No. 20-14741

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GEORGIA REPUBLICAN PARTY, INC., et al.,
Plaintiffs-Appellants,

v.

BRAD RAFFENSPERGER,
in his official capacity as Secretary of State of Georgia, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION (1:20-cv-05018-ELR)

APPELLANTS' EMERGENCY MOTION FOR A STAY OR INJUNCTION PENDING APPEAL AND EMERGENCY MOTION TO EXPEDITE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Plaintiffs-Appellants Georgia Republican Party, Inc., National Republican Senatorial Committee, Perdue for Senate, and Georgians for Kelly Loeffler certify that they are not publicly traded and do not have a parent corporation and that no publicly held corporation owns more than 10% of its stock.

The following persons and entities have an interest in the outcome of this appeal: Plaintiffs and their members, Defendants, Intervenor-Defendants, and Amici

(1) The undersigned counsel of record for Plaintiffs to this action certifies that the following is full and complete list of all parties in this action, including any parent corporation and any publicly held corporation that owns 10% or more of the stock of a party:

Plaintiffs: Georgia Republican Party, Inc., which has no parent corporation, nor does any publicly held company own any interest in it;

National Republican Senatorial Committee, which has no parent corporation, nor does any publicly held company own any interest in it;

Perdue for Senate, which has no parent corporation, nor does any publicly held company own any interest in it; and

Georgians for Kelly Loeffler, which has no parent corporation, nor does any publicly held company own any interest in it.

Defendants: Brad Raffensperger, in his official capacity as Secretary of State of Georgia;

Rebecca N. Sullivan, in her official capacity as the Vice Chair of the State Election Board;

David J. Worley, in his official capacity as a Member of the Georgia State Election Board;

Matthew Mashburn, in his official capacity as a Member of the Georgia State Election Board; and

Ahn Le, in her official capacity as a Member of the Georgia State Election Board.

Intervenors-Defendants: Democratic Party of Georgia and DSCC.

(2) The undersigned further certifies that the following is a full and complete list of all other persons, associations, firms, partnerships, or corporations having either a financial interest in or other interest which could be substantially affected by the outcomes of this particular case:

None.

(3) The undersigned further certifies that the following is a full and complete list of all persons serving as attorneys for the parties in this proceeding:

Plaintiff: Richard Cullen; George J. Terwilliger, III (to be admitted *pro hac vice*); Michael Francisco (to be admitted *pro hac vice*); and Brooks H. Spears (to be admitted *pro hac vice*); all of McGuireWoods LLP

Defendants: Charlene S. McGowan, Christopher M. Carr, Bryan K. Webb, and Russell D. Willard from the Georgia Attorney General's office.

Intervenors: Adam M. Sparks; Joyce Gist Lewis, Susan P. Coppedge, at Krevolin & Horst, LLC for Intervenors; and Marc E. Elias, Amanda R. Callais, John M. Geise, Henry J. Brewster, Laura Hill, Johnathan P. Hawley at Perkins Coie LLP for Intervenors by pro hac vice admissions

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INTRODUCTION

Appellants have a lot at stake in the upcoming Georgia runoff election for the U.S. Senate. Pre-election challenge to unconstitutional election procedures are relatively common. Challenges are typically made by voters, political parties, or candidates. This lawsuit has all three. If one of these parties does not have standing to challenge unconstitutional signature verification, then nobody does. The court below, however, dismissed the case for lack of standing, reasoning that "the Supreme Court instructs that a theory of future injury is too speculative to satisfy the well-established requirement that threatened injury must be certainly impending." [Doc. 46, Dec. 17, 2020 Hrg. Tr. at 2:2-5 (included in Appendix at 370)]. The judge dismissed the claimed injury as hypothetical, speculative or in the nature of a generalized grievance. [*Id.* p.2-3.][1] On the contrary, Appellants' proven injury is real, concrete, particularized, traceable and redressable, and imminent. Unless this Court issues a temporary injunction to preserve the status quo, Appellants will be deprived of their constitutional rights.

