IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

THE TWELFTH CONGRESSIONAL DISTRICT REPUBLICAN COMMITTEE; BRIAN W. TUCKER an individual voter and resident of Richmond County; CATHY A. LATHAM, a 2020 candidate for Presidential Elector; and EDWARD T. METZ, a 2020 candidate for Presidential Elector,

Plaintiffs,

v.

BRADFORD J. RAFFENSPERGER, in his official capacity as SECRETARY OF STATE OF GEORGIA; REBECCA N. SULLIVAN, DAVID J. WORLEY, MATTHEW MASHBURN, and ANH LEE, in their official capacities as Members of the Georgia State Election Board; and TIM MCFALLS, MARCIA BROWN, SHERRY T. BARNES, TERENCE DICKS, and BOB FINNEGAN, in their official capacities as Members of the RICHMOND COUNTY BOARD OF ELECTIONS,

Defendants,

and

DEMOCRATIC PARTY OF GEORGIA and DSCC,

Intervenor-Defendants.

Civil Action No. 1:20-cv-00180-JRH-BKE

INTERVENOR-DEFENDANTS' OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

INTRODUCTION

Just weeks before Georgia's high-profile January 5, 2021 runoff election for its two U.S. Senate seats, Plaintiffs ask this Court to upend the state's absentee voting regime by eliminating sensible rules that have been in place for the last three elections, including the recent November 3, 2020 election. In several recent decisions, multiple federal judges have rejected similar efforts to challenge their constitutionality. *See generally Wood v. Raffensperger*, No. 1:20-cv-04651-SDG,

2020 WL 6817513 (N.D. Ga. Nov. 20, 2020) ("*Wood I*"), *aff'd*, No. 20-14418, 2020 WL 7094866 (11th Cir. Dec. 5, 2020) ("*Wood II*"); Tr. of Motions Hearing, *Pearson v. Kemp*, No. 1:20-CV-4809-TCB (N.D. Ga. Dec. 7, 2020) ("*Pearson* Tr.") (attached as Ex. 1).

Plaintiffs' request for preliminary relief is similarly unsupported by both the law and the facts. Though made under the auspices of election integrity, Plaintiffs fail to proffer *any* evidence of fraud. This omission is particularly glaring given that Georgia just completed a highly scrutinized and high-turnout presidential election, in which all of the challenged provisions were in place and the election results were confirmed by three separate counts of the ballots. If evidence was to be had to support Plaintiffs' claims, they had ample opportunity to procure it. Yet their meritless effort to displace Georgia's well-considered elections laws is as unsupported as its predecessors. And like those failed challenges, Plaintiffs' suit is sorely and fatally deficient.

But the Court need not even consider the merits of the challenge, because Plaintiffs have failed to establish that it has jurisdiction to do so. Plaintiffs lack standing and the Eleventh Amendment bars their claims because, even liberally construed, Plaintiffs' alleged harm amounts to nothing more than a generalized grievance that state officials failed to comply with state law. Finally, even if Plaintiffs could overcome these significant hurdles, the U.S. Supreme Court has repeatedly admonished federal courts to avoid disruptively altering voting rules on the eve of elections. This admonition is particularly salient here where not only has absentee voting already begun, but the runoff election will be conducted under the same rules as the November election, which Plaintiffs now seek to change at the eleventh hour.

II. BACKGROUND

In the leadup to Georgia's 2020 elections, Bradford J. Raffensperger, the Secretary of State (the "Secretary"), and the other members of the State Election Board (the "SEB") adopted and

promulgated various rules and guidelines related to absentee ballots.[1] At issue in this litigation are the following three specific pieces of rules or guidance: (1) Rule 183-1-14-0.8-.14 (the "Drop Box Rule"), which was first adopted by the SEB at its February 28, 2020 meeting and then readopted with minor variations at the SEB's July 1 and November 23 meetings; (2) an Official Election Bulletin issued by the Secretary on May 1, 2020 (the "Signature Matching Bulletin"); and (3) Rule 183-1-14-0.9-.15 (the "Ballot Processing Rule"), first adopted by the SEB at its July 1 meeting and readopted on November 23. Each constituted a straightforward exercise of discretionary authority and, until the sudden raft of post-election litigation brought by Republican candidates and their affiliates, was uncontroversial.

