Nos. 20–13730, 20–14067

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DONNA CURLING, *et al.*,

Plaintiffs–Appellees,

v.

BRAD RAFFENSPERGER, *et al.*,

Defendants–Appellants.

Consolidated Appeals From The United States District Court For The Northern District Of Georgia, Case No. 1:17–CV–02989–AT —Hon. Amy Totenberg

BRIEF OF PLAINTIFFS–APPELLEES COALITION FOR GOOD GOVERNANCE, LAURA DIGGES, WILLIAM DIGGES III, RICARDO DAVIS, & MEGAN MISSETT

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JUNE 2, 2021

CIP AND CORPORATE DISCLOSURE STATEMENT

Certificate of Interested Parties

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-2(b), Plaintiffs–Appellees Coalition for Good Governance, Laura Digges, William Digges III, Ricardo Davis, and Megan Missett, through undersigned counsel, certify that the CIP filed in the Initial Brief of Appellants is correct and complete, subject to the additional inclusion of:

166. **Dominion Voting Systems, Inc.**, a third party;

Dated: June 2, 2021 /s/ Robert A. McGuire, III

Dated: June 2, 2021 /s/ Cary Ichter

Corporate Disclosure Statement

Pursuant to Fed. R. App. P. 26.1(a) and pursuant to 11th Cir. R. 26.1-1 and 11th Cir. R. 26-2, Plaintiff–Appellee Coalition for Good Governance states that it is a nongovernmental corporate party, that it has no parent corporation, and that there is no publicly held corporation that owns 10% or more of its stock.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs–Appellees Coalition for Good Governance, Laura Digges, William Digges III, Ricardo Davis, and Megan Missett respectfully request oral argument. This consolidated appeal involves two preliminary injunction orders, one of which is presently stayed over the partial dissent of a member of this Court. Argument by the parties will aid the Court in resolving the issues raised by the Appellants.

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STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

In this brief, Plaintiffs–Appellees Coalition for Good Governance, Laura Digges, William Digges III, Ricardo Davis, and Megan Missett adopt and incorporate:

- The Joint Response To Jurisdictional Question From Plaintiffs–Appellees, filed on December 18, 2020, in No. 20-14067; and
- The Brief For Plaintiffs-Appellees Donna Curling, Donna Price, and Jeffrey Schoenberg filed on June 2, 2021, in Consolidated Nos. 20-13730 and 20-14067.

STATEMENT OF SUBJECT-MATTER JURISDICTION AND APPELLATE JURISDICTION

A. Basis for the District Court's Subject-Matter Jurisdiction

On July 3, 2017, this action was filed in Fulton County Superior Court (Doc 1-2, Pg 1.)[1] The initial claims included federal constitutional claims brought under 42 U.S.C. § 1983. Those claims were within the original jurisdiction of the district court, *see* 28 U.S.C. §§ 1331, 1343, 2201, 2202, and thus were removable, 28 U.S.C. § 1441(a). Defendants timely removed the case on August 8, 2017. (Doc 1-1.)

[1] Page citations within documents in the district court's docket refer to the blue page numbers superimposed atop filings by the CM/ECF system.

The initial complaint was amended twice, (Doc 15, 70), before the Plaintiffs split into two groups in early 2018. Since then, the "Coalition Plaintiffs" (Coalition for Good Governance, Laura Digges, William Digges III, Ricardo Davis, and Megan Misset) and the "Curling Plaintiffs" (Donna Curling, Donna Price, and Jeffery Schoenberg) have pursued separate claims focused on distinct, but complementary issues.

The Coalition Plaintiffs are currently proceeding under two different pleadings, both of which are simultaneously operative. First, Coalition Plaintiffs are proceeding under their Third Amended Complaint (the "TAC"), which was docketed on June 13, 2018. (Doc 226.) The TAC is focused on enjoining requirements for polling place voters to use the voting system that existed in Georgia when this case was first filed. The TAC challenged multiple components of that voting system, including the touchscreen direct recording electronic (DRE) voting machines on which voters cast their votes, along with electronic pollbooks and all related software applications and databases, such as Georgia's voter registration database, called E-Net. (Doc 226, Pg 29 ¶ 59, Pg 42–47 ¶¶ 109–24.) The TAC is an amended complaint with allegations that relate back to the initial filing of the case in July 2017.

Second, Coalition Plaintiffs are also proceeding under their First Supplemental Complaint (the "FSC"), which was docketed on October 15, 2019.

(Doc 628.) The FSC focuses on enjoining requirements for voters to use Georgia's newer voting system, which incorporates touchscreen ballot marking devices (BMDs), instead of DREs, and related hardware and software, including electronic pollbooks. That new system was authorized by the General Assembly in April 2019 and purchased in Fall 2019, while this case was underway. The new system utilizes and relies on portions of the older system, primarily the E-Net voter registration database, which continues to drive the electronic pollbooks. Thus the FSC raises supplemental claims both based on some allegations incorporated from the TAC and based on numerous allegations that only arose when the specific BMD system was selected, approximately two years after the relation-back date of the TAC.

Both the TAC and the FSC assert similar federal constitutional claims—violations of the fundamental right to vote and of equal protection—under section 1983. The district court thus has jurisdiction over the claims in both of these operative complaints pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202.

B. Basis for the Court of Appeals' Jurisdiction

This consolidated proceeding involves two interlocutory orders of the district court that were separately appealed by the "State Defendants" (Brad Raffensperger, Ahn Le, Matthew Mashburn, Rebecca N. Sullivan, Sara Tindall

Ghazal,[2] and the State Election Board). Appellate jurisdiction exists in No. 20–13730, but not in No. 20–14067.

No. 20–13730 (Pollbook Order)

Appeal No. 20–13730 concerns district court's Opinion and Order, Doc 918 (Sept. 28, 2020), *as amended by* Order, Doc 965 (Oct. 12, 2020), *and*, Amended Order, Doc 966 (Oct. 12, 2020) (all three operating together, the "Pollbook Order"). Coalition Plaintiffs agree that this Court has appellate jurisdiction over the Pollbook Order because it is an interlocutory order that grants an injunction. 28 U.S.C. § 1292(a)(1).

No. 20–14067 (Scanner Order)

Appeal No. 20–14067 concerns the district court's Opinion and Order, Doc 964 (Oct. 11, 2020) (the "Scanner Order"). Appellate jurisdiction does not exist over the Scanner Order because it is an interlocutory order that addresses liability but grants no substantive relief. Thus the Scanner Order is not an "injunction" and is not immediately appealable under 28 U.S.C. § 1292(a)(1). *See Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742, 744–45 (1976).

[2] Sara Tindall Ghazal succeeded David Worley in office on June 1, 2021. She is automatically substituted for him. Fed. R. Civ. P. 25(d).

C. Dates Establishing Timeliness of this Appeal

Without conceding jurisdiction over the Scanner Order exists, Coalition Plaintiffs agree that all relevant notices of appeal were timely filed.

D. Finality Information Required by Fed. R. App. P. 28(a)(4)(D)

This is *not* an appeal from a final order or judgment disposing of all parties' claims. Both appealed orders are interlocutory and in the nature of preliminary injunctions. They are only appealable, if at all, under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether Coalition Plaintiffs' claim for injunctive relief—to require State Defendants to provide up-to-date voter lists to counties before Election Day to avoid disenfranchising eligible in-person voters—is, or should be deemed to be, within the scope of claims raised by the operative pleadings.

2. Whether the district court correctly determined that Coalition Plaintiffs were likely to succeed on the merits of their claim for pollbook relief when it granted the Pollbook Order in No. 20-13730.

3. Whether this Court lacks appellate jurisdiction over the Scanner Order in No. 20-14067 because that Order is not an appealable injunction.

INTRODUCTION

Georgia's voting system security problems have been the focus of much controversy over real and imagined problems. Many of the voting system problems are demonstrably real. Georgia's voter registration database, used in both Georgia's former and current voting systems, has long been plagued with real errors and inaccuracies that consistently cause individual voters to be deprived of the right to vote on Election Day. This has personally happened to, and in the presence of, some Coalition Plaintiffs, including members of Coalition for Good Governance.

Georgia's electronic pollbook devices used on Election Day contain voter information that is imported from the State's E-Net voter registration database. The electronic pollbook devices used with the DRE system were branded "ExpressPoll books." The BMD system's electronic pollbooks are called "PollPads." Whether Both types of electronic pollbooks have a history of frequent malfunctions that cause them to present erroneous voter information to poll workers on Election Day, which all too often prevents individual voters from being able to cast any vote at all in at least some of the races for which they are eligible to vote. It is noteworthy that Fulton County, which implements the electronic pollbook system and would deploy the updated paper backup, does not appeal the Pollbook Order.

Another issue with Georgia's voting system is the demonstrated inability of the new voting system's optical scanners to count all votes cast on hand marked paper ballots–*i.e.*, absentee mail ballots, provisional ballots, and emergency ballots. When the scanners are operated using the State's mandated scanner operating settings, they are unable to correctly detect and count many votes that are clearly and without question discernible to a human eye—votes that are required to be counted under Georgia law. O.C.G.A. § 21–2–438(c).

These and numerous other serious system flaws have imposed severe burdens on voting and have deprived voters, including Coalition Plaintiffs, of equal protection. To obtain prospective relief from these injuries, Coalition Plaintiffs

brought suit below. In August 2019, they prevailed in obtaining an injunction that barred the State from using its DRE-based voting system beyond the end of the year and that required improvement to Georgia's defective electronic pollbooks and the underlying voter registration database driving the pollbook system. (Doc 579.) The State did not appeal that order and subsequently transitioned in early 2020 to the new touchscreen BMD voting system, with the new PollPad devices as the electronic pollbooks component. But, in making this transition, the State retained mostly the same deficient and error-riddled voter registration software and databases, which now populate the new system's electronic pollbooks. After another year of litigation and demonstrated disenfranchisement of voters, Coalition Plaintiffs pursued and obtained the two further orders now being appealed—the Pollbook Order and the Scanner Order.