The Georgia Republican Party, Inc., the National Republican Senatorial Committee, Perdue for Senate, and Georgians for Kelly Loeffler, bring this action

[1] Appellants have attached the transcript of the trial court's order reflected in minute order at Doc. 46 in the Appendix being filed simultaneously with this Stay Request. As of the time of the filing of this motion, the transcript had not been entered on the District Court docket.

against Appellees, the Georgia Secretary of State and the members of the State Election Board, to remedy Georgia's unconstitutional, arbitrary, and inconsistent policies and enforcement of the signature matching process for absentee ballots, *before* those ballots are processed. Contrary to the lower court's conclusion, this case bears no resemblance to that of a single voter, after the election has occurred, asking to overturn the entire election. See *Wood v. Raffensperger*, No. 20-14418, 2020 WL 7094866 (11th Cir. Dec. 5, 2020). Appellants are the right parties, bringing their constitutional claims at the right time—before ballot processing begins and invalid ballots can't be properly verified.

Appellants respectfully ask this Court to order that all absentee ballots remain unopened pending this appeal. Specifically, Appellants ask this Court (1) to stay the District Court's Order of December 17, 2020; (2) order Appellees to ensure absentee ballots cast in the upcoming election for Georgia's U.S. Senators are (a) not separated from mailing envelopes with signatures information and (b) are segregated and safely stored, until appellate review is concluded (the "Stay Request"). The relief sought in this Stay Request is similar to the relief recently granted by Justice Alito in *Republican Party of Pennsylvania v. Boockvar*, No. 20A84 (Nov. 6, 2020). There, Justice Alito ordered certain ballots to be segregated and kept "in a secure, safe and sealed container separate from other voted ballots." *Id.* In addition to their Stay Request, Appellant also respectfully seek expedited appellate review.

This matter is of the utmost urgency and importance in that absentee ballots will begin to be processed on Monday, December 21, 2020. Without an immediate grant of this Stay Request and expedited review by this Court, the integrity and reliability of the process for determining validly counted ballots in this critical runoff election will be jeopardized.

STATEMENT OF THE CASE

Appellants seek declaratory and injunctive relief on an expedited basis in order to increase confidence in the fairness and openness of the 2021 runoff election for Georgia's U.S. Senators by further enhancing procedures to assure the integrity of signature verification for absentee ballots. The district court held that Appellants lack standing and denied their motion for a preliminary injunction. Appellants appeal those rulings, while also seeking an emergency injunction to prevent the opening of ballots that could occur as early on Monday.

I. Statement Justifying Emergency and Expedited Consideration Before Monday, December 21, 2020.

On Monday, December 21, Georgia election officials can begin opening absentee ballots, Georgia State Election Board Rule 183-1-14-0.9-.15(1), and a substantial number of Counties have announced their intent to start scanning absentee ballots on that day.[2] Absentee ballot processing becomes mandatory the

[2] Contrary to the district court's ruling, the imminent nature of Appellants' injury is anything but conjectural. More than 30 counties have already stated their intent to

following week, on December 28. *See id.* Absent intervention, absentee ballots that have not adequately received signature verification will be separated from their corresponding signatures beginning on Monday. This justifies expedited consideration of this appeal. It also justifies an injunction, pursuant to Fed. R. App. P. 8, to order that all absentee ballots remain unopened until this appeal is adjudicated.

II. Statement of Facts.

The process by which Georgia's election officials fail to verify or arbitrarily verify the signatures on absentee ballots unconstitutionally infringes on Appellants' rights. The State Code requires verification, as well as the rejection of any ballots whose signatures cannot be verified. *See* O.C.GA. § 21-2-386(a)(1). However, a compromise settlement agreement from the Secretary of State and a resulting bulletin from the State Election Board have made it more difficult for officials to reject ballots with invalid signatures. *See* Compromise Settlement Agreement and Release, *Democratic Party of Ga. v. Raffensperger*, No. 19-cv-05028 (Mar. 6, 2020) (ECF 56-1).

