Nos. 20-13730 and **20-14067**

In the

United States Court of Appeals
for the Eleventh Circuit

DONNA CURLING, DONNA PRICE, JEFFERY SCHOENBERG,
and
COALITION FOR GOOD GOVERNANCE, LAURA DIGGES,
WILLIAM DIGGES III, RICARDO DAVIS, AND MEGAN MISSETT,

Plaintiffs-Appellees,

v.

BRAD RAFFENSPERGER, *et al.*,

Defendants-Appellants.

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On Appeal from the United States District Court for the
Northern District of Georgia, Atlanta Division.
No. 1:17-cv-2989-AT — Amy Totenberg, *Judge*

APPELLANTS' REPLY BRIEF

Vincent R. Russo
Joshua B. Belinfante
Carey A. Miller
Alexander F. Denton

ROBBINS ROSS ALLOY BELINFANTE
LITTLEFIELD, LLC
500 14th Street NW
Atlanta, Georgia 30318
Tel: (678) 701-9381

Bryan P. Tyson
Jonathan D. Crumly
Robert Dalrymple Burton
Diane F. LaRoss
Bryan F. Jacoutot
Loree Anne Paradise
TAYLOR ENGLISH DUMA, LLP
1600 Parkwood Circle
Suite 200
Atlanta, Georgia 30339
Tel: (770) 434-6868

Counsel for Appellants

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rules 26.1-1 through 26.1-3, counsel for Appellants hereby certify that the Certificate of Interested Persons contained in their Initial Brief is complete, with the exception of the following persons, omitted therein and disclosed in Coalition and Curling Plaintiffs' Briefs:

166. Dominion Voting Systems, Inc., a non-party to this case;
167. Palmore, Joseph R., counsel for Curling Plaintiffs;
168. Qian, Michael F., counsel for Curling Plaintiffs.

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CORPORATE DISCLOSURE STATEMENT

Counsel for Appellants certify that Appellants are individuals, sued in their official capacities as representatives of State government entities. Counsel for Appellants further certify that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

/s/ Vincent R. Russo
Vincent R. Russo
Georgia Bar No. 242628
Counsel for Appellants

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INTRODUCTION

Coalition Plaintiffs are advocates who have a particular view of how elections should be run—without electronic voting machines that are too vulnerable and insecure for use by Georgians, except for disabled voters. That view came into sharp focus in litigation surrounding Georgia's Dominion BMD System after the 2020 election, when other litigants relied on the record in this case to erroneously allege that the malicious hacking of the sort theorized by the Plaintiffs in this case occurred in the Presidential election. In its entry of two injunctions, the district court endorsed Coalition Plaintiffs' view, requiring changes to Georgia's election system on the eve of the 2020 election, before this Court ultimately stayed the Pollbook Order. Unsurprisingly, those other litigants relied on the orders and Plaintiffs' outlandish claims in their quest to shake the confidence of Georgians in their elections.

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In response to State Defendants' arguments in their principal brief, Coalition Plaintiffs[1] are left re-imagining the history and record

[1] Of the two groups of Plaintiffs in this case, only Coalition Plaintiffs received any relief and thus are the only appellee in this appeal. Nonetheless, Curling Plaintiffs filed a brief as an Appellee, asserting—without citation—that "State Defendants devote the standing section of their brief to attacking Curling Plaintiffs' claims challenging Georgia's BMD System." Curling Br. at 22; *but see* Reply ISO Mot. to Correct Style at 5–7 (disputing Curling Plaintiffs' misleading statement).

before the district court. They ask this Court to ignore whether they have demonstrated an injury in fact—and ignore themselves the requirements of traceability and redressability. But this sleight of hand is not surprising. Coalition Plaintiffs do not want this Court to recognize they have only generalized grievances, common to all voters and not particularized to them. And to the extent they make identifiable claims about potential injuries, they rely on declarations that were not before the district court when it entered its injunctions or that only reference the system that was taken out of service in Georgia and decertified over 18 months ago.

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But even if the district court had jurisdiction, it made a number of reversable errors. It misapplied the *Anderson/Burdick* test, finding a severe burden on the right to vote from everyday occurrences in voting, ignoring Georgia's interest in its existing statutory scheme that already addresses the purported issues, relying on inapposite declarations and filings from other cases judicially noticed after evidence had closed, and granting relief on claims not encompassed with Coalition Plaintiffs complaints. And then it crafted two orders that were confusing and non-specific, relying on a prior unenforceable order from 2019 and placing State Defendants in peril of contempt based on the actions of nonparty

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Because Curling Plaintiffs cannot decide whether they want to be a party to this appeal or not, and because State Defendants' motion to dismiss them from the appeal remains pending, State Defendants focus this reply brief on Coalition Plaintiffs' response brief.

county officials. The district court improperly directed State Defendants on the administrative details of elections—down to the data fields to be included in materials used by poll workers—and ignored the Eleventh Amendment and prudential considerations. Both orders should be vacated.