The Pollbook Order requires State Defendants to provide counties with voters' up-to-date pollbook information that can be printed out and used as a backup to the electronic pollbooks on Election Day. Without this relief, which is currently stayed pending appeal, the constitutional rights of real voters, including the individual Coalition Plaintiffs, the entity Plaintiff Coalition for Good Governance's non-Plaintiff members, and Curling Plaintiffs have been violated, and will continue to be violated and threatened, whenever these voters vote in person.

In the Scanner Order, the district court indicated it expected to grant relief to be determined in the future that will compel State Defendants to modify their scanners to more accurately count hand marked votes. Until that future relief is eventually determined and granted, the constitutional rights of voters who cast mail, provisional, and emergency ballots, including Coalition Plaintiffs, will continue to be violated and threatened.

In these consolidated appeals, Coalition Plaintiffs defend the Pollbook Order and ask this Court to dismiss State Defendants' appeal of the Scanner Order for lack of appellate jurisdiction. The issues raised by these two appeals are narrow, but they are important to protecting voting rights and ensuring equal protection.

The voters victimized by Georgia's system have not been excluded from their right to participate in self-government by some mere vagary of life, like a snowstorm or a traffic jam. Rather, they have been arbitrarily prevented from voting and have been severely and unequally burdened in voting as a direct result of *government* conduct—namely, an inexplicable insistence on enforcing procedures that require utilization of equipment, software, and databases that have been compromised and frequently malfunction.

Although Coalition Plaintiffs are acting to prevent future constitutional injury to themselves, their success will nevertheless improve Georgia's elections

for all voters. This outcome is not only permissible in the Eleventh Circuit, *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 984 (11th Cir. 2005) ("judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally"), but it is a result that is rightly sought from the branch of government that the Founders expected to be the People's ultimate guarantor of individual rights and freedoms.

STATEMENT OF THE CASE

A. Nature Of The Case

Coalition Plaintiffs brought their two operative complaints and obtained the Pollbook Order and the Scanner Order to enjoin the State of Georgia and Fulton County from subjecting Plaintiffs to the required use of defectively insecure and error-plagued voting systems in their current form (including their electronic pollbook and optical ballot scanner components). The required use of the two particular components at issue in these appeals presently causes actual—not hypothetical—disenfranchisement of voters. State Defendants' appeal relates to the specific relief granted against these two challenged components.

B. Course of Proceedings And Dispositions In The Court Below

Within six weeks after the July 3 2017, filing of this case in Georgia state court, the initial claims were amended twice, and the defendants removed the case

to federal district court. By mid-September 2017, the claims of all plaintiffs had been settled in the Second Amended Complaint, which alleged two federal section 1983 claims and a number of state-law claim in eleven counts. (Doc 70, Pg 23–52.)

Though the initial claims had been amended twice, all three early complaints included the same foundational allegations about security researcher Logan Lamb's mid-2017 discovery that Georgia's central election server, which was used to warehouse the State's entire voter registration database and related pollbook and election management software, had been left catastrophically insecure for an unknown period of time, but at least six months, and that the elections server had actually been accessed in its exposed state by unknown, unauthorized persons.

Plaintiffs split into two groups—Coalition Plaintiffs and Curling Plaintiffs—to pursue their different priorities in seeking similar relief, after which Coalition Plaintiffs were granted leave to docket their own amended complaint (the TAC). (Doc 226.)

The TAC asserted two claims under 42 U.S.C. § 1983—a fundamental right to vote claim (Count I) and an equal protection claim (Count II), both seeking only prospective relief against only official-capacity defendants. (Id.) The TAC was challenged but withstood a motion to dismiss on all grounds, including standing and Eleventh Amendment immunity. (Doc 309, Pg 16–31; Doc 375.)

Curling Plaintiffs subsequently filed a notice dismissing certain claims and defendants and proceeded with the streamlined Second Amended Complaint as their operative pleading. (Doc 222.)[3]

Because elections follow one after the other, constantly renewing the threat of imminent injury to voters from the challenged conduct, the window for a court to grant relief that can feasibly be implemented in time for the next upcoming election, is a narrow one. As a result, this case has mostly proceeded through a series of successive motions for preliminary injunction.

Proceedings Against the DRE System (and Pollbook Problems)

Coalition Plaintiffs filed the following four motions against the components of the DRE-based voting system (all of which sought relief for electronic pollbook problems):[4]

1. August 3, 2018: Coalition Plaintiffs challenged the use of DRE machines and the electronic pollbooks. (Doc 258, Pg 2; Doc 258-1, Pg 8, 19, ; Doc 258-2, Pg 2 ¶ 5.) At the evidentiary hearing held on September 12, 2018, Coalition Plaintiffs

[3] From mid-2018 until now, the two plaintiff groups have litigated their separate claims side-by-side, with Coalition Plaintiffs focusing more on voter-facing malfunctions and errors that burden voting through pollbook malfunctions, voter registration database irregularities, ballot secrecy violations, touchscreen malfunctions, and scanner defects; while Curling Plaintiffs have focused more on the burdens on voting caused by system-level cybersecurity flaws.

[4] Because Curling Plaintiffs' accompanying motions are not at issue in this appeal, this statement of the case focuses for brevity only on Coalition Plaintiffs' motions.

elicited testimony about Georgia's electronic pollbooks and compromised voter registration database. (Doc 307, Pg 135:31, Pg 183:10–185:5.) The district court resolved standing and immunity issues in favor of Plaintiffs and found that both sets of Plaintiffs were "likely to succeed on the merits of one or more of their constitutional claims," (Doc 309, Pg 38), but declined to grant relief because the "eleventh-hour timing" made it too close to the 2018 general election, (Doc 309, Pg 41, 41–44.) The district court acknowledged electronic pollbook problems were part of the motion, but did not address the pollbook issues. (Doc 309, Pg 15–16.) [5]

2. October 2, 2018: Coalition Plaintiffs quickly filed a narrow motion for injunctive relief focused only on remedying the pollbook issues that the district court's recent order had not addressed. (Doc 327.) State Defendants advised the district court that they intended to contest the motion, (Doc 330), but the motion was stayed with the case when the district court stayed the case pending State Defendants' interlocutory appeal.

3. June 21, 2019: After the district court reacquired jurisdiction and unstayed the case following the interlocutory appeal, Coalition Plaintiffs again challenged both DREs and electronic pollbooks. (Doc 419.) A hearing was held July 25–26,

[5] Although they had prevailed, State Defendants immediately took an interlocutory appeal, in which they argued for dismissal of the case on Eleventh Amendment immunity and standing grounds. Though they lost their appeal, (Doc 338, *Curling v. Worley*, 761 F. App'x 927 (11th Cir. 2019)), State Defendants succeeded in staying the case from October 2018 to March 2019. (Doc 333.)

2019. (Docs 570, 571.) This time, on August 15, 2019, the district court enjoined the use of DREs beyond the end of 2019 and awarded relief directed at pollbook and voter registration problems. (Doc 579, Pg 149–50\.) State Defendants sought clarification of the injunction's requirements, (Doc 584), did not appeal the district court's injunction or seek to have it reconsidered. The district court held a hearing, (Doc 590), and issued an order of clarification, (Doc 598.)

4. September 12, 2019: Coalition Plaintiffs themselves sought to amend the district court's August 15, 2019 injunction on pollbook issues. (Doc 605).) The district court granted the requested amendments in part and denied them in part. (Doc 637.)

Proceedings Against the BMD System (and Pollbook Problems)

Following the General Assembly's April 2019 authorization, Georgia purchased a BMD-based voting system from Dominion Voting Systems, Inc, in Fall 2019. After this happened, Coalition Plaintiffs filed a First Supplemental Complaint (the FSC), which raised supplemental claims against the new voting system. (First Supplemental Complaint , Doc 628).) The FSC was challenged, but its right-to-vote and equal-protection claims withstood State Defendants' motion to dismiss. (Doc 751.)

Curling Plaintiffs obtained leave to file their own Third Amended Complaint to bring BMD-related claims within the scope of their pleadings. (Doc 627.)

Coalition Plaintiffs thereafter filed the following four additional injunction motions, this time targeting State Defendants' use of the BMD-based voting system (including its components such as the new electronic pollbooks, the previously existing voter-registration database, and related software):

5. & 6. October 23, 2019 and August 2, 2020: In late 2019, Coalition Plaintiffs move to enjoin the use of BMDs and for further relief from the electronic pollbooks. (Doc 640.) The district court did not rule for nearly ten months. After malfunctioning PollPads cause widespread voting problems in the June 2020 Presidential Preference Primaries, Coalition Plaintiffs filed a request for immediate relief on paper pollbook backups, with which they submitted substantial updated evidence. (Doc 755, 756.) State Defendants responded. (Doc 757.) The district court responded by denying the state injunction motion without prejudice since its evidentiary record was now "dated" and provided an "insufficient basis for the Court to issue such a ruling of weighty importance." (Doc 768, Pg 10–11.) The district court dismissed the pending motions for preliminary injunctive relief without prejudice, inviting Plaintiffs to refile with updated evidence to "provide the Court with a more streamlined and clean record." (Doc 768, Pg 11.)

7. August 21 and 24, 2020: When Coalition Plaintiffs re-filed, they separated their requested relief into two motions: a broader motion seeking relief on the BMDs, scanners, and audits (Doc 809), and a more focused motion (Doc

800) addressing updated paper pollbook backups. The district court held a combined motions hearing on September 10–11 and 14, 2020. (Docs 904, 905, 906.)