Appellants proved this through expert opinions and statistical analysis of rejection rates from the 2020 general election. For instance, 100 of 159 counties in

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begin processing ballots on Monday. https://sos.ga.gov/admin/uploads/Intent%20for%20Early%20Processing%20Website%20File%2012172020.pdf

Georgia did not reject a single ballot for having a mismatched signature. The rejection rates in nine of Georgia's counties are so low that the likelihood of obtaining those rates is less than one-hundredth of one percent. These and other facts prove the conclusion of Appellants' expert statistician: that "counties could be enforcing different standards for rejecting absentee ballots, particularly for signature mismatch," and that some of these counties "may be failing to do signature matching at all, or do so only sporadically." This conclusion is virtually identical to the conclusion of the opposing expert, who likewise found "local variation in good-faith interpretations of the standards provided by state officials."

Based on these uncontested facts, Appellants sued to ensure that ballots with invalid signatures are not counted in the upcoming special runoff election. But the district court did not consider that issue. Nor did it consider any of the evidence. Instead, the district court held that Appellants lack standing to pursue their claims because they have not shown an injury in fact.

Although Appellants ask this Court to reverse the standing decision, there is a more pressing issue that must be addressed first. Under Georgia State Election Board Rule 183-1-14-0.9-.15(1), state election officials are authorized to begin removing absentee ballots from their outer envelopes as early as this Monday. The outer envelopes contain the signature that must be verified. Once removed from these envelopes, the ballots contain no information that can be used to locate the

corresponding signature. Thus, if any counties begin separating the ballots from the envelopes, Appellants will no longer be able to redress their injuries. That is why an injunction is warranted to prevent ballots from being opened pending a decision in this appeal.

III. Procedural History.

On December 10, 2020, Appellants filed a Verified Complaint, Emergency Motion for Temporary Restraining Order and Preliminary Injunction, and memorandum in support. Appellants sought modest injunctive relief targeted at improving election administration *before* any absentee ballots are processed. On December 16, Appellees filed their Consolidated Brief in Support of Their Motion to Dismiss and Response in Opposition to Plaintiffs' Motion for Injunctive Relief. The same day, the Democratic Party of Georgia, as intervenor, also filed an opposition. The District Court held a hearing on Thursday, December 17. In an oral ruling at the conclusion of the hearing, the district court dismissed Appellants' claims and denied their motion for preliminary relief for lack of standing. Appellants now seek emergency relief in this Court, ask this Court to stay the District Court's Order of December 17, 2020, issue the requested injunction, and set an expedited briefing schedule.

STANDARD OF REVIEW

This Court considers four factors when determining whether to grant a motion for stay pending appeal: "'(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lie.'" *Hand v. Scott*, 888 F.3d 1206, 1207 (11th Cir. 2018) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)). *See also* Fed. R. App. P. 8; 11th Circuit Rule 27-1(b)(2).

With regard to standing, Article III of the Constitution limits the subject-matter jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. "To have a case or controversy, a litigant must establish that he has standing," which requires proof of three elements. *United States v. Amodeo*, 916 F.3d 967, 971 (11th Cir. 2019). The litigant must prove (1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). As a question regarding subject-matter jurisdiction, the issue of standing is reviewed *de novo*. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020); *United States v. Pavlenko*, 921 F.3d 1286, 1289 (11th Cir. 2019).

ARGUMENT

I. Appellants Have Standing Under the Precedents of This Court and the Supreme Court.

The District Court dismissed Appellants with prejudice due to a supposed lack of standing. If the Appellants, who include both of the Republican candidates for each of the two races for U.S. Senate (through their respective committees) in the upcoming election, do not have standing then the federal judiciary should not hear another pre-election constitutional case ever again. In this Circuit alone, there have been multiple cases brought by the Democratic Party in advance of the 2020 elections. *See, e.g.*, *Democratic Party of Georgia, Inc., et al. v. Raffensperger, et al.*, No. 1:19-cv-05028 (N.D. Ga.); *Anderson v. Raffensperger*, No. 1:20CV3263 (N.D. Ga.).