The Drop Box Rule allows county election officials "to establish one or more drop box locations as a means for absentee by mail electors to deliver their ballots to the county registrars." Compl. for Injunctive & Declaratory Relief ("Compl."), ECF No. 1, Ex. A, at 1. The Signature Matching Bulletin provides statewide guidance on the procedures for absentee ballot envelopes, designed to increase uniformity in signature matching determinations. *See id.* Ex. C. And the Ballot Processing Rule simply permits county officials to open and process absentee ballots prior to Election Day, enabling the faster tabulation of ballots on Election Day. *See id.* Ex. B.

The Signature Matching Bulletin and Drop Box Rule were therefore in place for Georgia's June 9 primary and August 11 primary runoff elections, as well as the November 3 general and special U.S. Senate elections. All three of the provisions, including the Ballot Processing Rule, were in place for the November elections.

[1] The Rules at issue can be found on the Secretary's website. *See Rules and Rulemaking of the State Election Board*, Ga. Sec'y of State, https://sos.ga.gov/index.php/elections/state_election_board (follow "Rules and Rulemaking of the State Election Board" hyperlink) (last visited Dec. 15, 2020).

On November 3, Georgia held its election and special U.S. Senate elections, with both of the state's U.S. Senate seats on the ballot. Georgia law requires a winning candidate to receive "a majority of the votes cast." O.C.G.A. § 21-2-501(a)(1). If no candidate surpasses the 50 percent threshold, the state holds a runoff election between the two candidates that received the highest vote totals. *Id*. Because no candidate for either U.S. Senate seat won a majority of the vote in November, Georgia will hold a runoff election on January 5, 2021. *See* Compl. ¶ 12.

Plaintiffs filed this action on December 9, five days before early voting commenced and less than one month before the runoff election. As of yesterday, roughly 1.2 million voters had requested absentee ballots, with more than 200,000 already returned. *See* Alexa Corse, *Georgia Senate Runoffs Early Voting Begins as Requests for Mail-in Ballots Top 1 Million*, Wall St. J (Dec. 14, 2020), https://www.wsj.com/articles/georgia-senate-runoffs-early-voting-begins-as-requests-for-mail-in-ballots-top-1-million-11607953020. In the midst of this election, already well underway, Plaintiffs seek to change the rules. They challenge the Drop Box Rule, Ballot Processing Rule, and Signature Matching Bulletin, asserting that these provisions violate the U.S. Constitution's Elections and Electors Clauses (Counts I and II), *id.* ¶¶ 62–69; Plaintiffs' right to vote and associate based on a theory of vote dilution (Count III), *id.* ¶¶ 70–81; the Equal Protection Clause (Count IV), *id.* ¶¶ 82–84; and Georgia law (Count V), *id.* ¶¶ 85–91.

Plaintiffs filed their emergency motion for injunctive relief the same day that they filed their complaint. *See* Pls.' Emergency Mot. for TRO & Prelim. Inj. ("Mot."), ECF No. 2. Their bare-bones motion appears to seek relief only on their claims under Georgia law and the First and Fourteenth Amendments. *See, e.g.*, Mem. in Supp. of Pls.' Mot. for Prelim. Inj. ("Mem."), ECF No. 2, at 3–4. The only evidence they offer in support of their motion is a single declaration by a Richmond County voter, and a late-filed declaration similarly complaining about purported county

administration issues. *See* Mot. Ex. A; ECF No. 25. With these paltry submissions, Plaintiffs ask this Court for extraordinary, last-minute relief that would prohibit Defendants from administering the election in accordance with previously established rules and guidance.

III. ARGUMENT

A. Plaintiffs lack standing.

This Court need not reach the merits of Plaintiffs' claims because they lack standing to bring them. To demonstrate Article III standing, a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). As noted above, Plaintiffs raise only First Amendment, Fourteenth Amendment, and state law claims in their motion. They have failed to establish that they have standing to pursue these claims—or any of the other claims pleaded in their complaint. As a result, this Court lacks jurisdiction over this action in its entirety and has no power to enter the relief that Plaintiffs seek.

1. Plaintiffs have suffered no injury sufficient to raise a First Amendment claim.

Plaintiffs seek, under the trappings of the First Amendment, to raise a claim that Defendants' practices unduly burden Plaintiffs' right to vote by "enabl[ing] numerous absentee voters to vote illegally" and thereby "discount[ing] and cancel[ling] the votes of the Individual Plaintiffs." Compl. ¶ 72. But as many federal courts have repeatedly and definitively held, these types of allegations are inadequate to allege an injury sufficient for standing.

