendants are not proper defendants in an election contest. Additionally, the General Assembly has not waived sovereign immunity to either authorize election contest claims to be brought against the State Defendants or to cause relief to issue against them in

an action of this type. Therefore, the claims against the State Defendants must be dismissed. With the dismissal of the State Defendants, there remains no cause of action remaining against any party for the Court to grant intervention into, nor is there a party remaining against whom Petitioner can gain relief.

Accordingly, for the forgoing reasons the motion to dismiss by the State Defendants is **GRANTED** and Petitioner's election contest is **DISMISSED**. In light of this, all other motions are moot, and therefore, **DENIED**.

This 8th day of December, 2020.

Judge Jane C. Barwick
Fulton County Superior Court
Atlanta Judicial Circuit

Prepared by:
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