Appellants assert the following separate injuries: (1) associational standing on behalf of their voter members who are injured by the dilution of their votes; (2) associational standing and standing in their own right to redress the injury to the competitive landscape caused by the counting of unlawful votes; and (3) the diversion of its resources to address Georgia's unlawful signature matching process. In their pleadings and evidence below, Appellants demonstrated that these harms are imminent and reasonably likely to occur in the January 2021 election. Each of these injuries is distinct, and each independently supports standing.

The Appellees and Intervenors primarily relied on this Court's recent decision in *Wood*. But *Wood* actually supports Appellants, because this Court held that "vote dilution can be a basis for standing," and that "a political candidate harmed by [a

state election process]" suffers "a personal, distinct injury." *Wood*, 2020 WL 7094866, at *4 (citing *Roe v. Alabama ex rel. Evans*, 43 F.3d 574, 579 (11th Cir. 1995)); *Dillard v. Chilton Cty. Comm'n*, 495 F.3d 1324, 1333 (11th Cir. 2007) (explaining that "vote dilution" is a "concrete and personalized injur[y]"). Thus this Court explicitly recognized the injuries articulated by two of the Appellants.

The lower court particularly misses the mark in rejecting organizational standing and candidate standing based on competitive interest in the runoff election. The District Court concluded Appellants lack standing to redress harm to their competitive interests, but *Wood* explicitly recognized that a candidate suffered a cognizable injury when an election practice harmed their chances in an election. This injury arises from the dilution of Republican votes and improperly counting of unlawful votes in the close runoff election. This Court's holding in *Wood* places it squarely in line with prevailing precedent. *See also Drake v. Obama*, 664 F.3d 774, 782–83 (9th Cir. 2011) (collecting "competitive standing" cases); *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006) (recognizing competitive standing); *Shays v. FEC*, 414 F.3d 76, 87 (D.C. Cir. 2005) (candidates have a "concrete interest" in retaining elected office and have standing to challenge rules that "illegally structure a competitive environment").

Likewise, this Court's recent holding in *Jacobson v. Florida Sec'y of State*, 974 F.3d 1236 (11th Cir. 2020), supports Appellants' standing. *Jacobson*

specifically reserved the question of whether "a political party would have standing to challenge an electoral practice that harmed one of *its* candidates' electoral prospects in a particular election." *Id.* at 1251. That is this case: Appellants filed suit to protect their candidates and members in a specific, imminent runoff election against the backdrop of a recent contest where one of the key safeguards against counting unlawful ballots was disregarded or unequally applied. Appellants are thus well within the exception to the holding in *Jacobson*, which other courts have recognized. *See Pavek v. Simon*, 467 F. Supp. 3d 718, 743 (D. Minn. 2020); *see also Nelson v. Warner*, __ F. Supp. 3d __, 2020 WL 4004224, *4 (S.D. W. Va. 2020).

In addition to the injury to these competitive interests, Appellants also asserted an injury because they are forced to divert resources to address constitutional violations created by Appellees. Resource diversion is a well-recognized basis for organizational standing. *See Jacobson*, 974 F.3d at 1250; *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1333 (N.D. Ga. 2018) (finding resource diversion injury in challenge to Georgia's signature matching process). At this stage, Appellants need not provide a "detailed quantification of their diverted resources," and the standing requirement is still satisfied "even if the diversion is 'slight.'" *Pavek*, 467 F. Supp. 3d at 740. As shown in the sworn declarations submitted to the District Court, Appellants are expending resources to contest an election that is expected to be very close, and they are harmed by the diversion of resources to

ensure proper absentee vote counting, resources that could go towards supporting the Republican candidates.[3]