ARGUMENT AND CITATION TO AUTHORITY

I. The district court entered mandatory injunctions.

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Coalition Plaintiffs first argue that this Court should ignore its own precedent and disregard the mandatory nature of the injunctions at issue here. Coalition Br. at 35. Relying on *Innovative Health Sys. v. City of White Plains*, 117 F.3d 37, 43 (2d Cir. 1997), they contend that the injunctions entered in the Pollbook and Scanner Orders are prohibitory rather than mandatory injunctions and should be reviewed using the "ordinary standard." Coalition Br. at 35.[2] This is incorrect.

"When a preliminary injunction goes beyond the status quo and seeks to force one party to act, it becomes a mandatory or affirmative injunction and the burden placed on the moving party is increased." *Mercedes-Benz U.S. Int'l v. Cobasys, LLC*, 605 F. Supp. 2d 1189, 1196

[2] Pursuant to 11th Cir. R. 28-5, page number references to documents filed in this Court and in the District Court refer to the page number appearing in the header generated by the courts' electronic filing systems.

(N.D. Ala. 2009) (citing *Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 441 F.2d 560, 561 (5th Cir. 1971)) (additional citations omitted). Here, the district court did not enter an injunction preserving the status quo or prohibiting State Defendants from some action. Instead, the district court *directed* State Defendants to generate paper pollbook back-ups including certain types of data, print and distribute them for use as the district court required, evaluate the need for additional backups, train local officials on use of the backups consistent with the court's order, implement changes to scanner settings prior to the next election cycle, and expeditiously review and revise its pre-election testing procedures. Doc. 918 at 64–66; Doc. 964 at 59–60, 140–41.

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In this Circuit, "[m]andatory preliminary relief, which goes well beyond simply maintaining the status quo, is particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party." *Powers v. Sec'y, Fla. Dep't of Corrections*, 691 F. App'x 581, 583 (11th Cir. 2017) (quoting *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976)). Mandatory injunctions "are to be sparingly issued and [only] upon a strong showing of necessity and upon equitable grounds which are clearly apparent." *Fox v. City of W. Palm Beach*, 383

F.2d 189, 194 (5th Cir. 1967).[3] And mandatory injunctions increase the plaintiff's burden. *Exhibitors Poster Exch.*, 441 F.2d at 561.

II. Coalition Plaintiffs lack Article III standing to pursue their claims.

Coalition Plaintiffs want this Court to ignore its jurisdictional limitations and those of the district court, claiming that this Court should not review their standing to press the claims pleaded in their complaint. Coalition Br. at 37. Although Curling Plaintiffs should not be considered a party in this appeal, they agree, arguing that "whether Plaintiffs have standing to challenge the State's BMD system is entirely separate from whether they have standing to challenge pollbooks and scanners." Curling Br. at 23. Even accepting Plaintiffs' formulation of the jurisdictional issue, it shows precisely what State Defendants have argued all along: claims regarding scanner settings and Poll Pads *are not encompassed within the operative complaints*. If they are, then there should be no objection from Plaintiffs to this Court's review of Coalition Plaintiffs' standing to press their claims, but if they are not encompassed within the complaint, reversal is required for an independent reason: Coalition Plaintiffs did not demonstrate they were "likely to prevail on the merits of any cause of action [they] *had*

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[3] In *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1210 (11th Cir. 1981), the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit adopted prior to October 1, 1981.

alleged." *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1134 (11th Cir. 2005) (emphasis added); *see also*, *infra*, Section III.

In any event, determining whether the district court had jurisdiction over the case requires a "preliminary determination of *what claims the plaintiff has actually raised* (and therefore, what claims he must have standing to raise)," and in making that determination this Court is "bound by the contents of the plaintiff's pleadings, even on summary judgment." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 976 (11th Cir. 2005) (emphasis in original)[4]; *see also Raines v. Byrd*, 521 U.S. 811, 818 (1997) (evaluating standing of plaintiffs "based on their complaint"). Accordingly, the complaint is the proper starting point for an inquiry into whether standing exists at the preliminary-injunction stage.

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Without standing, the district court had no jurisdiction to exercise its authority in issuing the orders—and this Court has an independent obligation to "satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review." *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999) (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)) (internal marks omitted). Moreover, many of the problems in the orders (and this case as a whole) can be traced to the district court's refusal to properly delineate the claims at

[4] Shockingly, Coalition Plaintiffs press this argument despite citing to this *very case* in their brief three times. Coalition Br. at 21, 44, 51.

issue by way of determining Plaintiffs' standing for the precise claims they press and requiring motions for relief be tied to those claims. *See Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353 (1997) (explaining the district court's duty to adequately manage cases before it and the consequences of failing to rule on significant pretrial motions).