Pollbook Order

On September 28, 2020, the district court granted the pollbooks motion and entered an injunction requiring State Defendants to provide counties with updated paper pollbook backups to be used at polling places on Election Day. (Doc 918.) The order was subsequently amended on motion, (Doc 965, 966), and the resulting Pollbook Order is now being appealed by State Defendants, (Doc 973.) The district court denied a motion by State Defendants to stay the Pollbook Order pending appeal. (Doc 969.)

Scanner Order

On October 11, 2020, the district court granted in part and denied in part Coalition Plaintiffs' motion related to BMDs and scanners. (Doc 964, Pg 147.) The district court found the relief requested in Plaintiffs' motion "broader than what is called for to address the specific injury identified and on the other, insufficiently precise." (Doc 964, Pg 141.) Rather than grant relief, the district court instead directed Plaintiffs to submit a proposed order delineating the specific relief they were seeking. (Doc 964, Pg 141–42). Plaintiffs did so. (Doc 990.)

On October 29, 2020, before the district court had acted on Plaintiffs' proposed order, the State filed a notice of appeal, (Doc 991), directed at the Scanner Order. The appeal was docketed in this Court as No. 20-14067.

On December 2, 2021, over a month after the State appealed the Scanner Order, the district court issued an Order deferring further consideration of requested scanner relief until after the January 2021 runoff election. (Doc 1021.) Since that Order was entered, the district court has entered no further relief related to the Scanner Order. The State has not amended its notice of appeal, (Doc 991), for No. 20-14067 to include the December 2, 2021 Order. (Id.)

The State has not asked either the district court or this Court to stay the Scanner Order.

Appellate Proceedings

In October 2020, State Defendants moved this Court on an expedited basis to stay the Pollbook Order pending appeal. A divided panel of this Court granted the stay without explanation on October 24, 2020.

On December 12, 2020, a panel of this Court *sua sponte* issued a Jurisdictional Question concerning its appellate jurisdiction over the Scanner Order. The parties briefed the question. On January 4, 2021, this Court consolidated the two appeals. On March 29, 2021, this Court ordered the jurisdictional question to be carried with the case.

On March 12, 2021, after the 2020 general election and early 2021 elections had passed, Coalition Plaintiffs moved this Court to lift the stay on the Pollbook Order. On April 1, 2021, the stay panel, again divided, declined to lift the stay of the Pollbook Order.

Although State Defendants are appealing the Pollbook Order and the Scanner Order, Fulton County is not appealing the two orders.

C. Statement Of The Facts

Georgia presently uses a version of electronic pollbooks called PollPads to check the eligibility of voters who go at their polling places to vote in person on Election Day. The PollPads contain the official list of electors and it is updated after early voting to prevent duplicate voting. Each polling location must also have a paper backup list of every registered voter assigned to that polling place. Because the paper registered voter list does not include information on who has voted in early voting or requested a mail ballot, however, the paper registered voters list does not have the same information as the PollPads and cannot serve as a substitute for the PollPads. If the PollPads malfunction or are not operational, therefore, Election Day voting comes to a complete standstill. And, unfortunately, PollPads provided to every county have malfunctioned in most Georgia elections in which they have been used.

The evidentiary record of pollbook, scanner, and other problems that has been assembled by Plaintiffs in this case is enormous. Coalition Plaintiffs' submitted hundreds of pages of sworn declarations showing the failures of the electronic pollbooks and the ineffectiveness of the outdated paper backup provided to counties to serve as an effective remedy.

The evidence showed pollbook registration issues from elections in 2018. (Doc 258, Pg 286–95 (different voting locations shown for members of same household), Pg 107–11 (incorrect voter assignments), Pg 263 (voter record lost); Doc 277, Pg 45–46, Pg 81, Pg 98–100.)

Similar check-in issues, unmitigated by the outdated paper lists provided by State Defendants, recurred in 2019 elections, (Doc 412 (*passim*); Doc 413 (*passim*); Doc 640-1, Pg 150–53, 157–58, 163–64, 168–69; Doc 680-1, Pg 75, 83–91, 132–35, 192–93, 170–75), and again in March 2020, (Doc 723, Pg 27–28, Pg 55–56, Pg 60–61), and again—catastrophically—in the 2020 Presidential Preference Primary election, (Doc 755, *passim*). Electronic pollbook insecurity and malfunctions were pervasive. (Docs 800-2, Pg 4–9; Doc 800-3, Pg 1–7; Doc 800-4, Pg 8; Doc 800-5, Pg 1–2.)

Two specific examples from the record suffice to illustrate the reality of disenfranchisement and severe burdens on voting that pollbook errors caused to members of the Plaintiff entity Coalition for Good Governance.

First, as detailed in the district court's findings, (Doc 579, Pg 109–10), Coalition for Good Governance presented evidence that its member Dana Bowers relied on the Secretary of State's website to find her precinct. However, the electronic pollbook did not agree with the website, causing her to have to cast a provisional ballot in the wrong precinct, depriving her of the right to vote all races for she was eligible to vote.

Second, Georgia State Representative and Coalition for Good Governance member Jasmine Clark testified about how, in the July 2018 election, she suffered the experience of having to convince poll managers for a half an hour to let her vote in her correct precinct, rather than sending her to the wrong precinct listed in the electronic pollbook. (Doc 570, pg. 176–78.)

These examples , along with the "mountain" of other evidence submitted by Coalition Plaintiffs, convinced the district court that Georgia's voter registration database and electronic pollbooks have been so poorly safeguarded by the State, and are so inherently vulnerable to errors and malfunctions—if not actual manipulation—that the voter check-in process in every election *threatens* to burden voters and, too often, *actually* prevents eligible in-person voters from voting at all in every contest for which they are eligible to cast votes.[6]

[6] The evidence of voter disenfranchisement due to optical scanner deficiencies that was presented by Coalition Plaintiffs, (Docs 809-2 through 809-16), and in the three-day hearing, (Docs 904, 905, 906), was at least as compelling.

The evidence also showed the district court that Coalition Plaintiffs' proposed preliminary injunctive remedy for electronic pollbook problems, or some variant of it, was feasible for State Defendants to implement.

Specifically, at the September 2020 hearing, Fulton County election director Rick Barron testified about the pervasive pollbook problems that Fulton County had just experienced in the September 2020 election. (Doc 905, at 155–58.) Barron testified that Coalition Plaintiffs' requested relief of the State providing updated paper pollbook information to counties would have helped with Fulton County's voting problems that arose on Election Day and with election-day administration. (Doc 905, Pg 164:19–167:16.)

Georgia election director Chris Harvey also testified that each county could indeed print its own copy of a voters list updated after the close of early voting (Doc 905, Pg 186:4–:20)—i.e., Harvey conceded that Coalition Plaintiffs' requested paper pollbook relief was feasible. When the State's counsel instead cited Harvey's testimony in closings to argue that paper pollbook relief would impose a printing burden on the State, (Doc 906, Pg 164:2–:5), the Court noted Harvey's concession about the alternative—counties doing the printing—and asked counsel to verify whether Harvey's testimony was accurate that the counties could do their own printing if they were electronically provided with updated voter

information. (Doc 906, Pg 164:6–:23.) The State filed an eight-page argumentative response that began by conceding the answer was "Yes." (Doc 895, Pg 1.)

The district court considered the entire evidentiary record established by the numerous preliminary-injunction motions it had received in making its findings. In its Pollbook Order, the district court provided an exhaustive survey of the evidence supporting the injunction relief for all upcoming elections, including November and December 2020, and January 2021. (Doc 965, Pg 10.) Thus the virtually undisputed facts supported by substantial evidence include the following:

First, the PollPads have malfunctioned on Election Day, across the State, in most elections: in the November 2019 pilot of BMDs (Doc 918, Pg 28-32); in the First Quarter 2020 special legislative elections (Doc 723, Pg 23, 55); in the June 2020 primaries (Doc 918, Pg 32-43); in the August 2020 runoff election, (id., Pg 43-47); and even during early voting in the September 29, 2020 Special Election that was underway during the preliminary injunction hearing, (id., Pg 54).

Second, the failure of State Defendants to provide counties with updated paper backups for the malfunctioning electronic pollbooks led to "long lines and waiting periods of hours" and "caused voters to leave and be deterred from voting." (Id., Pg 50; *see generally* id., Pg 28-48). Numerous eye-witness accounts in the evidentiary record tell the same, depressing, story: citizens of all ages,

healthy and frail, eager to vote, are forced to endure (if they can)[7] the State's complete inability to check-in voters because the State provides an exclusively electronic pollbook that routinely and predictably fails to function.

Third, without updated paper pollbook backups, these problems are likely to continue in the upcoming elections in November and December 2020 and the January 2021 U.S. Senate runoff. "The totality of the evidence presented in connection with the elections conducted thus far on the State's new system provides no indication that the circumstances facing voters described above will be better in the November election." (Doc 918, Pg 50).

D. Standard Or Scope Of Review For Each Contention

This Court is required to examine its own jurisdiction *sua sponte* and reviews jurisdictional issues *de novo*. *Wood v. Raffensperger*, 981 F.3d 1307, 1313 (11th Cir. 2020). Once standing requirements are met, *Granite State Outdoor Advert., Inc. v. City of Clearwater*, 351 F.3d 1112, 1116 n.3 (11th Cir. 2003), this Court will "examine the district court's grant of the preliminary injunction for abuse of discretion, reviewing *de novo* any underlying legal conclusions and for

[7] A June 2020 voter in Sope Creek recounted: "Water and a chair were requested for a gentleman who was 'collapsing from overheating.' When I returned to the parking lot, I saw emergency responders who were tending to him and loading him into the ambulance. Sadly, he was not able to cast his vote this morning." (Doc 755 at 148).

clear error any findings of fact." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317 (11th Cir. 2019).

