NO. 20-14813

In The United States Court of Appeals For The Eleventh Circuit

L. LIN WOOD, JR.,

Plaintiff/Appellant,

vs.

BRAD RAFFENSPERGER, et al.,

Defendants/Appellees.

On Appeal from the United States District Court
For the Northern District of Georgia
CASE No. 1:20-cv-5155-TCB

APPELLANT'S CONSOLIDATED REPLY BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

L. Lin Wood, Jr. v. Brad Raffensperger, *et al.*
Case No. 20-14813

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

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/s/ *L. Lin Wood, Jr, Esq.*
L. LIN WOOD, JR., ESQ.

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INTRODUCTION[1]

In December 2020, Appellant was a registered voter residing in Fulton County, Georgia, who was otherwise a qualified, registered "elector" possessing all of the qualifications for voting in the State of Georgia. On December 18, 2020, Appellant filed an action seeking declaratory and injunctive relief in the district court, seeking to enjoin the Appellees from conducting the January 5, 2021 Senatorial Runoff election in an unconstitutional manner, which violated his rights and directly conflicted with the election scheme established by the Georgia State Legislature. Appellant specifically alleged that Appellees' actions in unilaterally promulgating rules and revising the State's election scheme, unconstitutionally contravened the Georgia Legislature's prescribed election procedures in at least three respects. Namely, the signature verification procedures for absentee ballots; the manner for processing absentee ballots; and the installation of unauthorized ballot drop boxes. As a result of these unlawful and unconstitutional changes to the State's election procedures, Appellant alleged that his rights under the equal protection and due process clause of the Fourteenth Amendment to the United States Constitution, as well as his constitutional rights under the Guarantee Clause, U.S. Const. art. IV, § 4 (plenary power of State Legislature to define "Times, Places and

[1] Although this brief principally replies to Appellees' answer brief, it also addresses the arguments raised in the Intervenor's response brief. The latter two briefs make substantially the same and overlapping arguments as the Appellees.

Manner" of federal elections), were violated.[2]

Appellant's Complaint, in addition to seeking declaratory and injunctive relief, sought nominal damages with respect to each of the three counts in the complaint, which the district court's December 28, 2020 Order failed to address. Consequently, this appeal, as Appellant asserted in his jurisdictional brief, involves a live case or controversy and is not moot. *See Uzuegbunam v. Preczewski*, 592 U.S. ___ (2021).

In the short period of time this case was pending in the district court, and despite the voluminous record, which included witness and expert affidavits, documentary evidence and exhibits, the district court refused to hold any evidentiary hearings or otherwise address the merits of the claims. Consequently, Appellees reference each and every election challenge Appellant participated in during the 2020-2021 election cycle, ostensibly to point out that each challenge was summarily rejected, and that this Court should follow suit. While Appellant acknowledges that the claims he consistently raised, for the most part, were summarily rejected, the validity and appropriateness of those claims has now been recognized by the Georgia Legislature, which on March 25, 2021 passed SB 202, abrogating most of the

[2] Despite the District Court's refusal to grant injunctive relief, and its dismissal of Appellant's well pled causes of action, it should be noted that on March 25, 2021, the Georgia Legislature lawfully revised the State's election laws, which specifically addressed the allegations and causes of action in Appellant's complaint, despite having been summarily dismissed.

unconstitutional election procedures utilized by Appellees during the 2020 Presidential election and the 2021 Senatorial runoff election. To be sure, the injury suffered by Appellant, as recognized by SB 202, is directly traceable to Appellees' conduct and their violation of Appellant's constitutional rights.

For these reasons, the order of the district court should be vacated and remanded for the district court to address the merits of the claims set forth in the Complaint.

REPLY ARGUMENT

I. Appellant has standing to maintain his Constitutional challenge to Appellee's signature verification procedures because they violate his constitutional right to Equal Protection.