In this appeal, Coalition Plaintiffs offered no response to State Defendants' arguments on traceability and redressability, which is fatal to their contentions on appeal. As State Defendants explained in their brief, the purported injuries are neither traceable to State Defendants nor redressed by an order against them. State Defs' Br. at 72–74. On the only standing argument Coalition Plaintiffs do address, injury, their arguments are misplaced. Coalition Plaintiffs vaguely claim their "injuries-in-fact involve a direct, personally felt adverse impact on individuals in the act of exercising the constitutional right to vote." Coalition Br. at 42–43. However, the record shows that no plaintiff has been personally harmed (or threatened with imminent harm) by any aspect of the Dominion BMD System since its implementation.

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A. *Coalition Plaintiffs cannot demonstrate an injury in fact.*

Coalition Plaintiffs contend that in their Third Amended Complaint (the "TAC") and First Supplemental Complaint ("FSC") they had "alleged a variety of past and future harms that they had suffered and would imminently suffer in upcoming elections." Coalition Br. at 38

(citing Doc. 226) and 40 (citing Doc. 628). This, however, ignores that the TAC challenged the use of the old DREs and the old EPollbooks,[5] neither of which are in use anymore. More troubling, Coalition Plaintiffs allege other individuals with claimed injuries are members of the Coalition for Good Governance, but there is nothing in the record demonstrating that membership.

For example, Coalition Plaintiffs point to Brian Blosser, Dana Bowers, and Representative Jasmine Clark as members of the Coalition who experienced alleged burdens on their right to vote "due to unremedied flaws in State Defendants' electronic pollbooks and voter registration databases." Coalition Br. at 43–44 (citing Doc. 258-1 at 72–76; Doc. 277 at 45–46; Doc. 258-1 at 107–10). But all of these citations concern the old EPollbooks which are *no longer in use*. Moreover, there is no evidence in the record of Rep. Clark's membership with the Coalition for Good Governance. *See generally* Doc. 570, Tr. 175–189. Even as to Mr. Blosser, the only appearance of this individual in the entire record of this case is confined to Coalition Plaintiffs' TAC. Doc. 226 at 49 (¶¶ 131–132), 59–60 (¶¶151–152). No declaration from Mr. Blosser attesting to his membership is in the record and no testimony from Mr. Blosser was ever heard by the district court. Coalition

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[5] EPollbooks are the tradename of the electronic Pollbooks utilized with the old DRE/GEMS system. Those components were replaced by the KnowInk Poll Pads with implementation of the Dominion BMD System.

Plaintiffs cannot therefore point to these individuals to establish associational standing—no reliable evidence of their purported member status exists and their purported injuries are confined to the old system.

Even beyond their purported members, Coalition Plaintiffs continue to rely on various declarations alleging problems with the voting system that Georgia replaced before the 2020 elections. Coalition Br. at 30 (citing Doc 412; Doc 413; Doc 640-1 at 150–53, 157–58, 163–64, 168–69; Doc 680-1 at 75, 83–91, 132–35, 192–93, 170–75). Relying on *Lynch v. Baxley*, 744 F.2d 1452, 1456 (11th Cir. 1984), Coalition Plaintiffs claim that the past experiences of these individuals shows that they are threatened with experiencing an injury in each future election. Coalition Br. at 44. However, these alleged past injuries occurred under the old DRE system, which was decertified nearly 18 months ago, Doc. 689-4, and not under Georgia's current Dominion BMD System. Like the plaintiffs in *Shelby Advocates for Valid Elections v. Hargrett*, another suit brought by activists opposed to electronic voting systems, the allegations "all boil down to prior system vulnerabilities, previous equipment malfunctions, and past election mistakes. Past may be precedent. But the Supreme Court has not been sympathetic to claims that past occurrences of unlawful conduct create standing to obtain an injunction against the risk of future unlawful conduct." 947 F.3d 977, 981 (6th Cir. 2020).

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Even with their claims about the new Poll Pads, Coalition Plaintiffs cannot demonstrate an imminent injury in fact, let alone an injury to *themselves*. Coalition Plaintiffs claim that malfunctions of the Poll Pads delayed voters at polling locations. Coalition Br. at 29–30, 33. Notwithstanding that even the district court recognized that "[i]n many instances … poll workers *did not use*" the paper backups already required by State law, Doc. 918 at 48 (emphasis added), there is no evidence that any *plaintiff* experienced a delay voting due to a Poll Pad not being operational, nor that any *plaintiff* was prevented from voting due to any issue with a Poll Pad. Coalition Plaintiffs do not have a "personal stake" in the dispute, and the alleged injury suffered is not particularized as to any plaintiff. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–561 (1992) (to have standing, the plaintiff must have suffered a "particularized" injury, which means that "the injury must affect the plaintiff in a personal and individual way").