Finally, the alleged injury is also traceable to and redressable by Appellees. Appellees do not deny that they have the authority to issue statewide rules that govern county officials. *See* O.C.GA. § 21- 2-31(1)-(2). Indeed, the District Court's dismissal on standing is particularly troubling given that earlier this year the Appellees settled a lawsuit brought by Intervenors by agreeing to issue a "procedure applicable to the review of signatures on absentee ballot envelopes by county elections officials[.]" Compromise Settlement Agreement and Release, at 2-4, *Democratic Party of Ga. v. Raffensperger*, No. 1:19-cv-05028 (Mar. 6, 2020) (ECF 56-1); *see also Georgia Muslim Voter Project*, 918 F.3d at 1268 (Pryor, J., concurring). Appellees have even issued guidance regarding the absentee ballot process to Georgia's counties just last week. The trial court also relied on *Anderson v. Raffensperger*, __ F.3d __, 2020 WL 6048048 (N.D. Ga. Oct. 13, 2020), but in that case the plaintiff *conceded* that Appellee lacked the authority to provide the relief sought. *Id.* at *22. That is not the case here, where the Secretary of State not

[3] *See* Decl. of Benjamin Grayson at ¶¶ 8-10; Decl. of Darby Grant at ¶ 13; Decl. of Stewart Bragg at ¶ 11; Decl. of Benjamin Fry at ¶¶ 8-10, all filed below and accepted by the court. [Doc. 40]

only has the authority to order the uniform, statewide relief necessary, but has *actually done so*.

Appellants have standing, and respectfully ask this Court to grant their request for an injunction and expedited review.

II. Appellants are Likely to Succeed on the Merits, Will Be Irreparably Injured if this Court Denies Their Stay Request, No Other Party Will Injured if the Stay Request is Granted, and the Public Interest Weighs Heavily in Favor of Granting Appellants' Stay Request.

Georgia's defective practices for verifying absentee ballot signatures violate core Constitutional rights and calls for immediate relief. Moreover, there would be no prejudice to Defendants resulting from a short stay to decide the merits of Plaintiffs' claim. Federal courts have frequently adjudicated the constitutionality of signature mismatch rejection in Georgia, and this case addresses the closely related issue of signature mismatch acceptance, an equally critical part of the same ballot verification process. *See Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324 (N.D. Ga. 2018); *Martin v. Crittenden*, 347 F. Supp. 3d 1302 (N.D. Ga. 2018); *Martin v. Kemp*, 341 F. Supp. 3d 1326 (N.D. Ga. 2018).

The failure to prevent the imminent counting of unlawful absentee ballots will result in the dilution of the lawfully cast ballots of Appellants' members. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("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."). These constitutional violations can be, and indeed must be, addressed before votes are counted. Addressing the unconstitutional violations prospectively will protect the constitutional right to vote and participate in a free and transparent election without risking the disenfranchisement of *any* votes.

A. Georgia's signature verification process unconstitutionally burdens the right to vote guaranteed by the First and Fourteenth Amendments.

Georgia's defective signature verification process unconstitutionally burdens the right to vote under the *Anderson-Burdick* framework. *New Georgia Project v. Raffensperger*, 976 F.3d 1278, 1280 (11th Cir. 2020); *see Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). Under this framework, "severe burden[s]" on the right to vote are permissible only if they are "narrowly tailored" and "advance[] a compelling interest." *New Georgia Project*, 976 F.3d at 1280 (citations and internal quotations omitted). "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." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318–19 (11th Cir. 2019) (citing *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009)). In addition, "episodic events" in which "the election process itself reaches the point of patent and fundamental unfairness" violate voters' substantive due process rights guaranteed by the Fourteenth

Amendment. *Curry v. Baker*, 802 F.2d 1302, 1315 (11th Cir. 1986). Defendants run afoul of both standards.