"Clear error exists if after reviewing the entire record, we are 'left with the definite and firm conviction that a mistake has been committed.'" *United States v. Brown*, ___F.3d___, 2021 WL 1821852, *22 (U.S. 11th Cir. 2021). But "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Madison v. Commissioner*, 761 F.3d 1240, 1255 (11th Cir. 2014).

State Defendants say that both appealed orders are mandatory injunctions that should be subject to a heightened standard of review. But this invitation into semantics should be avoided because both orders are essentially prohibitory and, in any event, meet the standard for granting injunctive relief set by the Supreme Court in *Winter v. NRDC,* 555 U.S. 7, 20 (2008). The Pollbook Order, for example, prevents the State from excluding early and absentee voters from the outdated paper lists of voters eligible to vote on Election Day that currently accompany the electronic pollbooks and from relying upon the flawed and corrupted data in the electronic pollbooks. (Doc 965, Pg 3.) Substantive prohibitions like this are reviewed using the ordinary standard. *See Innovative Health Sys. v. City of White Plains*, 117 F.3d 37, 43 (2d Cir. 1997) ("the distinction between mandatory and

prohibitory injunctions is often 'more semantical than substantive'") (citation omitted).

Review of an injunction is "extremely narrow in scope." *Carillon Imps., Ltd. v. Frank Pesce Int'l Grp., Ltd.*, 112 F.3d 1125, 1126 (11th Cir. 1997). "[N]o attention is paid to the merits of the controversy beyond that necessary to determine the presence or absence of an abuse of discretion." *Mitsubishi Int'l Corp. v. Cardinal Textile Sales*, 14 F.3d 1507, 1517 (11th Cir. 1994).

The ruling below may be affirmed "on any ground that appears in the record, whether or not that ground was relied upon or even considered by the court below." *Simpson v. Sanderson Farms, Inc.*, 744 F.3d 702, 705 (11th Cir. 2014).

SUMMARY OF ARGUMENT

As a threshold matter, though State Defendants' broad standing objection is not properly at issue in this appeal, Coalition Plaintiffs have standing to sue and to seek relief regarding pollbooks and scanners under the allegations of both of their operative complaints. Their standing has been demonstrated with evidentiary proof appropriate for the preliminary-injunction stage of litigation.

In Appeal 20-13730, the Pollbook Order should be affirmed because the pollbook relief is within the scope of Coalition Plaintiffs' two operative complaints, because the district court was correct on the merits in granting the relief, and because neither Rule 65 nor the Eleventh Amendment bars the relief.

In Appeal 20-14067, the Scanner Order is not an appealable injunction because it grants no relief. The appeal should be dismissed.

Because no other issues are raised by these consolidated appeals, this Court should limit its review to consideration of the two appealed orders. It is unnecessary for this Court to delve any further into the merits to be able to affirm the Pollbook Order and dismiss the appeal of the Scanner Order.

ARGUMENT

I. Coalition Plaintiffs Have Standing To Sue

State Defendants object to Coalition Plaintiffs' standing to challenge the BMD electronic touchscreen voting machines. (Aplts.' Br. 30-44.) That is not properly challenged in this appeal because interlocutory appellate jurisdiction extends only to the two appealed injunction orders. Reviewing Coalition Plaintiffs' standing to sue under other aspects their two operative complaints would effectively permit a backdoor appeal of two district court orders that are not themselves subject to interlocutory appellate review under 28 U.S.C. § 1292(a)(1)—namely, the two orders that denied State Defendants' standing-based motions to dismiss Coalition Plaintiffs' operative complaints. (Doc 375, Doc 751.) Neither of these orders is addressed by State Defendants' brief.

Though State Defendants develop no arguments against Coalition Plaintiffs' standing to seek the relief at issue on appeal regarding pollbooks and scanners,

Coalition Plaintiffs do, in fact, have such standing. They established standing to sue in both of their operative complaints by alleging "(1) an injury in fact, meaning an injury that is concrete and *particularized*, and actual or imminent, (2) a causal connection between the injury and the causal conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *City of Clearwater*, 351 F.3d at 1116 (emphasis in original).

A. Coalition Plaintiffs' Third Amended Complaint

In the TAC, (Doc 226), Coalition Plaintiffs alleged a variety of past and future harms that they had suffered and would imminently suffer in upcoming elections as a result of State Defendants' mandate for counties and voters to utilize defectively compromised and error-plagued components of Georgia's then-existing voting system. (Doc 226, Pg 57–65, ¶¶ 145–165.) The alleged harms included disenfranchisement—such as when Coalition for Good Governance member Brian Blosser was turned away from his polling place on Election Day in 2017 due to a recurring "software glitch" that erroneously listed him as ineligible to vote in his congressional district's special election. (Doc 226, Pg 49 ¶ 132, 59–60 ¶ 152.) Other alleged harms involved the threatened violation of Coalition Plaintiffs' rights to freely vote their conscience and to be treated equally with other, similarly situated voters. The entity Coalition for Good Governance alleged the injury of being forced to divert personnel and resources away from its ordinary activities in

order to counteract State Defendant's threatened illegal conduct. (Id. at 14–15, ¶¶ 18–21; at 54–57, ¶¶ 139–44.)

As the district court properly found when it denied Defendants' motions to dismiss the TAC—in an order not challenged by this appeal—the injuries-in-fact alleged by the TAC were concrete, particularized to Coalition Plaintiffs, and imminent. (Doc 309, Pg 17–22.) Because these injuries were also causally connected to Defendants' challenged conduct and redressable by an order against Defendants, they were sufficient to establish Coalition Plaintiffs' standing at the pleading stage. (Id. at 22–29.)

As the case thereafter proceeded through successive preliminary injunction motions, the TAC's allegations of injury-in-fact were bolstered "with the manner and degree of evidence required at the successive stages of the litigation." *Camp Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1269 (11th Cir. 2006). For example, Coalition Plaintiffs presented the sworn testimony of Coalition for Good Governance member Dana Bowers, who was forced to vote a provisional ballot outside her proper precinct, resulting in her disenfranchisement in local races. (Doc 258-1, Pg 72–76; Doc 277, Pg 45–46.)

The district court's several orders describe the ever-increasing body of evidence presented by Coalition Plaintiffs that demonstrate the ongoing burdens

threatening voters, including members of Coalition for Good Governance. (*E.g.*, Doc 309, Pg 32–41; Doc 579, Pg 90–105, 106–112.)

B. Coalition Plaintiffs' First Supplemental Complaint

After Georgia began transitioning from DREs to BMDs, Coalition Plaintiffs filed supplemental claims in the form of their FSC. (Doc 628.) The FSC expressly did not supersede or replace the TAC, but only added to it. (Id. at 6.) Like the TAC, the FSC alleged injuries-in-fact that the district court held to be sufficient to establish Coalition Plaintiffs' standing at the supplemental pleading stage. (Doc 751, Pg 8–14, 34–41.)[8] The district court correctly found that the injuries pled in the FSC satisfied causation and redressability requirements for purposes of standing to sue. (Id. at 41–45.)

Like the order denying dismissal of the TAC, the district court's order denying dismissal of the FSC is not challenged here and cannot be directly appealed on an interlocutory basis. *Nice v. L-3 Communs. Vertex Aero. LLC*, 885 F.3d 1308, 1311 (11th Cir. 2018). As litigation of the FSC's claims progressed beyond State Defendants' dismissal motion, Coalition Plaintiffs placed a huge volume of evidence into the record that reinforce the FSC's allegations of standing

[8] In ruling on State Defendants' motion to dismiss the FSC, the district court rejected the argument that the State's transition from DREs to BMDs rendered claims in the TAC moot. The district court reasoned that DREs would not be used again because they were barred, but the TAC's claims about voter registration and pollbook problems remained alive. (Doc 751, Pg 15–25.)

by showing continuing burdens on voting that present ongoing threats of future injury to Coalition Plaintiffs. (Doc 918, Pg 20–48.)

The injuries that give rise to standing under both these operative complaints are particularized to the individual Coalition Plaintiffs (and members of Coalition). In other words, the threatened injuries that Coalition Plaintiffs have both alleged and proved have been experienced "in a personal and individual way" by the individuals suffered them and are threatened by their recurrence. *Lujan v Defs. of Wildlife*, 504 U.S. 555, 560 n.1 (1992). Brian Blosser, for example, was personally deprived of his own individual right to vote as a result of pollbook irregularities that prevented him from casting a ballot in 2017, as the TAC alleges. (Doc 226, Pg 59–60 ¶¶ 151–52.) Dana Bowers and Jasmine Clark were affected in a personal and individual way by the voter registration and electronic pollbook problems described in their declarations. (E.g., Doc 258-1, Pg 72–76; Doc 277, Pg 45–46; Doc 258-1, Pg 107–10.) These and other individual members of Coalition for Good Governance are threatened with the imminent recurrence of similar harm in each new election; they are threatened, in other words, with exactly the kind of concrete, particularized, non-speculative threatened injury that establishes constitutional standing to seek prospective relief.

Finally, the injuries that give rise to Coalition Plaintiffs' standing to seek pollbook relief are redressable by the Pollbook Order. *See Grizzle v. Kemp*, 634

F.3d 1315, 1317–19 (11th Cir. 2011). "[P]artial relief is sufficient for standing purposes." *Made in the USA Found. v. United States*, 242 F.3d 1300, 1310 (11th Cir. 2001).

C. State Defendants Arguments Are Meritless

State Defendants' standing arguments focus on standing to challenge the BMD electronic touchscreen voting machines, which are not at issue on appeal. (Aplts.' Br. 30–44.) But even if State Defendants had made similar arguments about Coalition Plaintiffs' challenges to pollbooks and scanners, those arguments would be without merit.