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Coalition Plaintiffs largely avoid any response to State Defendants' arguments that their purported injuries are not imminent. In *Tsao v. Captiva MVP Rest. Partners, LLC*, 986 F.3d 1332 (11th Cir. 2021), this Court held that where a plaintiff's claims were premised on a fear that "he *could* suffer future injury from misuse of the personal information disclosed during the cyber-attack (though he has not yet)," the potential future harm was insufficient to confer standing on the plaintiff. *Id.* at 1337. In addressing *Tsao*, Coalition Plaintiffs argue that

"[f]acing disenfranchisement at your polling place on Election Day is not in the same category as being affected by a data breach." Coalition Br. at 46. But Coalition Plaintiffs cite no authority for the distinction they draw and ignore entirely the Sixth Circuit's holding in *Hargrett*, 947 F.3d 977. In any event, the Supreme Court emphasized again just weeks ago, imminence is required to maintain standing for a prospective claim: "a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently *imminent and substantial*." *TransUnion LLC v. Ramirez*, No. 20-297, 2021 WL 2599472 at *12 (U.S. June 25, 2021) (emphasis added) (citations omitted). Indeed, the Supreme Court has consistently refused to "endorse standing theories that rest on speculation about the decisions of independent actors," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013), and especially speculation about future unlawful conduct, *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). This Court should not entertain Coalition Plaintiffs' request to ignore binding precedent.

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Finally, any injury from the scanner threshold settings is not personal to Coalition Plaintiffs. Coalition Plaintiffs do not allege that *their* vote will be subject to harm from the scanner DPI settings (indeed they do not allege anything in their complaints regarding scanner settings). Every person who votes a mail-in absentee ballot is subject to the same scanner threshold settings used by the scanners to determine

whether a ballot has been marked. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (injury must affect the plaintiff in a personal and individual way). And every voter is subject to the same instructions on the ballot which tell the voter to "blacken the oval next to the candidate of their choice." Doc. 964 at 95.[6] In any event, there is no evidence in the record of a Plaintiff's vote, nor any Coalition member's vote, not counting due to the scanner settings.[7] Nor is there any evidence that voters who simply follow the printed instructions on the ballot suffer a risk of disenfranchisement. Coalition Plaintiffs are simply "concerned bystanders," without a sufficiently particularized and personal stake in the matter, inserting themselves into litigation so they can "use it simply as a vehicle for the vindication of value interests." *Gardner v. Mutz*, 962 F.3d 1329, 1342 (11th Cir. 2020) (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013)).

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B. *The Coalition, as an organization, cannot establish injury in fact.*

Coalition Plaintiffs offer little in response to State Defendants' arguments that the Coalition lacks standing as an organization.

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[6] For this same reason, any purported injury from scanner settings is traceable only to the independent decision of a voter to ignore the printed instructions on the ballot.

[7] Strangely, the relief Coalition Plaintiffs seek in the operative complaint would involve the continued use of the same Dominion scanners that they also claim are unconstitutional. *See* Doc. 226, Ad Damnum Clause at ¶ C; Doc. 628, Ad Damnum Clause at ¶¶ F and H.

Coalition Br. at 30–31. They rely on the purported standing of their members, but that is unavailing because no member faces an imminent and concrete injury. On Coalition's standing under a diversion-of-resources theory, they assert they have "substantiated" their diversion of resources, but then cite to a self-serving declaration submitted well after the district court entered the injunctions and this appeal was taken. Coalition Br. at 46–48. They further ignore that *they* chose not to prove *their* standing burden in the hearing on their motions after the district court refused State Defendants' request to cross-examine the Plaintiffs on their standing.

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The Coalition claims it has associational standing 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." Coalition Br. at 47. But this argument is inapposite. First, not a single purported member of the Coalition claims to have been injured by the Dominion scanners at issue in the Scanner Order. Second, none of the purported members of the Coalition or individual Plaintiffs have experienced a personal injury caused by the new Poll Pads at issue in the Pollbook Order.

The individual Plaintiffs and purported members of the Coalition each make the same assertion: that they are aware of "systemic

problems" with electronic pollbooks during the November 2018 elections and prior elections. Doc. 640-1 at 150–51, 157, 163, 168. Dana Bowers' declaration states that in 2018, her "My Voter Page" (not a part of this case) indicated that she was assigned to one precinct but she believed she was actually assigned to a different precinct, and when she went to vote in person, the electronic pollbook had her assigned to the correct precinct. Doc. 258-1 at 72–74. Jasmine Clark's declaration from 2018 does not indicate that she was a member of the Coalition at the time of her declaration, and despite initially being told that she was assigned to a different precinct, her name was ultimately located in the electronic pollbook and she was allowed to vote. Doc. 258-1 at 106–111. Finally, in the TAC, Coalition Plaintiffs' allege that Brian Blosser is a member of the Coalition and was prevented from voting in 2017 because he was erroneously listed as a resident of another congressional district. Doc. 226 at ¶¶ 151–152. But Mr. Blosser has not provided a declaration to substantiate the allegations in the TAC, and like the other declarants cited by Coalition Plaintiffs, any harm experienced by Mr. Blosser occurred prior to the Dominion BMD System.