Every unlawful vote counted by the State directly counteracts Appellants' legitimate votes. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote can neither be denied outright . . . nor diluted by ballot-box stuffing. . . . [T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." (citations omitted)). As the Eleventh Circuit has explained, allowing states to count unlawful ballots "would dilute the votes of those voters who m[e]et the requirements of" the law. *Roe v. State of Ala. By & Through Evans*, 43 F.3d 574, 581 (11th Cir. 1995).

In *Roe*, the Eleventh Circuit concluded that plaintiffs "demonstrated fundamental unfairness" by the State of Alabama after a state court required officials to count "absentee ballots that did not comply with [the state's election code]." *Id.* at 580–81. Thus, "[E]lection laws that will effectively 'stuff the ballot box,' implicat[e] fundamental fairness issues." *Id.* at 581 (citing *United States v. Saylor*, 322 U.S. 385, 389 (1944)). The Court found that this "post-election departure from previous practice in Alabama" would, *inter alia*, "dilute the votes of those voters who met the requirements of the [absentee ballot rules] as well as those voters who actually went to the polls on election day." *Id.* at 581.

Here, as in *Roe*, Defendants' tabulation and certification of invalid ballots "implicate[s] fundamental fairness and the propriety of the . . . election[] at issue." *See id.* Defendants' unwillingness to act is precisely the type of election process "that will effectively 'stuff the ballot box,'" *see id.* at 581 (citation omitted), and that "implicates the very integrity of the electoral process." *Duncan*, 657 F.2d at 691. The counting and certification of these votes thus violates a fundamental element of Appellants' franchise: a voter's "right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson v. United States*, 417 U.S. 211, 227 (1974).

The evidence establishes that the vote dilution burden here warrants exacting scrutiny. *See* Sorens and Gessler Reports. With the likelihood of a close runoff election, the failure to fairly and consistently verify absentee signatures threatens to change the outcome of one or both runoff elections. This not only threatens Plaintiffs' interests, but it also threatens the public interest at large.

The Eleventh Circuit has held that a law that affected "less than 5 hundredths of a percent of . . . more than 9 million total ballots cast" imposed a "serious burden on the right to vote." *Lee*, 915 F.3d at 1319–21; *accord Anderson*, 417 U.S. at 227 ("The deposit of forged ballots in the ballot boxes, no matter how small or great their number, dilutes the influence of honest votes in an election, and whether in greater or less degree is immaterial." (citation and internal quotations omitted)); and

Saucedo v. Gardner, 335 F. Supp. 3d 202, 217 (D.N.H. 2018) (low rejection rate of signature mismatch support federal claim and remedy). Dr. Sorens found that, had three of Georgia's four largest counties rejected absentee ballots for signature mismatch at the same rate as the state as a whole (a rate already "impossibly low," Gessler Report at ¶ 14), they would have rejected 168% more absentee ballots. "Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted." *Id.* at 217.

Defendants cannot meet their burden under any standard of review because the state interests are minimal. To be sure, the State has an interest in "*combatting* voter fraud" and "*increasing* confidence in elections," but it has no such interest in *facilitating* fraud and *undermining* public confidence in elections. *See Greater Birmingham Ministries v. Secretary of State for Alabama*, 966 F.3d 1202, 1230 (11th Cir. 2020). Likewise, although the State "has an important interest in structuring and regulating its elections to avoid chaos and to promote the smooth administration of its elections," *Lee*, 915 F.3d at 1322, that interest is not sufficient to justify the burden on Appellants' voting rights. The Eleventh Circuit has held that requiring a state to conduct notice-and-cure requirements for thousands of ballots rejected for signature mismatches would not "inordinately disrupt the smooth facilitation of [a statewide] election." *Id.* at 1322.