Appellees contend that this Court lacks subject matter jurisdiction based on their assertion that Appellant lacks standing to bring this cause of action. In the voting context, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue," *Baker v. Carr*, 369 U.S. 186, 206, (1962), so long as their claimed injuries are "distinct from a 'generally available grievance about the government," *Gill v. Whitford*, 138 S.Ct. 1916, 1923 (2018)(quoting *Lance v. Coffman*, 549 U.S. 437, 439, 1 (2007) (per curiam).

Appellant has, consistent with several constitutional provisions, established an injury sufficient for standing. Specifically, under the Fourteenth Amendment of the U.S. Constitution, a state may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Fourteenth Amendment is one of several constitutional provisions that "protects the right of all qualified citizens to vote, in state as well as federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). Because the Fourteenth Amendment protects not only the "initial allocation of the franchise," as well as "the manner of its exercise," *Bush v. Gore*, 531 U.S. 98, 104, (2000), "lines may not be drawn which are inconsistent with the

Equal Protection Clause ...." *Id.* at 105 (citing *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966)).

The Supreme Court has identified two theories of voting harms prohibited by the Fourteenth Amendment. First, the Court has identified a harm caused by "debasement or dilution of the weight of a citizen's vote," also referred to "vote dilution." *Reynolds*, 377 U.S. at 555. Appellant presented a dilution claim below.

Further, the Supreme Court has found that the Equal Protection Clause is violated where the state, "[h]aving once granted the right to vote on equal terms," through "later arbitrary and disparate treatment, value[s] one person's vote over that of another." *Bush*, 531 U.S. at 104-05 (2000); see also *Baker*, 369 U.S. at 208 ("A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box.") (internal citations omitted).

The second theory of voting harm requires courts to balance competing concerns around access to the ballot. On the one hand, a state should not engage in practices which prevent qualified voters from exercising their right to vote. A state must ensure that there is "no preferred class of voters but equality among those who meet the basic qualifications." *Gray v. Sanders*, 372 U.S. 368, 379-80, 83 (1963). On the other hand, the state must protect against "the diluting effect of illegal

ballots." *Id.* at 380. Because "the right to have one's vote counted has the same dignity as the right to put a ballot in a box," *id.*, the vote dilution occurs only where there is both "arbitrary and disparate treatment." *Bush*, 531 U.S. at 105. To this end, states must have "specific rules designed to ensure uniform treatment" of a voter's ballot. *Id.* at 106.

Appellant has alleged that he has been subjected to arbitrary and disparate treatment. The lower court denied the relief he requested, while other voters, through the procedural changes in the unlawful consent agreement, were permitted to vote, under a different and unequal set of rules, and that this is a concrete and particularized injury.

For the purposes of determining whether Appellant has standing, is it not "necessary to decide whether [Appellant's] allegations of impairment of his vote" by Appellees' actions "will, ultimately, entitle [him] to any relief," *Baker*, 369 U.S. at 208. Whether a harm has occurred is best left to this court's analysis of the merits of Appellant's claims, thus, the appropriate inquiry is, "[i]f such impairment does produce a legally cognizable injury," whether Appellant "is among those who have sustained it." *Baker*, 369 U.S. at 208.

For purposes of standing, a denial of equal treatment is an actual injury even when the complainant is able to overcome the challenged barrier:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than

> it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 666 (1993).

The Supreme Court has rejected the argument that an injury must be "significant"; a small injury, "an identifiable trifle," is sufficient to confer standing. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n. 14, 93 (1973). Appellant Wood submits that he has suffered an injury sufficient to confer standing, and to have sought redress for the constitutional violations, as well as nominal damages. "A plaintiff (such as Appellant) need not have the franchise wholly denied, to suffer injury. Any concrete, particularized, non-hypothetical injury to a legally protected interest is sufficient." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005).

For instance, requiring a registered voter to produce photo identification to vote in person, but not requiring a voter to produce identification to cast an absentee or provisional ballot is sufficient to demonstrate disparate treatment and thus, a constitutional injury sufficient for standing.