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Likewise, Coalition Plaintiffs' citation to allegations in the TAC and FSC, along with a February 12, 2021 declaration of the Coalition's Executive Director, Marilyn Marks, do not demonstrate the Coalition's organizational standing. Coalition Br. at 46–48. The district court did not consider Ms. Marks' declaration in determining Plaintiffs had

standing, nor did the district court consider this declaration at the time it issued the orders on appeal—those rulings had been made months prior. Regardless, both the pleadings and Ms. Marks' declaration demonstrate that the Coalition has not diverted any resources *away from* its mission—at most they show that the Coalition is using its resources (and this litigation) to promote its organizational purpose. *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). Because the Coalition is serving its purpose by pursuing this litigation, engaging in poll watching, educating voters about Georgia's voting system, and promoting its policies in Georgia, it cannot be diverting resources because it is doing the very thing it exists to do. *See Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996); *see also Ga. Ass'n of Latino Elected Officials, Inc. v. Gwinnett Cty. Bd. of Registrations & Elections*, 499 F. Supp. 3d 1231, 1240 (N.D. Ga. 2020) (no organizational standing when organization was only serving its organizational purpose); *NAACP v. City of Kyle*, 626 F.3d 233, 238–239 (5th Cir. 2010) (no injury sufficient for organizational standing where expended resources were litigation-related or no different than the organizations' ongoing activities); *Fair Hous. Council of Suburban Phila. v. Montgomery Newspapers*, 141 F.3d 71, 78 (3d Cir. 1998) (organizational standing was not satisfied where the activities were "part of the [organization]'s normal day-to-day operations").

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C. *The unconstitutional conditions doctrine provides no alternative for Coalition Plaintiffs' standing deficiencies.*

Coalition Plaintiffs alternatively argue that the doctrine of unconstitutional conditions confers them standing, Coalition Br. at 46, seeking to expand application of the doctrine to elections cases for the first time. This Court should not accept that invitation.

The unconstitutional conditions doctrine arises when the government conditions receipt of a benefit or privilege on the relinquishment of a constitutional right. *See Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004) (involving surrender of freedom from unreasonable searches and seizure in order to exercise two other fundamental rights, freedom of speech and assembly). Courts applying the unconstitutional conditions doctrine typically review situations where, unlike this case, one constitutional right has to be completely surrendered to exercise another right. *See Thomas v. Rev. Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981) (addressing denial of unemployment benefits due to free expression of religion); *Elrod v. Burns*, 427 U.S. 347, 360–64 (1976) (addressing First Amendment implications to patronage system and public employment); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (addressing public university tenure); *United States v. Snipes*, 611 F.3d 855, 867 (11th Cir. 2010) (surrendering Fifth Amendment right against self-incrimination against Sixth Amendment right to have venue proven).

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As the record shows, Coalition Plaintiffs have not surrendered their right to vote in order to exercise another constitutional right. Doc. 640-1 at 149, 156, 162, 167. Moreover, there is no constitutional right to "vote in any manner" that a voter chooses. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). "It is an individual voter's choice whether to vote by mail or in person." *Wood v. Raffensperger*, 981 F.3d 1307, 1315 (11th Cir. 2020) (citing *Bognet v. Sec'y of Pa.*, 980 F.3d 336, 360 (3rd Cir. 2020)). Precedent, therefore, precludes any claim based on the unconstitutional conditions doctrine.

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But even if it did apply, Coalition Plaintiffs have never asserted claims or pursued motions for injunctive relief about Poll Pads or Dominion scanners based on the "unconstitutional conditions" doctrine. *See generally* Docs. 226, Doc. 628, Doc. 800-1, and Doc. 809-1. Coalition Plaintiffs' brief in support of their preliminary injunction motion on paper pollbook backups does not mention the unconstitutional conditions doctrine, Doc. 800-1 and their preliminary injunction motion regarding BMDs, scanners, and audits only briefly references the doctrine as it relates to their *ballot secrecy claims* under the Equal Protection Clause regarding the BMDs used for in-person voters, not the scanners, Doc. 809-1 at 34. In any event, the district court summarily rejected this claim in its scanner order. Doc. 964 at 89–93.