1. Coalition Plaintiffs' past and threatened injuries caused by these two challenged system components are not "generalized grievances." (Aplts.' Br. 62, 64.) Coalition Plaintiffs' showing of imminently threatened, concrete, and particularized injuries-in-fact to themselves and their members is in no way diminished by the fact that many other voters may also be similarly threatened. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548, 1548 n.7 (2016) ("The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance. The victims' injuries from a mass tort, for example, are widely shared, to be sure, but each individual suffers a particularized harm."). As long as Coalition Plaintiffs are threatened with a concrete injury that directly affects them "in a personal and individual way," it is

irrelevant to their standing whether others may also be suffering or threatened with personalized injuries-in-fact of their own, arising from the Defendants' same conduct, that endow those others standing for similar reasons.

State Defendants point to *Wood*, 981 F.3d at 1307, as contrary authority. But in *Wood*, this Court correctly held that standing did not exist because there was no particularized injury. *Id.* at 1313–14. The injuries that were alleged in *Wood* were harm to the plaintiff's first asserted interest in only lawful ballots being counted and harm to his second asserted interest in absentee votes not being subjected to "irregularities in the tabulation of election results." *Id.* at 1314–15. Nothing about those interests in election integrity, writ large, concretely affected the plaintiff in a personal and individualized way; rather, both of his asserted interests were "undifferentiated and common to all members of the public." *Id.* at 1314. The plaintiff in *Wood* lacked standing because he alleged only generalized grievances about how the election was conducted.

The opposite is true of Coalition Plaintiffs. Their injuries-in-fact involve a direct, personally felt adverse impact on individuals in the act of exercising the constitutional right to vote. For example, Dana Bowers and Jasmine Clark, like Brian Blosser, are members of Coalition who *individually* experienced concrete burdens on their *own* right to vote, up to and including outright disenfranchisement, due to unremedied flaws in State Defendants' electronic

pollbooks and voter registration databases. (E.g., Doc 258-1, Pg 72–76; Doc 277, Pg 45–46; Doc 258-1, Pg 107–10.) These experiences show that Bowers and Clark are threatened with experiencing this injury in each new election. *Lynch v. Baxley*, 744 F.2d 1452, 1456 (11th Cir. 1984) ("Past wrongs do constitute evidence bearing on whether there is a real and immediate threat of repeated injury which could be averted by the issuing of an injunction."). It is of no matter to Bowers and Clark whether others, who are not before the district court, may be similarly threatened. The relief that Coalition Plaintiffs seek is aimed at avoiding the loss of the right to vote that they themselves (e.g., Bowers and Clark) are personally threatened with suffering. The fact that the relief they seek "may benefit others collaterally" has no effect on their standing. *Bochese*, 405 F.3d at 984.

Burdens on voting are not non-justiciable generalized grievances simply because they universally apply to all voters. What matters is whether the universal burdens are ultimately experienced in distinctly personal ways by different affected voters. Some of the most canonical cases in American constitutional law have addressed voting laws that applied to everyone. *Cf. Jones v. Governor of Fla.*, 975 F.3d 1016, 1030 (11th Cir. 2020) ("Consider first *Harper*, which invalidated a $1.50 poll tax under the Equal Protection Clause. This poll tax applied to the Virginia electorate generally; any voter who wished to cast a ballot in a state election had to pay the tax.") (William Pryor, J.) (describing *Harper v. Va. Bd. of*

Elections, 383 U.S. 663 (1966)).[9] The existence of such cases demonstrates the sufficiency of the allegations in this case. *See Allen v. Wright*, 468 U.S. 737, 751–52 (1984) ("In many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases.")[10]

2. State Defendants fare no better in their argument that Coalition Plaintiffs are improperly "manufacturing" standing by voluntarily choosing to vote by a particular method—and thus supposedly choosing to suffer the burdens entailed by that voting method—where different voting methods are available. But in *Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004), this Court rejected a nearly identical argument on the grounds that it imposed an unconstitutional condition. The city government defendant in *Bourgeois* argued that protestors could avoid a magnetometer scan that violated the Fourth Amendment simply by choosing to voice their disagreement in some other way. This Court held that imposing such a choice was itself a constitutional violation because it presented the

[9] Like *Harper*, this case asserts violations of the Equal Protection Clause.

[10] The justiciability of cases like *Harper*, in which the Supreme Court recognized individual voters' standing to challenge a universally applicable voting regulation (the poll tax), also establishes that Coalition Plaintiffs' operative complaints satisfy prudential standing principles. *See Mulhall v. Unite Here Local 355*, 618 F.3d 1279, 1290 (11th Cir. 2010) (stating three prudential limitations on standing).

"especially malignant unconstitutional condition" of requiring the surrender of one constitutional right as the price to exercise others. *Id.*

Coalition Plaintiffs pled violations of the unconstitutional-conditions doctrine in both operative complaints. (Doc 226, Pg 62 ¶ 158, 65–66 ¶ 162, 67 ¶ 173, 70 ¶ 181; Doc 628, Pg 69 ¶ 226, 72 ¶ 235.) Since a voter's interest in not being subjected to an unconstitutional condition is itself an injury for standing purposes, the existence of alternate voting methods that force voters to choose between burdens on their rights can only reinforce Coalition Plaintiffs' standing.

Moreover, State Defendants are wrong when they argue that the substantial likelihood of disenfranchisement threatening Coalition Plaintiffs, who are certain they will vote by one means or another, somehow equates to the "elevated risk of identity theft" that was found to be speculative in *Tsao v. Captiva MVP Rest. Partners, LLC,* 986 F.3d 1332, 1339 (11th Cir. 2021). Facing disenfranchisement at your polling place on Election Day is not in the same category as being affected by a data breach. Nor does taking steps to avoid that disenfranchisement equate to "manufacturing" standing.

3. State Defendants also challenge the organizational standing of entity Plaintiff Coalition for Good Governance because, they assert, the entity has not proved a diversion-of-resources injury. (Aplts.' Br. 68–72.) This assertion is incorrect—Coalition has both alleged, (Doc 226, Pg 54–57; Doc 628, Pg 64–66),

and substantiated, (Doc 1071-2, Pg 2–6), its diversion of resources "with the manner and degree of evidence required" at successive stags of the litigation. *Camp Legal Def. Fund, Inc.*, 451 F.3d at 1269; *see Arcia v. Florida Secretary of State*, 772 F.3d 1335, 1340–42 (11th Cir. 2014) (applying diversion-of-resources theory). These allegations and showings demonstrate what Coalition has diverted resources from. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1250 (11th Cir. 2020).

But this Court need not resolve the organizational standing question at all because only one Plaintiff must demonstrate standing, *American Civil Liberties Union of Florida, Inc. v. Miami-Dade Sch. Bd.*, 557 F.3d 1177, 1194 (11th Cir. 2009), and all four of the individual Coalition Plaintiffs have established pollbook-related injuries-in-fact. (Doc 1071-1, Pg 6; Doc 640-1, Pg 150–51, 157, 163, 168.). What is more, Coalition for Good Governance has plainly had associational standing throughout this case because several of its identified members, including Brian Blosser, Dana Bowers, and Jasmine Clark, have variously been alleged and shown to have actual and threatened individual injuries that would otherwise entitle them to sue over pollbook injuries in their own right. *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1160 (11th Cir. 2008) (stating elements of associational standing). Organizational standing need not be decided when associational standing exists. *Cf. Common Cause/Ga. v. Billups*, 554

F.3d 1340, 1351 (11th Cir. 2009**)** (dispending with associational standing inquiry where organizational standing was established).

4. Finally, State Defendants seek to tar Coalition Plaintiffs' claims in this case by association with claims that were unsuccessfully raised by different plaintiffs in *Pearson v. Kemp*, 1:20-cv-04809-TCB (N.D. Ga. Nov. 15, 2020). In *Pearson*, as State Defendants detail in their brief, the plaintiffs appear to have appropriated several declarations and a transcript from the district court's public docket in *this* case and re-filed those documents as their own evidence. (Aplts.' Br. at 50 n.8.) The unwarranted conclusion that State Defendants expect this Court to draw is that *Pearson* and this case are the based on the same allegations—they are not—and that standing should be denied here because standing was not found in *Pearson*. This Court should reject any false association of this case with others. Coalition Plaintiffs' claims arose in 2017 and the injuries alleged in the TAC and FSC are supported by a "mountain of voter testimony" and other "compelling evidence"—much of it undisputed. (Doc 579, Pg 11; Doc 918, Pg 21, 47.)

In summary, these State Defendants' arguments lack any merit. Even though State Defendants fail to properly focus their challenge to Coalition Plaintiffs' standing on Coalition Plaintiffs' pursuit of specific injunctive relief against pollbook and scanner problems, there can be no doubt that such standing exists.

II. The Pollbook Order Should Be Affirmed

The injunctive relief granted by the Pollbook Order should be affirmed. Pollbook relief is both actually and constructively within the scope of Coalition Plaintiffs' pleadings. As the district court correctly found, Coalition Plaintiffs are likely to prevail on the merits of their request for pollbook relief. And the relief granted by the Pollbook Order is both compliant with Rule 65 and permissible under the Eleventh Amendment. State Defendants' arguments to the contrary are wrong.

A. The Specific Relief Granted By The Pollbook Order Is Within The Scope Of Coalition Plaintiffs' Two Operative Complaints

Pollbook relief is within the scope of the allegations and claims set out in both of Coalition Plaintiffs' two operative complaints.[11] Even were this not true, the issue of pollbook relief was tried without objection in 2019, so it should be treated as being within the scope of the pleadings now under Rule 15(b)(2) and ordinary principles of waiver. State Defendants' intimation that prudential doctrine bars standing is an undeveloped argument that is wrong in any event.