Additionally, the inability of a voter to pay a poll tax, for example, is not required to challenge a statute that imposes a tax on voting, *see Harper*, 383 U.S. at 668, and the lack of an acceptable photo identification is not necessary to challenge a statute that requires photo identification to vote in person. Because Appellant has demonstrated that the unlawful "Consent Agreement" subjected him to arbitrary and disparate treatment, vis-à-vis, other voters, he has clearly suffered a sufficient injury. *See also Roe v. Alabama*, 43 F. 3d 574, 580-581 (11th Cir. 1995)(voter and candidates in statewide election had standing to allege violation of their constitutional rights based on the counting of improperly completed absentee ballots, which diluted votes of the voters who met requirements of absentee ballot statute and those who went to the polls on election day.)

In *Roe*, the Court also cited the seminal voting rights cases of *Reynolds v. Sims*, 377 U.S. 533, 561 (1964) and *Baker*, *supra*, for the proposition that:

> "[V]oters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage" *Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018), (quoting *Reynolds*, 377 U.S. at 561; *Baker*, 369 U.S. at 206). Claims premised on allegations that "the law . . . has not been followed . . . [are] precisely the kind of undifferentiated, generalized grievance about the conduct of government . . . [and] quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing." *Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1332–33 (11th Cir. 2007) (citing *Baker*, 369 U.S. at 207–08).

The Court noted that it had continuously distinguished between the '"undifferentiated, generalized grievance about the conduct of government" from the cases where "a private citizen had alleged a 'concrete and particularized' injury sufficient to satisfy the requirements of Article III." *Lance* at 439.

The claims asserted by Appellant are not "generalized grievances about the conduct of government." In this case, based on the unconstitutional voting procedures implemented by the Appellees, Appellant was subjected to a concrete and particularized harm, by way of the dilution of his vote, since the Appellees' previous actions in permitting massive amounts of unverified signatures that flooded the general election in Georgia, repeated, yet their procedures evaded review.

Further, in *Common Cause/Georgia v. Billups*, 554 F. 3d 1340, 1351 (11th Cir. 2009) this Court held that voters had standing to challenge the requirement of presenting government issued photo identification as a condition of being allowed to vote. The plaintiff voters in that case did not have photo identification, and consequently, would be required to make a special trip to the county registrar's office that was not required of voters who had identification. *Id.* 1351. There was no impediment to the plaintiff's ability to obtain a free voter identification card. Although the burden on the plaintiff voters was slight in having to obtain identification, this Court found that a small injury, even "an identifiable trifle" was sufficient to confer them standing to challenge the election procedure. *Id.*

In *George v. Haslam*, 112 F. Supp. 3d 700, 709 (M.D. Tenn. 2015), registered voters were found to have standing to sue the state governor and others based on the allegation that the method by which votes cast in the election were counted violated their rights to equal protection. That court observed that citizens have a constitutionally protected right to participate in elections on an equal basis with other citizens, and the Equal Protection Clause prohibited the state from valuing one person's vote over that of another. *Id. Accord*, *Nielsen v. DeSantis*, 2020 WL 5552873 at *2 (N.D. Fla. June 30, 2020)(voters had standing to challenge state voting procedures including the requirement to pay postage on their mail-in ballots, the election date deadline for the supervisor of elections to receive a mailed ballot, and a restriction on delivery of remote ballots cast by others.)

In *New Ga. Project v. Raffensperger*, 2020 WL 5200930 (N.D. Ga. August 31, 2020), registered voters had standing to sue the Georgia Secretary of State and the State Election Board challenging policies governing Georgia's absentee voting process in light of dangers presented by Covid-19.