III. The relief granted in the Pollbook Order is not within the scope of Coalition Plaintiffs' Complaints.

State Defendants demonstrated that the specific relief granted in the Pollbook Order—that State Defendants must include additional types of data in the already-required paper backups utilized by counties—was never actually raised by Coalition Plaintiffs in any of their complaints. In response, Coalition Plaintiffs provide string citations to various paragraphs in the TAC and FSC, Coalition Br. at 50, expecting the Court to dig through their pleadings. It need not. Only one paragraph referenced, Doc. 226 at 29 (¶59), mentions pollbooks and is nothing more than a description of the component parts of the prior DRE/GEMS voting system which was replaced in 2019. There is no reference to or complaint about the *paper backups* and the information therein, nor is it applicable to the Poll Pads utilized with the Dominion BMD System. Coalition Plaintiffs' reference to allegations in the FSC fares no better. Indeed, the FSC makes only one mention of pollbooks, Doc. 628 at 24 (¶¶ 70–71), and then makes generic allegations about the allegedly "defective voter registration system" and various vulnerabilities.[8] *See, e.g.*, Doc. 628 at 57 (¶189). Nowhere does it make

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[8] Notwithstanding the absence of this allegation from their complaint and district court's refusal to address the issue, another court in the Northern District of Georgia (with the benefit of extensive summary judgment briefing) found claims regarding vulnerabilities of the voter registration system moot. *Fair Fight Action, Inc. v. Raffensperger*, No. 1:18-cv-05391-SCJ, ECF No. 612, at *59–62 (N.D. Ga. Feb. 16, 2021).

any allegations about the inadequacy of the paper backups utilized by counties at the polling place.

Despite Coalition Plaintiffs' claims of waiver, State Defendants never acknowledged that pollbook backups were part of this case, and did not waive their contention to the contrary. State Defendants opposed every preliminary injunction sought by Plaintiffs on the topic. Docs. 265, 472, 658, 815, 821, and 834. And even if State Defendants did not raise this argument repeatedly, over the district court's disinclination to hear jurisdictional and procedural arguments from State Defendants, *see, e.g.*, Doc. 751 at 15 (expressing that State Defendants "ignored" the court's directive by moving to dismiss Plaintiffs' DRE claims as moot), that does not constitute waiver. *See Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1256 (11th Cir. 2020) ("The Secretary made clear at oral argument that her office has not changed its position on this issue, even if in this lawsuit she elected not to raise the argument yet again before a district court that had repeatedly rejected the Secretary's own understanding of her authority under state law."). Indeed, it is a frequent occurrence that State Defendants discover what this case is about, or what relief was actually sought and by whom, only after the district court rules. Regardless, State Defendants also cannot waive jurisdictional arguments of the district court or of this Court.

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IV. The district court erred in applying the *Anderson/Burdick* framework.

"Ordinary and widespread burdens, such as those requiring 'nominal effort' of everyone, are not severe." *Crawford v Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (Scalia, J., concurring). Nor are mere inconveniences to voters. *Id*. Instead, to demonstrate a severe burden, Plaintiffs must show a burden imposed on them as a direct result of a state's laws and policies—not burdens arising from life's vagaries. *Id*. And, it is for this reason that this Court has not only held that any challenges to a state's electronic voting system must be evaluated under the lower-scrutiny *Burdick* test, but that electronic voting systems are not a severe burden on the right to vote merely because they are electronic. *Wexler v. Anderson*, 452 F.3d. 1226, 1232–33 (11th Cir. 2006). In this case, the district court misapplied *Anderson/Burdick* and this Court should correct that error without deference to its determination. *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1280 (11th Cir. 2020) (citing *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1505 (11th Cir. 1992)).

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Coalition Plaintiffs continue to insist that the lack of updated information in an already-required paper backup, *see* Ga. Comp. R. & Regs. R. 183-1-12-.19, is a severe burden on the right to vote. Coalition Br. at 56. But the evidence cited by the district court in the Pollbook Order relies on speculative hearsay statements where poll workers

apparently ignored the requirements of state law.[9] *See, e.g.*, Doc. 918 at 36 ("poll workers did not attempt to use a paper backup to check in voters"), 37 (poll worker did not use paper backup), 37–38 (same). Other citations are to evidence that did *not* show the paper backup utilized failed to contain the name of a voter. *Id.* at 35. Moreover, use of the paper pollbook requires a failure of the electronic system in the first instance, which is a speculative "ordinary and widespread" burden. Ga. Comp. R. & Regs. R. 183-1-12-.19. Thus, when faced with a reasonable, non-discriminatory election regulation, the district court order improperly found a *severe* burden on the right to vote, never mind that it did so based on circumstances in which existing law was not followed. Any conceivable burden imposed by "the mere possibility of error" in a Poll Pad (much less the possibility of error combined with disregard of existing state law by local officials) is insufficient to mandate a change to the State's reasonable and nondiscriminatory processes. *Banfield v. Cortés*, 631 Pa. 229, 260 (2015). A motions panel of this Court found the same in this appeal. Order Denying Mot. to Lift Stay (April 1, 2021) ("the possibility of a computer glitch in an otherwise nonburdensome voting system is no more a severe burden than the possibility of an

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[9] State Defendants do not train poll workers—that function is carried out by county election superintendents and registrars. *See* O.C.G.A. §§ 21-2-50 (11) (Secretary trains registrars and superintendents); 21-2-70 (6), (8) (superintendents hire and instruct poll officers).

election-day snowstorm or traffic jam") (Brasher and Lagoa, JJ. concurring).