Here, the relief requested is less burdensome than the notice-and-cure obligations in *Lee*. And the number of ballots impacted by the lax acceptance of signatures is far greater than the number of ballots potentially wrongly rejected for mismatch signatures. Only 719 signature mismatches were identified in the Nov. 3, 2020 election. By way of contrast, 1.3 million ballots were processed through the unconstitutionally lax verification process. Constitutional protections are warranted on both sides of the coin; rejecting mismatched signatures and accepting signatures as valid. Thus, as in *Lee*, "the serious burden on voters outweighs [the State]'s identified interests[.]" *Id.* at 1326. Appellants are thus likely to succeed on their First and Fourteenth Amendment right to vote claim.

B. Georgia's weak to nonexistent signature verification process violates Constitutional Procedural Due Process protections.

Incontrovertible evidence shows that Georgia's electorate is being deprived of equal or consistent standards in how absentee ballot signatures are verified. An arbitrary process is no process at all. Evidence is overwhelming that in many counties, *no* signatures (not even missing signatures) are found lacking. Due to Georgia's robust ballot cure process, any signature rejected as invalid or not matching will not result in that ballot being rejected, and the voter disenfranchised, without additional process protections providing an opportunity to cure a deficient signature. Despite this safeguard, many counties are not doing the job of verifying signatures in any meaningful sense. This extreme, unprecedented, lax application of

the law contrasts with other counties where meaningful signature verification procedures are applied. Fundamentally, Georgia's signature matching procedure is arbitrary and applied unequally in a way that violates the First and Fourteenth Amendments.

The Fourteenth Amendment's Due Process Clause requires that the State provide an individual with adequate process where it deprives that individual of a liberty or property interest. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). To determine the process due, courts consider three factors: (1) the private interest at stake, (2) the risk of an erroneous deprivation of that interest under the current procedures and the probable value of additional procedure, and (3) the Government's interest. *Id.* at 334–35. Because voting is a protected liberty interest, Appellants may assert their procedural due process rights in challenging burdens on the right to vote. *See Georgia Muslim Voter Project v. Kemp*, 918 F.3d 1262, 1270–73 (11th Cir. 2019) (Pryor, J. concurring in the denial of the motion for a stay).

Here, these three factors militate in favor of the additional process requested by Appellants. *First*, Appellants have established that Appellees' actions will significantly undermine their "fundamental right to vote," "giving this first *Mathews* factor substantial weight." *Id.* at 1271. *Second*, the risk of erroneous deprivation of Appellants' voting rights is high because, as noted, the statistical analysis shows that Georgia's elections officials are not consistently applying the signature matching

process, where it is employed at all. *Third*, for the reasons stated, the government's interest is low, because the remedy sought by Appellants is narrowly tailored to redress the harm arising from the inconsistent application of Georgia's signature matching process while minimizing any additional administrative burden to the state. Accordingly, Appellants are likely to succeed on their procedural due process claim.

C. Defendants will imminently deprive Appellants of their Fourteenth Amendment Right to Equal Protection.

Appellants are also likely to succeed because application of the absentee ballot signature verification process violates the Fourteenth Amendment. The Equal Protection Clause prohibits Georgia from depriving "any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. In the context of voting rights, the Equal Protection Clause safeguards the "equal weight accorded to each vote and the equal dignity owed to each voter." *Bush v. Gore*, 531 U.S. 98, 104 (2000)). And it is violated where, as here, the vote counting procedures employed by the State will "accord[ ] arbitrary and disparate treatment to voters in its different counties." *Id.* at 107; *see also Moore v. Ogilvie*, 394 U.S. 814 (1969) (invalidating county-based procedure that diluted the influence of citizens in certain counties); *Gray v. Sanders*, 372 U.S. 368 (1963) (similar).

The empirical evidence in this case shows that standards for accepting or rejecting signatures on absentee ballots varies from county to county. Through a

statistical analysis of all 159 Georgia counties over the last three elections cycles, Appellants' expert found "that ballot rejection rates due to signature mismatch differ statistically significantly across counties." Sorens Report 2. For example, in the 2020 election, Cherokee, Cobb, DeKalb, and Fulton Counties "had mismatch rejections far below what could be attributed to random statistical variation." Sorens Report 7. Meanwhile, "Gwinnett, Henry, Liberty, and Taylor had mismatch rejections far above what could be attributed to random statistical variation." *Id.* These and other county-by-county discrepancies "strongly demonstrat[e] that the signature matching process is being applied unequally across the state." *Id.* at 2.