The TAC defined electronic pollbooks "and related firmware and software" as part of Georgia's challenged DRE voting system, which the TAC alleged had been hopelessly compromised by unauthorized intruders having unfettered access

[11] The district court so held several times. (Doc 751, Pg 20–25; Doc 579, Pg 88–89; Doc 918, Pg 4.)

for months to its software and databases on a completely unsecured Internet server. (Doc 226, Pg 29, ¶59 & ¶¶93–108, ¶¶109–124.) The TAC bases its claims of threatened constitutional violations on, among other things, allegations that Georgia's insecure, erroneous, and malfunctioning electronic pollbooks prevented at least one named member of the entity Coalition for Good Governance (Brian Blosser), from voting and that Coalition's members would be exposed to the same injuries in upcoming elections. (Doc 226, Pg 49, ¶¶131–32; 58, ¶148; 59, ¶¶151–52; 63, ¶¶159–161.)

The FSC adopts relevant allegations about the insecurity and compromised character of Georgia's DRE voting system from Coalition Plaintiffs' TAC, (Doc 628, Pg 54, ¶178), and allegations of serious security flaws in Georgia's voter registration system from Curling Plaintiffs' proposed Third Amended Complaint, (id.; Doc 581-2, Pg 22, ¶¶31–33; at 28, ¶¶50–57), and elaborates that the new voting system adopted in April 2019 and purchased in Fall 2019 will not only utilize compromised data from the old system, but will itself be compromised as a result of sharing unsecured IT infrastructure components with the compromised components of the old voting system. (Doc 628, ¶5, ¶¶177–78, ¶¶181–82, ¶189.) The FSC further alleges that implementation of the new system will require integration of the many new devices with "Georgia's current defective voter registration system." (Id. at 57, ¶189.) Voters using the new system will "suffer a

greater risk of casting a less effective vote than other similarly situated voters who vote by mail." (Id. at 62, ¶203.)

These allegations show that, in this case, the "claims the plaintiff has actually raised (and therefore, what claims he must have standing to raise)," *Bochese*, 405 F.3d at 976, clearly encompass a challenge to voting obstacles presented by Georgia's voter registration system and by both the old and new voting systems' electronic pollbooks.

State Defendants apparently agreed that pollbooks were part of this case during all of 2018, 2019, and most of 2020. In that time, they defended against five injunction motions addressing pollbook and voter registration problems, (Doc 258 (Aug. 2018 DRE and pollbooks motion); Doc 327 (Oct. 2018 pollbooks-only motion); Doc 419 (June 2019 DRE and pollbooks motion); Doc 640 (Oct. 2019 BMD and pollbooks motion); Doc 756 (Aug. 2, 2020 pollbooks-only motion), as well as one Rule 59 motion by Coalition Plaintiffs to amend the August 2019 pollbook relief they were awarded, (Doc 605 (Sep. 12, 2019)).

State Defendants responded to all these motions without ever raising any scope-of-pleadings objection. (Doc Nos. 265; 330; 472; 658; 757; 616.) In other words, after intensely litigating pollbook issues for almost three years—indeed, after even being ordered to fix pollbook problems and apparently meaning to comply, (Doc 584)—State Defendants *never* raised an objection to litigating

pollbook issues (apart from mootness)[12] until August 21, 2020—when they finally did so in the attenuated context of resisting a discovery request. (Doc 810, Pg 19–22, 27–32.) This wildly belated objection was raised on the very day that Coalition Plaintiffs filed their sixth and most recent pollbooks injunction motion, which produced the Pollbook Order. (Doc 800.) The objection met with justified incredulity from the district court and was properly overruled. (Doc 810, Pg 32:1–:20.)

Problems with the electronic pollbooks and voter-registration component of the old and new voting systems are expressly raised in Coalition Plaintiffs' two operative complaints. Even had these problems not been pled as threatening to injure Coalition Plaintiffs, they must by now be treated as having been raised in the pleadings. *See* Fed. R Civ. P. 15(b)(2) ("When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings."); *SEC. v. Rapp*, 304 F.2d 786, 790 (2d Cir. 1962) (treating preliminary injunction as trial for purposes of Rule 15(b)).

However, if State Defendants' decision to litigate pollbook and voter registration problems for the better part of three years without objection does not amount to trial by implied consent for purposes of Rule 15, then principles of

[12] State Defendants subsequently waived their mootness objection when they declined to brief mootness of the plaintiffs' DRE-related complaints when invited to do so by the district court. (Doc 362, Pg 5–7.)

ordinary waiver must still govern. The lengthy failure of State Defendants to object that pollbook problems were purportedly not framed by the pleadings, despite almost three years of intense litigation addressing precisely those problems, has waived any objection State Defendants might once have raised. *See Chavarria v. Intergro, Inc*., 815 F. App'x 375, 378 (11th Cir. 2020). Pollbook problems are clearly within the scope of the claims at issue in this case.

B. The Pollbook Order Is Correct On The Merits

State Defendants next argue that the district court erroneously granted the Pollbook Order on the merits.

1. Applicable Law

a) Injunction Standard

To be entitled to injunctive relief, a plaintiff must establish

> that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

Winter, 555 U.S. at 20; *Lee*, 915 F.3d at 1327 (same). The only element of this test that State Defendants dispute is likelihood of success on the merits.

b) Applicable Constitutional Law

Coalition Plaintiffs' operative complaints plead claims for injunctive relief against threatened violations of their fundamental right to vote and right to equal

protection.[13] These rights are guaranteed by the Due Process Clause of the Fourteenth Amendment and the First Amendment, and by the Equal Protection Clause of the Fourteenth Amendment, respectively.

The issue of whether Coalition Plaintiffs' will succeed on the merits of their right-to-vote and equal-protection claims is determined under the *Anderson-Burdick* framework, which recognizes that States' constitutional responsibility to administer elections necessarily entails a tension between constitutional rights, on one hand, and the practical need for regulation of election processes, on the other. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). "[T]he level of the scrutiny to which election laws are subject varies with the burden they impose on constitutionally protected rights." *Stein v. Alabama Sec'y of State*, 774 F.3d 689, 694 (11th Cir. 2014). "[A] court evaluating a constitutional challenge to an election regulation weigh[s] the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190 (2008). A law that severely burdens the right to vote must be narrowly drawn to serve a compelling state interest. *Burdick*, 504 U.S. at 434; *Lee*,

[13] The FSC also raised a procedural due process claim, but that claim was dismissed and is not at issue here. (Doc 751, Pg 50–51.)

915 F.3d at 1318. But "reasonable, nondiscriminatory restrictions" that impose a minimal burden may be warranted by "the State's important regulatory interests." *Common Cause/Ga.*, 554 F.3d at 1352, 1353–54 (citing *Anderson* and applying *Crawford*). "And even when a law imposes only a slight burden on the right to vote, relevant and legitimate interests of sufficient weight still must justify that burden." *Lee*, 915 F.3d at 1318-19; *Cause/Ga.*, 554 F.3d at 1352.

"The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). "[T]o be considered 'similarly situated,' comparators must be prima facie identical in all relevant respects." *Campbell v. Rainbow City*, 434 F.3d 1306, 1314 (11th Cir. 2006). "The classification must reflect pre-existing differences. . . . The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes." *Williams v. Vermont*, 472 U.S. 14, 27 (1985). Intentional discrimination is not required to prove an equal-protection violation if a rule "discriminates on its face." *See E & T Realty v. Strickland*, 830 F.2d 1107, 1112–13 (11th Cir. 1987). Differences between voting methods also give rise to equal protection issues "of constitutional dimension" where they lead voters who use one method to be "less likely to cast an effective vote than voters" who use a different method. *Wexler v. Anderson*, 452 F.3d 1226, 1231 (11th Cir. 2006). This standard reflects that, "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 v. Sims,* 377 U.S. 533, 555 (1964).

2. The District Court Properly Applied Anderson–Burdick In Finding A Likelihood Of Success On The Merits

In the Pollbook Order, the district court conducted an *Anderson–Burdick* analysis of the evidence in the record and found that, "repeated issues with the operation of the PollPads and BMDs themselves, and ineffective or nonexistent 'non-technical' backup systems in place has led to a severe burden on the rights of voters." (Doc 918, Pg 50.) The district court also found that "the option to vote absentee to avoid problems with the pollbooks" posed "other risks of voter disenfranchisement." (Doc 918, Pg 51–52.) To justify these burdens caused by their "refusal to provide a reconciled and updated paper backup" of eligible voter information, State Defendants offered only a "generic 'interest in timely and accurate administration of elections' and in the use of the electronic pollbooks as the primary method of determining voter eligibility." (Doc 918, Pg 53–54.) Accordingly, the district court properly concluded that, "Plaintiffs' concrete, personal, and measurable injury from the potential for imminent and arbitrary denial or burdening of access to the franchise, if in error, far outweighs the State's articulated concerns." (Doc 918, Pg 57.) The district court accordingly granted relief to alleviate the "significant problems in functionality of the e-pollbooks in

tandem with the defective voter registration database" that "could effectively block voters at the threshold of the polls and preclude or burden their exercise of the franchise." (Doc 969, Pg 10 (explaining Pollbook Order with citation to Doc 309 at 4–12, 34–38; Doc 579 at 21–90; and Pollbook Order, Doc 918 at 20–47).) As the district court later characterized its Pollbook Order ruling,

> The Court did not hold that the Constitution requires paper pollbook backups. The Court held that the State cannot unconstitutionally burden the right of qualified voters to cast their ballots and have them counted. It is plain and simple.

(Doc 969, Pg 11.)