Faced with this reality, Coalition Plaintiffs point to three hearsay affidavits of people who did not testify at any hearing, suggesting voters are burdened by the failure "to update eligible voter information." Coalition Br. at 59. But a close examination of these affidavits shows nothing of the sort. Nor do they show a severe burden on anyone's right to vote. Instead, they describe: (1) a purported but unidentified "state wide problem" that the poll manager had not even recognized and which did not exist at that precinct, Doc. 680-1, pp. 75–76; (2) "general impressions" by an untrained observer about some temporary issues that occurred when certain precincts first opened but which were resolved by 10:00 AM on Election Day that the witness theorized would create problems in "a high voter turnout election" Doc. 680-1, pp. 83–91; and (3) some temporary Wi-Fi problems that were later resolved and a generalized worry that precincts might not have enough Poll Pads (not paper backups). Doc. 680-1, pp. 132–36.

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Next, after conceding that voters who encounter problems can vote provisionally, Coalition Plaintiffs suggest that casting a provisional ballot is not a viable solution because a voter who showed up at the wrong precinct might be sent a polling place where the ballots "are likely not to contain all the races for which that voter is eligible to vote." Coalition Br. at 59. To support this position, Coalition Plaintiffs rely on

an unsworn allegation in the June 2018 TAC about *one voter* who allegedly was not given a provisional ballot because of an issue with the DRE/GEMS voting system that is no longer in use, Doc. 226 at 49 (¶¶ 131–132) and 59–60 (¶¶ 151–152), and an affidavit from a voter who was actually permitted to cast a provisional ballot in 2018 (under the old DRE System) but who was concerned that a provisional ballot "can unintentionally disenfranchise voters," though apparently not her, because "candidates in their home precinct may not be on the provisional ballot." Doc. 258-1 at 75. In other words, Coalition Plaintiffs have not presented any actual evidence from *any voter* who was not permitted to cast a provisional ballot. Instead, as they have consistently done in this case, they present only hypothetical scenarios where a voter *might* encounter a problem that prevents her from voting.

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Next, Coalition Plaintiffs suggest that casting an absentee ballot is not a valid solution because of the district court's factual conclusion that the absentee voting process "poses other risks of voter disenfranchisement." Doc. 918, pp. 51–52. But to support this conclusion the district court did not consider any evidence presented in connection with Coalition Plaintiffs motion about pollbook backups. Instead, it relied only on affidavits submitted in connection with a *prior* motion from voters who described issues—many of their own making—with the absentee-ballot process in 2018 when the prior DRE/GEMs voting system was in place. While the district court cited a number of

these affidavits, to the extent they are not voter error, they involve the processing of absentee ballots. Docs. 918, pp. 51–52; 413 at 110–115, 138–140. As this Court explained after the 2020 election, State Defendants have no role in the processing of absentee ballots, so basing injunctive relief on a process over which State Defendants have no control was also an abuse of discretion. *Ga. Republican Party, Inc. v. Ga. Sec'y of State*, No. 20-14741-RR, 2020 WL 7488181 at *6 (11th Cir. Dec. 20, 2020). Further, the district court's other citation was to *New Ga. Project v. Raffensperger*, 484 F. Supp. 3d 1265 (N.D. Ga. 2020), which should have never been considered, State Defs' Br. at 84, but regardless this Court found that reasoning less than persuasive, *New Ga. Project*, 976 F.3d 1278 (staying the order of the district court). Given the complete lack of any factual basis for the injunctive relief, and disregard of Georgia's absentee and provisional ballot schemes, the finding of a severe burden on the right to vote was error and an abuse of the district court's discretion.

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Finally, in response to State Defendants' argument that the existing paper pollbook regulations at issue reflect reasonable non-discriminatory restrictions which are justified by important regulatory interests, Coalition Plaintiffs take a remarkable position—they baldly assert that Georgia does not have any legitimate or relevant governmental interest in its current regulations. Coalition Br. at 62. But that completely ignores the consistent findings of this Court and

the Supreme Court that States have compelling interests in conducting an efficient election, protecting both the integrity of their election processes as well as voter confidence, and avoiding voter confusion. *See e.g., Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S. Ct. 5, 7 (2006); *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018); *New Ga. Project*, 976 F.3d at 1282.