The district court in *Middleton v. Andino*, 2020 WL 5591590 at *12 (D.S.C. September 22, 2020) ruled that a voter had standing to challenge an absentee ballot signature requirement and a requirement that absentee ballots be received on election day to be counted. The court observed that the fact that an injury may be suffered by a large number of people does not by itself make that injury a non-justiciable

generalized grievance as long as each individual suffers particularized harm, and voters who allege facts showing disadvantage to them have standing to sue. *Id.*

Similarly, in the present case, the Appellant has shown below that as a voter and as a financial supporter of the Republican Party, he has legal standing to maintain the challenge to Appellees' unconstitutional signature verification requirements, and other deviations from election procedures implemented and used in the 2021 Senatorial Runoff election. *Accord, Citizens for Legislative Choice v. Miller*, 993 F. Supp. 1041, 1044-1045 (E.D. Mich. 1998) (voters who wished to vote for specific candidates in an election had standing to challenge constitutionality of a state constitutional amendment establishing term limits for state legislators). Without question, Appellant's allegations are directly connected to *his* personal interest in *his* vote, which is sufficient to confer him legal standing, despite Appellees' contentions to the contrary.

Moreover, Appellees belabor the argument that Appellant did not suffer an injury sufficient to confer him standing because he did not vote in the Senatorial Runoff election. First, there is no evidence in the record in that regard, and secondly, this issue neither was presented nor considered by the district court. Whether the Appellant voted in the Senatorial Runoff election is neither here nor there, as it was not material or paramount in the district court's reasoning and/or order and is otherwise immaterial to whether Appellant has suffered an injury in fact.

When Appellant filed this case in the lower court, he intended to vote in the Senatorial Runoff election, and claimed that his vote in the Senatorial Runoff was going to be diluted in the same way his vote was diluted in the general election (in which he voted in person and subsequently challenged the same election procedures in a separate lawsuit), because the same voting procedures were going to be utilized in the Senatorial Runoff election. Accordingly, he requested that the lower court take immediate action in the form of injunctive relief, but the lower court denied such relief and dismissed his claim before the election occurred and before he even had the opportunity to vote. To be sure, Appellant's decision whether to cast a ballot (which would once again be diluted) or not was predicated on the district court's decision. Had the court enjoined the unconstitutional procedures, thereby affirming that Appellant's vote would effectively be counted, without being diluted and thus he would not suffer further injury, a ballot could easily be cast. However, since the district court refused to take action, Appellant's vote was once again due to be discounted and he continued to suffer a particularized injury based on Appellees unconstitutional conduct. Hence, contrary to the Appellee's contentions, if Appellant did not vote in the Senatorial runoff election as a result of the unconstitutional election procedures which remained in place at the time of the runoff election, it does not vitiate his claim of injury, but rather augments his injury to the franchise and his right to cast a vote without being subject to dilution.

Accordingly, Appellant has standing. As discussed below, the Appellees' procedure for verifying signatures and rejecting absentee ballots was unconstitutional. It valued absentee votes more than in person votes, and impermissibly diluted the Appellant's in person vote. Accordingly, the trial court erred in concluding the Appellant lacked standing.

II. The Appellees' change of the procedures for rejecting absentee ballots impermissibly diluted the Appellant's vote and resulted in mail-in absentee ballots being valued more than in person ballots in violation of his Equal Protection rights.

The procedures applicable to voter identification verification in connection with the actual voting process treat in person voters like Appellant, different from mail-in absentee voters. Pursuant to O.C.G.A. § 21-2-417(a), an in person voter must "present proper identification to **a** poll worker" before their vote may be cast. (emphasis added). Similarly, the voter identification procedure provided by O.C.G.A. § 21-2-386 provides that absentee ballots would be received and reviewed by "**a** registrar or clerk." (emphasis added). *See* O.C.G.A. § 21-2-386(a)(1)(B). If the signature does not appear to be valid or does not conform with the signature on file, "the registrar or clerk shall write across the face of the envelope "Rejected" giving the reason therefore." See O.C.G.A § 21-2-386(a)(1)(C). As such, before the Appellees and political party committee Intervenors entered into the unconstitutional settlement agreement, one poll worker was charged with verifying the voter's

identity before their ballot was cast regardless of whether the vote was in person or by mail-in absentee ballot.