These findings were correct. What is more, these findings as to severity of Coalition Plaintiffs' burdens and the comparative weightiness of the State's justification for its preferred practices are all *factual* determinations. Such findings are only properly reviewed for abuse of discretion. Given the amount of evidentiary support for these findings shown by the entire record of the case and in light of the specific evidence cited in the Pollbook Order itself, the district court's determinations of the burdens on voters and the relative weight of State Defendants' countervailing interests cannot be clearly erroneous. *Madison*, 761 F.3d at 1255 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

State Defendants offer several arguments why the district court erred in applying the *Anderson–Burdick* framework when it decided the Pollbook Order.

1. State Defendants cite the existence of Ga. Comp. R. & Regs. r. 183–1–12–.19(1), which they say already requires a "paper backup list" of voters to be provided to each polling place for use to check in voters if electronic pollbooks fail. (Aplts.' Br. 76.)[14] This is true as far as it goes, but it ignores the crux of the issue that led to the Pollbook Order being granted—whatever list State Defendants provide, it is not sufficiently updated. The issue is not whether a paper backup list is provided *at all*; rather, it is whether the paper list is accurate and sufficiently *updated* so that the list can actually serve its purpose of being a backup for when the electronic pollbooks fail or are wrong, as so often happens. The rule that State Defendants cite is silent on its face about timing, and the evidence shows that State Defendants' current practice is disenfranchising and unjustifiably burdening voters. An outdated list is useless and does not prevent the electronic pollbook check-in process from imposing an unjustified obstacle to voting.

State Defendants argue that their failure to update the paper list with "particular types of data" —*i.e.*, up-to-date data that reflects all early and absentee voting—cannot create a burden on voting of constitutional magnitude. (Aplts.' Br.

[14] State Defendants previously told the district court (incorrectly) that the rule requiring paper voter lists was Ga. Comp. R. & Regs. r. 183-1-12-.07(1), which provides no such thing. (Doc 658, Pg 54)

76; Doc 918, Pg 59).) But this argument fails in the face of the facts on the ground because it disregards the mountain of evidence that convinced the district court to find as a matter of fact that voters are burdened by the failure to update the eligible voter information. (*E.g.*, Doc 680-1, Pg 75–76, Pg 83–91, Pg 132–36.) And even if the burden of potential disenfranchisement were not severe, which it is, relief would still be warranted because State Defendants' preference to provide a list without ensuring it is sufficiently current to serve its purpose is simply not a "reasonable regulatory interest" capable of justifying the resulting burdens on voting. *New. Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020).

2. State Defendants argue that in-person voters who are prevented from voting by erroneous electronic pollbooks and who are unable to be checked in using an out-of-date paper voter list can vote a provisional ballot; that this solution eliminates harm because there is purportedly no evidence in the record of any problems counting provisional ballots; and that voters avoid these burdens on in-person voting by using an absentee ballot. These three related points are misplaced.

First, provisional ballots offer only a partial solution (at best) to disenfranchisement problems caused by malfunctioning electronic pollbooks. Voter database errors frequently send voters to the wrong polling place, where the ballots available to the voter are substantially likely not to contain all the races for which the voter is eligible to vote. For example, Brian Blosser was told he was not

registered in his congressional district and was not given a provisional ballot, so he was unable to vote at all. (Doc 226, Pg 49 ¶¶ 131–32, Pg 59–60 ¶¶ 151–52.) Dana Bowers went to her assigned precinct according to the Secretary of State's website, only to be told that the electronic pollbook assigned her to a precinct some distance away and that she could not vote unless she went to the other precinct (which she did not have time to do), leaving her with no option but to vote a provisional ballot that did not include all races where she was an eligible elector. (Doc 579, Pg 109–10.) And Georgia law has become more restrictive since the Pollbook Order was entered. Now provisional ballots cast in the wrong polling place before 5:00 p.m. cannot be counted at all, even if the voter relies upon erroneous information on the Secretary's website or a precinct card for his or her precinct assignment. O.C.G.A. § 21–2–418(a) (2021).

Second, any suggestion that there is no evidence showing problems with the counting of provisional ballots is entirely beside the point, given that voters who must cast a provisional ballot in the wrong precinct will generally be disenfranchised in some races even if their ballots are counted perfectly.

Third, as previously explained, State Defendants cannot excuse pollbook errors by suggesting the voters can just as easily vote absentee. The district court found as a factual matter that the absentee voting process "poses other risks of voter disenfranchisement" (Doc 918, Pg 51–52 (citing "declarations from fourteen

voters who reported that they returned their absentee ballots by the deadline, but . . . the ballot was not counted").) Forcing voters to choose one constitutional burden in order to avoid another in this manner violates the unconstitutional conditions doctrine. Coalition Plaintiffs pled the imposition of precisely this kind of unconstitutional condition as an injury. (Doc 226, Pg 62 ¶ 158, 65–66 ¶ 162, 67 ¶ 173, 70 ¶ 181; Doc 628, Pg 69 ¶ 226, 72 ¶ 235.) Giving voters the choice to be potentially disenfranchised in a different way is not a viable constitutional alternative to relieving the threat of disenfranchisement posed by erroneous electronic pollbooks.

3. State Defendants argue that burdens found to be severe by the district court cannot, in fact, be severe because they arise "from life vagaries," *Crawford*, 553 U.S. at 197, and because this Court In *Wexler*, 452 F.3d at 1232–33, purportedly held that "electronic voting systems are not a severe burden on the right to vote merely because they are electronic." (Aplts.' Br. 75.) These points are misplaced. When *Crawford* spoke of "life's vagaries," it was referring to the trivialities of a voter losing his own photo identification or not resembling his photo after growing a beard. Those minor issues are categorically different than the burdens here, which involve the government denying eligible voters the ability to cast a ballot on Election Day because the government insists on systematically utilizing inaccurate and out-of-date data for its own records. As for *Wexler*, it does

not apply since Coalition Plaintiffs have never asked the district court to do away with electronic pollbooks "because they are electronic." Rather, Coalition Plaintiffs have asked for a modest remedial measure that will protect them from malfunctions and data errors in the electronic pollbooks, which the evidence shows to have occurred pervasively in Georgia on most Election Days. Nothing in *Wexler* is contrary to Coalition Plaintiffs' request for such relief.

4. State Defendants argue the *Anderson–Burdick* framework imposes no burden of proof and requires no evidentiary showing for the State to prove the existence of the government interest that is to be weighed. (Aplts.' Br. at 75 (citing *Common Cause/Ga.*, 554 F.3d at 1353.) It is true that a State need not prove the existence of its *own* interest with evidence, but whatever the State's asserted interest is, the interest still must be "relevant and legitimate." *Crawford*, 553 U.S. at 191. Neither a State's "financial considerations" nor "its own administrative convenience" qualifies, for neither can justify restraining constitutional rights. *Tashjian v. Republican Party*, 479 U.S. 208, 218 (1986). And no authority takes the government's ability to merely assert an interest of its own to mean that the State can contradict a plaintiff's evidence of constitutional burdens without presenting contrary proof. Regardless of these points, it is unclear why State Defendants believe this point is even relevant; the district court did not disregard

the State's articulated interests, but instead weighed them and found them insufficient to justify the burdens that were imposed on voters.

5. State Defendants argue that the Pollbook Order is improper because the district court relied upon its own previous factual findings and conclusions made in the August 2019 injunction against DREs, which also provided some pollbook relief. (Aplts.' Br. 82.) This argument is borderline frivolous, both given the vast evidentiary record relied upon by the district court in deciding the Pollbook Order, which expressly incorporated the evidence and findings of four previous orders, none of which were appealed by State Defendants, (Doc 918, Pg 3–4), and given the failure by State Defendants to point this Court to any actual *examples* of objectionable "post-hearing" or other "fact-finding" apart from a single filing, (Doc 895), which State Defendants only submitted after the hearing because they were unable to answer a question from the bench that sought to clarify the testimony of their own witness, Chris Harvey, after it was misstated by State Defendants' counsel during closing argument. (Doc 906, Pg 164:2–:23.) To the extent the district court took judicial notice of any other extrinsic materials, including State Defendant's own filing in other cases before the district court, doing so was either permissible or completely harmless. In any event, the "mountain" of evidence adduced by both sets of Plaintiffs in this case was more than adequate to support the findings and conclusions made in the Pollbook Order.

6. Finally, State Defendants suggest that the Pollbook Order did not decide whether Coalition Plaintiffs were likely to succeed on the merits of their injunction motion, but instead decided only whether they were likely to succeed on an "ancillary" contempt motion directed at State Defendants' non-compliance with the August 2019 injunction. (Aplts.' Br. 82–83.) This strange argument disregards that the Pollbook Order, on its face, decides the very question that it claims to decide. The fact that the Pollbook Order incorporated earlier findings and conclusions from the August 2019 order, which State Defendants never appealed, says nothing about the merits of the Pollbook Order. It is frankly mystifying why State Defendants would see any advantage in highlighting their own potential non-compliance with an earlier injunction of the district court. Whatever their motive, State Defendants cannot dispute the merits of the Pollbook Order by calling it something it is not. The district court plainly decided Coalition Plaintiffs' latest pollbook-related injunction motion, not an imaginary contempt motion.

In summary, the district court correctly concluded that Coalition Plaintiffs are likely to succeed on the merits of their request for relief from the threat of being disenfranchised at the polls on Election Day by Georgia's defective voter registration database and pollbooks.

3. State Defendants Dispute None Of The Other Injunctive Factors; Nor Do They Dispute Feasibility

State Defendants do not dispute any of the remaining injunctive factors, nor could they prevail on them if they did.