The purported injury of vote-dilution-through-unlawful-balloting has been repeatedly rejected as a viable basis for standing, and for good reason: supposed vote dilution caused by counting supposedly improper votes would affect *all* Georgia voters, not just Plaintiffs, making it no more than a generalized grievance. *See, e.g.*, *Wood II*, 2020 WL 7094866, at *5 (holding theory of vote dilution does not provide personal, distinct injury necessary for standing because "'no

single voter is specifically disadvantaged' if a vote is counted improperly, even if the error might have a 'mathematical impact on the final tally and thus on the proportional effect of every vote'" (quoting *Bognet v. Sec'y of Commonwealth*, 980 F.3d 336, 356 (3d Cir. 2020))); *Bognet*, 980 F.3d at 354–56 ("Th[e] conceptualization of vote dilution—state actors counting ballots in violation of state election law—is not a concrete harm under the Equal Protection Clause of the Fourteenth Amendment."); *Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-CV-1445 JCM (VCF), 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) (finding vote-dilution theory too speculative to confer standing); *Martel v. Condos*, No. 5:20-cv-131, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020) (concluding vote-dilution theory amounted to generalized grievance that could not confer standing); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926–27 (D. Nev. 2020) (similar). Plaintiffs' claims here are not meaningfully different from those rejected for lack of standing in these cases.

Plaintiffs try to salvage standing by asserting that they are injured because the "12th District Committee" must divert additional resources from activities it would undertake to instead engage in "efforts to counter or minimize the consequences of the ballot harvesting that" Defendants' conduct purportedly permits. Compl. ¶ 75; *see also* Mem. 8. But this assertion, like the vote-dilution-by-fraudulent-ballot theory that courts have soundly rejected, rests on speculation and conjecture that voters will in fact cast unlawful ballots. Thus, for the same reason, it is not "concrete" or "imminent" enough to support standing. *See, e.g.*, *Cegavske*, 2020 WL 5626974, at *4; *Paher*, 457 F. Supp. 3d at 926–27. Moreover, courts have recognized that merely spending money to combat a speculative injury cannot alchemize the expenditure into a cognizable injury for Article III purposes, since a plaintiff "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly

impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013). Plaintiffs have thus failed to establish that they have standing to pursue this claim, whether as individuals or as entities.

2. Plaintiffs have not suffered an injury under the Equal Protection Clause.

Plaintiffs' contention that disparate treatment of in-person and absentee voters provides an injury to support their claim under the Equal Protection Clause, *see* Compl. ¶ 82, is equally unavailing. The caselaw firmly establishes that this type of allegedly differential treatment is not by itself a cognizable harm. Importantly, Plaintiffs have *not* alleged that they were prevented from voting or had their votes denied based on signature matching or anything else. Nor do Plaintiffs allege that any voters were treated differently because of a suspect classification or that disparate treatment caused a deprivation of a fundamental right. Instead, they merely claim an injury because "the state is *not* imposing a restriction on *someone else's* right to vote." *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078, 2020 WL 6821992, at *12 (M.D. Pa. Nov. 21, 2020) (quoting *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5997680, at *44 (W.D. Pa. Oct. 10, 2020)), *aff'd sub nom. Donald J. Trump for President, Inc. v. Sec'y of Commonwealth*, No. 20-3371, 2020 WL 7012522 (3d Cir. Nov. 27, 2020). As these cases and others establish, the mere fact of some differential treatment of voters within a state does not alone constitute an injury absent some harm to Plaintiffs resulting from that treatment. *See, e.g.*, *ACLU of New Mexico v. Santillanes*, 546 F.3d 1313, 1320 (10th Cir. 2008) ("Absentee voting is a fundamentally different process from in-person voting, and is governed by procedures entirely distinct from in-person voting procedures.") (citations omitted); *id.* at 1320-21 (B]ecause there are clear differences between the two types of voting procedures, the law's distinction is proper."); *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 830-31 (S.D. Ind. 2006) (It is an "obvious fact that absentee voting is an inherently different procedure from in-person voting.").

3. Plaintiffs have suffered no injury due to purported violations of Georgia law.

Plaintiffs do not allege any injury from Defendants' purported violations of Georgia law outside of the basic fact that the law was not followed. But a simple complaint that Defendants are not following the law—absent more—is "precisely the kind of undifferentiated, generalized grievance about the conduct of government" that does not confer standing. *Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1332–33 (11th Cir. 2007) (quoting *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam)); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–74 (1992) ("[R]aising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy."); *Wood II*, 2020 WL 7094866, at *4 (holding that injury to right "that government be administered according to the law" is generalized grievance). Even if Plaintiffs were correct in their allegations regarding Georgia law—they are not, *see infra* Section III.C.1.c—they would still lack standing because they can point to no individualized injury.