As set forth more fully in the initial brief, the Appellees and political party committee intervenors changed the clear statutory procedure for confirming voter identity at the time of voting, so that rather than one poll worker reviewing signatures, a committee of three poll workers was charged with confirming that absentee ballot signatures were defective before rejecting a ballot.

This new procedure treated in person voter identification verification different from mail-in absentee voter identification verification at the time of casting the vote. By designating a committee of three to check mail-in absentee voter identification but having a single poll worker check in person voter identification, the challenged procedure favors the absentee ballots, treats the absentee voters differently from in person voters and values absentee votes more than the ballots of in-person voters. Indeed, when a question of voter identity arises, one poll worker resolves it for an in-person voter, but any questions regarding mail-in absentee voter identification is resolved by 3 poll workers. Thus, the challenged procedure violates the Appellant's rights to equal protection and cannot be allowed to stand.

It is well established that a state may not arbitrarily value one person's vote over that of another. *Obama For America v. Husted*, 697 F.3d 423 428 (6th Cir. 2012). The Equal Protection Clause prohibits a state from treating voters in disparate

ways. *Id.* 428. Before the settlement agreement one poll worker resolved questions of voter identification regardless of whether the vote was in-person or by mail-in absentee ballot. The settlement agreement resulted in a later arbitrary change that improperly treated the in person votes differently than the mail-in absentee ballots.

III. Appellant's Guarantee Clause Claim is justiciable.

Appellant has properly set forth a claim asserting a violation of the Guarantee Clause of Article IV, § 4 of the U. S. Constitution. This is the first time this Court has considered this issue in any case related to the 2020 Presidential election or any runoff. Specifically, when a cause of election fraud, loss, or dilution of the right to vote is by state action, this elevates the matter into an Art. IV, § 4 claim, mandating judicial protection. "[T]he right to vote is inherent in the republican form of government envisaged by Article IV, § 4 of the Constitution." *Baker,* 369 U.S. at 242. "[E]mphasis on this basic right to vote is essential to the fair workings of the democratic process under our republican form of government." *Kessler v. Grand Cent. Dist. Management Ass'n, Inc.*, 158 F.3d 92, 118 (2d Cir.1998). Federal Courts are institutions of the United States which are constitutionally compelled to enforce this guarantee. *See* Art IV, § 4.

Undeniably, the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by the Supreme Court in cases involving attempts to deny or restrict the

right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, *Ex parte Yarbrough*, 110 U.S. 651 (1884), and to have their votes counted, *United States v. Mosley*, 238 U.S. 383 (1915). In *Mosley*, the Court stated that it is 'as equally unquestionable that the right to have one's vote counted is as open to protection * * * as the right to put a ballot in a box.' 238 U.S. at 386. The right to vote can neither be denied outright, *Guinn v. United States*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939), nor destroyed by alteration of ballots, *see United States v. Classic*, 313 U.S. 299 (1941), nor diluted by ballot-box stuffing. *See Ex parte Siebold*, 100 U.S. 371 (1879); *United States v. Saylor*, 322 U.S. 385 (1944). As the Court stated in *Classic*, "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted * * *." *See Classic* at 315.

History has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. Furthermore, the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. *Reynolds*, 377 U.S. at 554–55.

Indeed, *Bush*, addressed issues like those present in this case, where the constitutionality of election procedures was challenged. In deciding the issue, the Supreme Court determined such challenges to be justiciable. Just like in *Bush v. Gore*, Appellant is seeking to invoke the Court's protection of the fundamental right of the voters to vote in a constitutional election as prescribed by the State Legislature.