V. The Pollbook Order lacks the specificity required by Rule 65.

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Fed. R. Civ. P. 65 requires every injunction to contain: (1) a statement of the reasons for issuing the injunction; (2) a statement detailing the specific terms of the injunctions; and (3) a reasonably detailed description of the act or acts to be restrained or required. While agreeing that every injunction must satisfy this test, Coalition Plaintiffs do not discuss the failures raised by State Defendants, including the injunction's requirement that the Secretary "direct" every county superintendent "to take *every reasonable measure* to ensure that county election officials and poll workers are trained as to how to generate and use paper pollbook backups," and to "maintain a *sufficient* stock of emergency ballots…[.]" State Defs' Br. at 50–51. Instead they claim, without citation to any authority, that even though the Pollbook Order is "obviously not complete", it should be affirmed because it "grants prospective injunctive relief" in the form of "modest requirements that

provide only partial redress for a specific harm" which is "the kind of relief" sought in their complaints. Coalition Br. at 67. Coalition Plaintiffs offer no other defense because they cannot—the district court erred when it entered the Pollbook Order because it lacks the specificity required by Rule 65.

VI. The Scanner Order is properly before the Court and also lacks the specificity required by Rule 65.

This Court earlier asked the parties to brief the question of whether this Court had jurisdiction over the appeal of the Scanner Order (Appeal No. 20-14067). Both parties did so and the Court elected to carry that question with the case by order dated March 29, 2021. Rather than respond to any of the arguments of State Defendants that this Court has jurisdiction to review the Scanner Order, Coalition Plaintiffs simply reiterated their argument that this Court lacks jurisdiction to consider that order. But, in doing so, Coalition Plaintiffs concede that the Scanner Order, like the Pollbook Order, fails to satisfy the requirements of Rule 65 due to its lack of specificity. Coalition Plaintiffs specifically describe the Scanner Oder as having "the hallmarks of an order that grants *no* relief." Coalition Br. at 70 (emphasis in original).

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VII. The Pollbook Order and Scanner Order are barred by the Eleventh Amendment and prudential considerations.

State Defendants have demonstrated that the Pollbook Order and Scanner Order reach into the administrative details and minutiae of conducting elections, and are barred by the Eleventh Amendment and prudential considerations. In their response, Coalition Plaintiffs contend that the Pollbook Order "simply requires the State to make modest changes to a single process for checking in voters on Election Day." Coalition Br. at 68. But the district court did not grant a simple injunction prohibiting enforcement of a law, and there is no constitutional basis which permits the district court to oversee such administrative details. *Curry v. Baker*, 802 F.2d 1302, 1314 (11th Cir. 1986); *see also Pettengill v. Putnam Cty. R-1 Sch. Dist.*, 472 F.2d 121, 122 (8th Cir. 1973). Nor do Coalition Plaintiffs address whether either order seeks to resolve a political question for which the district court was ill-equipped to adjudicate. State Defs' Br. at 85 (citing *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997)).

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CONCLUSION

The same Constitution that limits the jurisdiction of federal courts assigns the primary responsibility for administering elections to the States. By entering injunctions when Plaintiffs lacked standing, misapplying the relevant law, and interfering in the administrative

details of elections, the district court abused its discretion. This Court should vacate both injunctions and return this case to the district court with specific direction regarding establishing standing in this case.

Respectfully submitted this 7th day of July 2021.

*_/s/ Vincent R. Russo_*

Vincent R. Russo
Joshua B. Belinfante
Carey A. Miller
Alexander F. Denton
ROBBINS ROSS ALLOY BELINFANTE LITTLEFIELD, LLC
500 14th Street NW
Atlanta, Georgia 30318
Tel: (678) 701-9381
vrusso@robbinsfirm.com
jbelinfante@robbinsfirm.com
cmiller@robbinsfirm.com
adenton@robbinsfirm.com

Bryan P. Tyson
Jonathan D. Crumly
Robert Dalrymple Burton
Diane F. LaRoss
Bryan F. Jacoutot
Loree Anne Paradise
TAYLOR ENGLISH DUMA, LLP
1600 Parkwood Cir., Ste 200
Atlanta, Georgia 30339
Tel: (770) 434-6868
btyson@taylorenglish.com
jcrumly@taylorenglish.com
dburton@taylorenglish.com
dlaross@taylorenglish.com
bjacoutot@taylorenglish.com
lparadise@taylorenglish.com

Counsel for Appellants

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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 6,491 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 Century Schoolbook.

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This 7th day of July, 2021,

/s/Vincent R. Russo
Vincent R. Russo,
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2021, I filed the foregoing Reply Brief for Defendant-Appellants electronically using the Court's CM/ECF system, which will send notification of such filing to all counsel of record.

/s/Vincent R. Russo
Vincent R. Russo,
Counsel for Appellants

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