First, irreparable harm exists because erroneous electronic pollbooks threaten to prevent eligible voters from voting or from voting in all races for which they are eligible. "The denial of the opportunity to cast a vote that a person may otherwise be entitled to cast—even once—is an irreparable harm" *Jones v. Governor of Fla.*, 950 F.3d 795, 828 (11th Cir. 2020), *rev'd on other grounds*, 975 F.3d. 1016 (11th Cir. 2020) (en banc). The availability of provisional ballots (in and for the wrong precinct) does not mitigate this irreparable harm for an affected voter who is sent to the wrong precinct. The same erroneous pollbook data that says a voter is ineligible to vote in the original precinct will also determine which precinct's provisional ballot that voter will be offered. Because the ballot content is frequently different in different precincts, voters who are given a provisional ballot after being sent to the wrong polling place by an arbitrary pollbook error (like Dana Bowers) are still substantially likely to be prevented from voting in at least some of the contests for which they are eligible (and entitled) to vote.

Second, the balance of equities and the public interest weigh decisively in favor of affirming the Pollbook Order. The testimony of Defendants' own elections directors, which conceded both the feasibility and likely benefits of Coalition

Plaintiffs' requested relief, leaves State Defendants with nothing of any weight to put in the balance. (Doc 905, Pg 164:19–167:16 (Barron test.); Doc 905, Pg 186:4–:20 (Harvey test.).) The State's avoidance of administrative inconvenience and cost are not considerations that can be used to justify the violation of constitutional rights. *Tashjian*, 479 U.S. at 218.

Finally, State Defendants press no timing arguments on appeal based on *Purcell v. Gonzales,* 549 U.S. 1, 4–5 (2006), and *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). Nor could they; the staying of the Pollbook Order eliminated even any minor risk that the Pollbook Order would produce voter confusion on the eve of the 2020 general election.

Judgments "about the viability of a plaintiff's claims and the balancing of equities and the public interest . . . are the district court's to make and we will not set them aside unless the district court has abused its discretion in making them." *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., Ltd. Liab. Co.*, 425 F.3d 964, 968 (11th Cir. 2005). The district court's conclusions in the Pollbook Order as to the three unchallenged injunctive factors were legally sound and fully supported by the record, (Doc 918, Pg 5–53 (irreparable injury), Pg 59–60 (public interest), Pg 63 (balance of equities)); thus they were not an abuse of discretion.

C. The Pollbook Order Grants Permissible Relief

1. The Pollbook Order Satisfies Rule 65's Standards

The Pollbook Order clearly satisfies the requirements of Rule 65(d). State Defendants strain to read the order's requirements as indecipherably vague, going when what the Pollbook Order demands from State Defendants is perfectly plain on the face of the order.

State Defendants are wrong that the Pollbook Order fails to grant "intermediate relief of the same character as that which may be granted finally." The Pollbook Order grants prospective injunctive relief, which is exactly the kind of relief that Coalition Plaintiffs expressly seek in the two operative complaints and is consistent with the clear intent of Georgia statutes concerning the accuracy of pollbooks. The relief is obviously not complete; it contains modest requirements that provide only partial redress for a specific harm caused by a single practice that is just one part of State Defendants' larger challenged course of conduct. But the district court's reluctance to impose more than careful and non-disruptive requirements on State Defendants' conduct does not make the Pollbook Order in any way deficient as an injunction. Rather, it merely serves to illustrate and reinforce the extraordinary deference and restraint that the district court has continuously showed to State Defendants throughout this case.

2. The Eleventh Amendment Does Not Bar The Relief Granted By The Pollbook Order

This Court previously held that the Eleventh Amendment did not bar claims raised in Coalition Plaintiffs' TAC while noting that the TAC did not seek "a court order directing the precise way in which Georgia should conduct voting." (Doc 338 (*Curling v. Worley*, 761 F. App'x 927, 930, 934 (11th Cir. 2019)). State Defendants claim the specificity of the Pollbook Order should produce a different outcome now. But the Pollbook Order does not come close to directing "the precise way in which Georgia should conduct voting." Instead, it simply requires the State to make modest changes to a single process for checking in voters on Election Day. Such changes are consistent with the intent of Georgia's existing statutes.

Such modest changes are well within the outer boundaries of equitable relief that a federal court may grant against a State consistently with the Eleventh Amendment. *See Seminole Tribe of Fla. v. Fla. Dep't of Revenue*, 750 F.3d 1238, 1246 (11th Cir. 2014) (citing with approval *Milliken v. Bradley*, 433 U.S. 267, 289–90 (1977), for ruling a federal court could require a State to institute school programs to eliminate the vestiges of racial segregation). Moreover, the Supreme Court has long held that the constitutional authority of States to regulate elections must be exercised "in conformity to the Constitution," *United States v. Classic*, 313 U.S. 299, 314 (1941), including the Bill of Rights. The State is simply wrong

that the Eleventh Amendment prevents the district court from enjoining election practices that violate constitutional rights.

III. The Scanner Appeal Should Be Dismissed For Lack Of Jurisdiction

Appellate jurisdiction over the Scanner Order is lacking. Appeal No. 20-14067 should be dismissed, and the Scanner Order returned to the district court for further proceedings.[15] This Court was correct to issue its Jurisdictional Question on December 12, 2020, asking whether the appeal of the Scanner Order was premature. The answer is "Yes." As this Court discerned for itself, the Scanner Order granted no specific relief, but instead only declared the district court's *intention* to grant undetermined relief. (Doc 964, Pg 142.)

Once Coalition Plaintiffs submitted their proposal, along with explanatory expert testimony and exhibits, (Doc 990, 990-1, 990-2), the district court did not adopt this plan, but instead deferred its "further consideration" of scanner relief until after the January 5, 2021 runoff election, (Doc 1021.) The district court has not yet ordered any substantive relief.

State Defendants liken the Scanner Order to the vague injunction that the Supreme Court held to be reviewable in *Schmidt v. Lessard*, 414 U.S. 473 (1974).

[15] Coalition Plaintiffs adopt all arguments against this Court's appellate jurisdiction over the Scanner Order set out in the December 18, 2020, Joint Response To Jurisdictional Question From Plaintiffs–Appellees (No. 20-14067) and in the June 2, 2021, Brief For Plaintiffs-Appellees Donna Curling, Donna Price, and Jeffrey Schoenberg (Consolidated Nos. 20-13730 and 20-14067).

(Aplts.' Br. at 80.) But the "important distinction" that made the order in *Schmidt* reviewable was the fact that it was accompanied by a judgment. There is no judgment here; *Schmidt* is inapposite.

In practical terms it is clear that State Defendants understand the Scanner Order requires nothing of them. They sought to stay the Pollbook Order both in the district court and in this court, but never did the same for the Scanner Order. If the Scanner Order actually required State Defendants to do anything, or imposed any adverse consequence upon them, then presumably they would have sought to stay it as well. That they did not speaks volumes.

For another thing, State Defendants argue the Scanner Order fails to comply with Rule 65 because it is "silent as to any details" and instead expresses a lack of "enough information to put the relief into place." (Aplts.' Br. at 81.) These faults are the hallmarks of an order that grants *no* relief, not one that is merely vague. State Defendants' arguments against the Scanner Order support dismissal of the appeal for lack of appellate jurisdiction, not a reversal of the Scanner Order on the merits. *See Gunn v. Univ. Comm., to End War*, 399 U.S. 388, 389 n.4 (1970).

The Scanner Order is plainly premature for appeal. It will not become appealable until and unless the district court grants substantive relief. When that happens, State Defendants can appeal. For now, this Court should dismiss Appeal No. 20-14067.

IV. No Other Issues Are Properly Before This Court On Appeal

The only issues properly raised in these consolidated appeals—the merits of the Pollbook Order and this Court's lack of appellate jurisdiction over the Scanner Order—are narrow. Yet, for the second time, State Defendants invite this Court to wade into this case with a sweeping ruling to extricate them from what has been a protracted, but productive, multi-pronged litigation battle. This Court should resist being drawn more deeply into the merits of this case than necessary for a properly limited review. This is particularly so, now that this case is moving toward a conclusion in the district court, with a summary judgment and trial readiness schedule having just been put into place. (Doc 1093 (May 20, 2021).)

"Although we can sometimes decide legal issues conclusively in preliminary injunction appeals, . . . the Supreme Court has said that 'limited [abuse of discretion] review normally is appropriate.'" *Harbourside Place, Ltd. Liab. Co. v. Town of Jupiter*, 958 F.3d 1308, 1314 (11th Cir. 2020) (collecting cases) (alteration in original). Just such an approach is warranted here.

The record shows, as the district court has found, that Coalition Plaintiffs have amassed a "mountain of voter testimony," "a huge volume of significant evidence," and "compelling evidence"—much of it undisputed—in support of their pollbook and scanner claims. (Doc 579, Pg 11; Doc 964, Pg 23; Doc 918, Pg 21, 47.) Coalition Plaintiffs have accomplished this achievement even though

"[p]reliminary injunction motions are often, by necessity, litigated on an undeveloped record" that "makes it harder for a plaintiff to meet his burden of proof." *Siegel v. LePore*, 234 F.3d 1163, 1175 (11th Cir. 2000). In view of the evident progress and advanced state of the proceeding below, this Court should not now short-circuit the usual course of litigation by unnecessarily deciding broad standing or merits issues beyond the limited ones required to resolve these consolidated interlocutory appeals.

CONCLUSION

The Pollbook Order should be affirmed. The appeal of the Scanner Order should be dismissed as premature for appellate review, and the Scanner Order should be returned to the district court for further proceedings.

Respectfully submitted on June 2, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains **12,997** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(i) and 11th Cir. R. 32-4; and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

This 2nd day of June 2021,

By: *S/ Robert A. McGuire, III*
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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2021, I filed the foregoing Brief Of Plaintiffs–Appellees Coalition For Good Governance, Laura Digges, William Digges III, Ricardo Davis, & Megan Missett electronically using the Court's CM/ECF system, which will send notification of such filing to all counsel of record.

By: *S/ Robert A. McGuire, III*
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