IV. Appellant's claims are not Moot.

The Appellees and intervenors' argument that Appellant's claims and request for injunctive relief are moot should be rejected. First, this Court in *Siegel v. Lepore*, 234 F.3d 1163, 1172-73 (11th Cir. 2000), held that a suit challenging the vote tabulation procedure in a presidential election was not rendered moot when the manual recounts were completed, and the vote tabulations certified. In that case, as in the present controversy, the election had been completed and the vote tabulations certified, but the case was not moot. *Id.* at 1173. Based on the complex and ever shifting circumstances in *Siegel*, this Court found that even after the completion of the election, there remained a live controversy. The reasoning in *Siegel* squarely applies in this case. As such, the lower court erred in finding that the Appellant's claims were moot.

Appellees argue that the unconstitutional procedures challenged by Appellant in the district court have been changed, which impliedly recognizes that the procedures in effect at the time of both the 2020 Presidential election and the

Senatorial runoff were defective *ab initio*. Despite these remedial, post hoc changes, there now exists no doubt that Appellant's constitutional rights were violated, for which Appellant demanded nominal damages, as well as other relief in the court below. The present appeal therefore involves a live case or controversy and is not moot. *See Uzuegbunam v. Preczewski,* 592 U.S. __ at 11–12 (March 8, 2021) (Slip Opinion) (a single claim for "nominal damages" is enough to sustain a claim even when the Defendant has stopped the challenged conduct and the Plaintiff suffered no actual monetary damages).

Moreover, Appellant brought this action before the Appellee certified the 2021 Senatorial election results. Appellee nonetheless certified the election, with full awareness that this litigation was ongoing. By insisting on certifying the election results in the face of an ongoing constitutional challenge, on which appellate remedies had not been exhausted, the Appellees seek to circumvent Appellant's claim for redress from their constitutional violations by manufacturing a claim of mootness. Appellant's prayer for relief also includes an award of nominal damages, and attorney's fees and costs, which have not been determined. Thus, Appellant's issue is not moot because the Court can still afford Appellant meaningful relief for the constitutional injury suffered.

In their response brief, Appellees' improperly claim that the "Election Integrity Act of 2021" Senate Bill 202 ("SB 202") renders Appellant's controversy

moot because it alters many of the election practices challenged in Appellant's lawsuit. To the contrary, by passing SB 202, the Georgia Legislature acknowledged that the procedures unilaterally implemented and utilized by Appellees, diluted Georgia voters' vote. In fact, the new law mirrors the relief sought in Appellant's lawsuit. While it is true that SB 202 confirms and vindicates the validity of Appellant's claims, and resolves several of the challenged issues, it does not resolve them all. The State's continued use of the Dominion BMD System remains under SB 202, and thus, at least one of the challenged election procedures is capable of repetition yet evading review. Thus, as argued in Appellant's response to the Court's jurisdictional question, the controversy is not moot, for if the result is permitted to stand, and if the same challenged election procedures are again established or employed in future elections in like manner, the Appellant (and the citizens of Georgia) will be permanently harmed by the Appellees' infringement on Appellant's voting rights. *See New Ga. Project,* 2020 WL 5200930 at *26-27 (concluding that the movant satisfied balance of harms/public interest factors, as "Plaintiffs will be forever harmed if they are unconstitutionally deprived of their right to vote"). Thus, this appeal presents this Court with the opportunity to review the challenged election procedures, and it is not moot. Appellees could, as they did before, unilaterally alter the statutory procedures, and their conduct must be checked to avoid a similar result.

See Hall v. Secretary State of Alabama, 902 F. 3d 1294 (11th Cir. 2018) (discussing the "capable of repetition, yet evading review" exception to mootness).

V. The Eleventh Amendment does not bar Appellant's claims.

Appellees assert that Appellant's claim is barred by the Eleventh Amendment because such amendment prevents this Court's exercise of judicial power to order state officials to conform their conduct to state law. However, the Appellees' arguments are simply a red herring, as by its own terms, Art. I, § 4, cl. 1 of the Constitution grants State Legislatures the plenary power to regulate the "Times, Places and Manner of holding elections for Senators and Representatives." Clearly, Appellant's claim, which raises a constitutional violation concerning the "Times, Places and Manner" of conducting the Senatorial Runoff Election is not barred by the Eleventh Amendment, as it sets forth a violation of federal law.