Indeed, there is no other plausible explanation for the discrepancies. Appellants' expert examined reasonable alternatives and found that "[t]he disparity in rejection rates between counties cannot be explained by population size or a county's geographic location within the state." *Id.* For example, several demographically similar counties in the Atlanta metropolitan area had dramatically different experiences with absentee ballot rejections. *Id.* at 8. And three of the four counties in the State that threw out zero ballots despite handling more than 10,000 of them – Douglas, Muscogee, and Rockdale – "have unusually high poverty rates and large populations of elderly and first-time voters, the sorts of voters one might expect to make mistakes on their ballots." *Id.*

In short, the evidence shows that application of Georgia's signature verification process has and will continue to afford arbitrary and disparate treatment to voters in different Georgia counties, depriving Appellants and their members of equal protection of the laws. Appellants will succeed on their equal protection claim.

D. Appellants Will Suffer Irreparable Harm.

Absent the Stay Request, Appellants will suffer irreparable injury both through the diversion of resources from supporting its candidates, an opportunity cost that can never be recovered, and from the competitive injury their members will suffer absent relief. "An injury is irreparable if it cannot be undone through monetary remedies." *Jones v. Governor of Fla.*, 950 F.3d 795, 828 (11th Cir. 2020) Vote dilution—in violation of the Constitution—irreparably harms voters' "right to an honest count . . . possessed by each voting elector" because legitimate voters' ballots are "distorted by fraudulently cast votes." *See Anderson*, 417 U.S. at 226–27 (citations and internal quotations omitted).

This irreparable harm is imminent if the Court does not take action. The State of Georgia will begin processing absentee ballots on December 21, meaning that the ballots will be separated from the envelopes that bear the voter's signature. Once this occurs, it is impossible to determine whether the ballot was properly and lawfully cast, and any dilution of the vote will have irreparably occurred. As

Plaintiffs' expert Mr. Gessler opined, "effective assurances of election integrity require immediate action during an election, not after." Gessler Report at ¶ 21.

E. The Balance of Equities Favors Appellants.

When courts balance a State's interests in administrative efficiency against the right to vote, the latter must carry the day. *See Gonzalez*, 978 F.3d at 1272–73 (holding that the "right to vote" outweighed Georgia's asserted interest in "avoiding chaos and uncertainty in the State's election procedures"). Even "significant" justifications in which "the State has a weighty interest" "are unavailing as compared to the plaintiffs' interest in their opportunity to exercise the core democratic right of voting." *Jones*, 950 F.3d, at 829. Where, as here, the only interest to offset Plaintiffs' voting is "a state's administrative burden," "there is no contest[.]" *See id.* at 830 (citing *Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016)).

F. The Public Interest Favors Appellants.

Finally, granting the Stay Request will benefit the public interest. The public has a "strong interest in exercising the 'fundamental political right' to vote." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Indeed, the Eleventh Circuit has repeatedly found that "[t]he 'cautious protection of the Plaintiffs' franchise-related rights is without question in the public interest.'" *Jones*, 930 F.3d at 830 (quoting *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005)).

CONCLUSION

Appellants respectfully request that this Court grant Appellants' Motion and Stay Request and set this appeal for expedited consideration.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,156 words, excluding the parts exempted by Rule 32(f).

This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27(d)(1) because it has been prepared in a proportionally spaced 14-point Times New Roman font using Microsoft Word.

/s/ Michael Francisco
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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2020, I electronically filed the foregoing Brief with the Clerk of this Court using the CM/ECF System, which will send notice of such filing to all counsel of record.

I also hereby certify that I have this day caused the foregoing in the above-captioned matter to be served via email on December 18, 2020, upon:

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