While the contours of the Eleventh Amendment's jurisdictional bar are ambiguous in many cases, this is not one of them. As the Court held in *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251 (N.D. Ga. 2019):

> Under the doctrine enunciated in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), … a suit alleging a violation of the federal constitution against a state official in his official capacity for injunctive relief on a prospective basis is not a suit against the state, and, accordingly, does not violate the Eleventh Amendment." *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011) (citations omitted); *see also Alden v. Maine*, 527 U.S. 706, 756-57, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) ("The rule [of sovereign immunity], however, does not bar certain actions against state officers for injunctive or declaratory

> relief.") and *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 n.10 (1989) ("Of Course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'").

Id. at 1278. The Court further held:

> In addition, the remedy of prospective injunctive relief is "not the 'functional equivalent' of a form of relief barred by the Eleventh Amendment." *Id.* The proposed remedy also will not resolve "for all time," Georgia's election system.

Id. at 1280.

The Sixth Circuit recently addressed the scope of Eleventh Amendment Sovereign immunity in the election context, in *Russell v. Lundergan-Grimes,* 784 F.3d 1047, 1045 (6th Cir. 2015). In *Russell*, the court held that federal courts do in fact have the power to provide injunctive relief where the defendant, "The Secretary of State, and members of the State Board of Elections," were, like Appellees, "empowered with expansive authority to 'administer election laws of the state.'" *Id.* at 1047 (internal quotations omitted). The court held that the Eleventh Amendment did not bar a federal court from "[e]njoining a statewide official under *Young* based on his obligation to enforce a law is appropriate" where the injunctive relief requested sought to enjoin actions that was within the official's statutory authority." *Id.* Thus, the Eleventh Amendment does not bar this action.

VI. Appellant has stated claims for relief.

Fed.R.Civ.P. 8(a)(2) requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." In order to survive a motion to dismiss, a plaintiff must articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662 (2009). While it is true that a pleading that merely offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" may be subject to dismissal under Rule 12(b)(6), the "facial plausibility" standard does not give rise to a "probability requirement" at the pleading stage. *Twombly* at 556. The standard merely "calls for enough facts to raise a reasonable expectation that discovery will reveal evidence" of the claim. *Id.* In doing so, the Court must accept all the plaintiff's allegations as true, construing them in the light most favorable to the plaintiff. *Pielage v. McConnell,* 516 F.3d 1282, 1284 (11th Cir.2008).

Twombly suggests that the Court adopt a "two-pronged approach" in applying these principles: 1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, "assume their

veracity and then determine whether they plausibly give rise to an entitlement to relief." Under *Twombly* and *Iqbal,* courts may infer from the factual allegations in the complaint "obvious alternative explanation[s]," which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer.

Turning to the plausibility inquiry, the Appellees contend that the Appellant's claims are frivolous. Appellant, however, has clearly met the pleading stage plausibility analysis because his claims are copiously supported with eyewitness and expert testimony. Appellant's offer of proof and documented evidence of fraud must be assumed and accepted as true at this stage of the proceedings. This is more than enough to surpass the 12(b)(6) standard under *Twombly* and *Iqbal*.

Appellees also absurdly contend that Appellant has failed to state a claim that the Equal Protection Clause was violated. There is a cognizable equal protection violation claim by the dilution of votes when tens of thousands of illegal ballots are injected into the electoral process. There is an Equal Protection violation in the use of Dominion equipment that confers a politically discriminatory 5% advantage to a particular candidate as compared to other election systems. There is an Equal Protection violation in the de facto abolition of the signature match requirement for absentee ballots as compared to in person voting in which voters have to provide proof of their identity. The receipt and counting of more than one million absentee ballots for which there was no effective

signature match (over 20% of the total number of ballots cast) violates the Georgia Election Code and subjects absentee voters and in person voters to disparate treatment. Counting votes from ineligible voters and non-residents unconstitutionally dilutes the votes of legal residents. The Equal Protection violations in this case are plain and obvious under a large body of "one person one vote" case law illustrated in *Baker v. Carr*, *Reynolds v. Sims* and *Bush v. Gore.*

> In Equal Protection cases, it has been made clear that [o]ur treatment of anecdotal evidence in *Cone Corp.* and *Ensley Branch* is consistent with the formulation in Justice O'Connor's *Croson* plurality opinion that 'evidence of a pattern of individual discriminatory acts can, *if supported by appropriate statistical proof,* lend support to a local government's determination that broader remedial relief is justified,' 488 U.S. at 509, (citation omitted) (emphasis added). In light of *Croson's* guidance on the point, and our decisions in *Cone Corp.* and *Ensley Branch,* we believe that anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone.

Engineering Contrs. Ass'n v. Metropolitan Dade County, 122 F.3d 895, 925(11th Cir. 1997) (*citing Richmond v. J. A. Croson Co.*, 488 U.S. 469, 509, (1989). Appellant has offered such statistical evidence, which should be considered on the merits.

Similarly, the Verified Complaint states a claim for a violation of the Due Process Clause. The Settlement Agreement and Rule 183-1-14-0.9-.15 were adopted in violation of the Georgia Election Code, depriving Appellant of his rights thereunder without Due Process. The fundamental right to vote protected by the Fourteenth Amendment is cherished in our nation because it "is preservative of

other basic civil and political rights." *Reynolds*, 377 U.S. at 562. Voters have a "right to cast a ballot in an election free from the taint of intimidation and fraud," *Burson v. Freeman*, 504 U.S. 191, 211 (1992), and "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

"Obviously included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted" if they are validly cast. *United States v. Classic*, 313 U.S. 299, 315 (1941). "[T]he right to have the vote counted" means counted "at full value without dilution or discount." *Reynolds*, 377 U.S. at 555, n.29 (quoting *South v. Peters,* 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

"Every voter in a federal . . . election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without it being distorted by fraudulently cast votes." *Anderson v. United States*, 417 U.S. 211, 227 (1974); see also *Baker*, 369 U.S. at 208. Invalid or fraudulent votes "debase[]" and "dilute" the weight of each validly cast vote. *See Anderson*, 417 U.S. at 227.

The right to an honest [count] is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws

and Constitution of the United States." *Anderson*, 417 U.S. at 226 (quoting *Prichard v. United States*, 181 F.2d 326, 331 (6th Cir.), *aff'd due to absence of quorum*, 339 U.S. 974 (1950)).

Practices that promote the casting of illegal or unreliable ballots or that fail to contain basic minimum guarantees against such conduct can violate the Fourteenth Amendment by leading to the dilution of validly cast ballots. *See Reynolds*, 377 U.S. at 555 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

The argument that Appellant has not stated a Due Process claim is without merit and should be rejected.

CONCLUSION

For the reasons stated above, as well as in Appellant's initial brief, the District Court's order should be reversed and this Court should grant or instruct the lower court to enjoin Appellees from implementing and utilizing the constitutionally defective election procedures used during the 2020 Presidential election and the 2021 Senatorial runoff, and to further cure any deficiencies in a manner consistent with Federal and Georgia law. Additionally, this Court should remand this action to the district court to determine the nominal damages, attorney's fees and costs.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word limitation requirements of Fed. R. App. P. 32 because the brief contains 6329 words, excluding the parts of the documented exempted by Fed. R. App. P. 32(f), and it complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it was prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14 point font.

/s/ L. Lin Wood, Jr.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of June, 2021, I electronically filed the foregoing Reply Brief through the Court's CM/ECF system, which will send a Notice of Electronic Filing to all participants who are registered CM/ECF users in this matter.

/s/ L. Lin Wood, Jr.
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