4. Plaintiffs have not raised the Electors and Elections Clauses in their motion, but lack standing to bring claims under these provisions.

While Plaintiffs assert claims under the Elections and Electors Clauses in their complaint, their motion has no assertions about their likelihood of success on these counts. In any event, Plaintiffs, as private individuals and a private organization, lack standing to raise claims under the Elections or Electors Clause. Plaintiffs again provide no allegations demonstrating how they are particularly harmed by the alleged violations. Instead, their recurring grievance is that Defendants did not follow the law regarding absentee ballot procedures. *See, e.g.*, Compl. ¶¶ 34–61; Mot. ¶¶ 1–

2. This is "precisely the kind of undifferentiated, generalized grievance about the conduct of government" insufficient to satisfy standing requirements. *Lance*, 549 U.S. at 442.

Nor do the presidential electors' assertions that they are candidates save them. First, and most obviously, the presidential election is over. This litigation concerns the upcoming runoff election for U.S. Senate, and so the fact that the individual Plaintiffs "were and will in the future be candidates to serve as Presidential electors," Mem. 8, is simply irrelevant to their request for injunctive relief regarding a Senate runoff. But even ignoring that salient detail, federal courts—including in the Northern District of Georgia just one week ago, in a case considering this very question as applied to the Signature Matching Bulletin, *see Pearson* Tr. 42—have repeatedly held that even individuals *who are candidates in the election in which they seek judicial intervention* lack Article III standing to challenged alleged violations of state law under the Elections Clause. *See*, *e.g.*, *Bognet*, 980 F.3d at 348–52 (finding voters and candidate lacked standing to bring claims under Elections and Electors Clauses); *Bowyer v. Ducey*, No. CV-20-02321-PHX-DJH, 2020 WL 7238261, at *3–5 (D. Ariz. Dec. 9, 2020) (presidential electors lacked standing to bring claims under Elections and Electors Clauses); *Hotze v. Hollins*, No. 4:20-cv-03709, 2020 WL 6437668, at *2 (S.D. Tex. Nov. 2, 2020) (holding candidate lacked standing under Elections Clause and concluding that U.S. Supreme Court's cases "stand for the proposition that only the state legislature (or a majority of the members thereof) have standing to assert a violation of the Elections Clause"). This conclusion is a natural consequence of the fact that the Elections and Electors Clauses empower state legislatures, and so any purported violation of them belongs to the

legislature alone. *See, e.g.*, *Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018) (per curiam) (noting that the Elections Clause "affirmatively grants rights to state legislatures").[2]

For the same reason, Plaintiffs also lack prudential standing to bring claims under the Elections and Electors Clauses. "Even if an injury in fact is demonstrated, [] a party may assert only a violation of its own rights." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988). Plaintiff's Elections and Electors Clauses claims, by contrast, "rest . . . on the legal rights or interests of third parties," *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004)—namely, the rights of the Georgia General Assembly. Plaintiffs cannot assert the General Assembly's rights, since they neither possess a close relationship with the General Assembly nor identify a "hindrance to the [General Assembly's] ability to protect [its] own interests." *Kowalski*, 543 U.S. at 130; *see also Bognet*, 980 F.3d at 350–51.

B. The Eleventh Amendment bars this Court from exercising jurisdiction.

Even if Plaintiffs had standing, the Eleventh Amendment bars this Court's exercise of judicial power to issue Plaintiffs' requested relief. A federal court cannot order state officials to conform their conduct to state law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). Plaintiffs are explicit that they seek an order from this Court requiring "that Defendants comply with Georgia law." Mot. ¶ 4. While they attempt to couch their complaint in the language of federal constitutional claims, Plaintiffs ultimately ask the Court to compel election authorities to do what they believe *Georgia* law requires. The Court cannot entertain such a request for injunctive relief requiring state officials to comply with state law.

[2] Although separate provisions, the Electors and Elections Clauses share "considerable similarity" and should be interpreted in the same manner. *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839 (2015) (Roberts, C.J., dissenting); *see also Foster v. Love*, 522 U.S. 67, 69 (1997) (referring to Electors Clause as Elections Clause's "counterpart for the Executive Branch"); *Bognet*, 980 F.3d at 349 (applying same test for standing under both clauses).

As the U.S. Supreme Court explained decades ago in *Pennhurst*, "the principles of federalism that underlie the Eleventh Amendment" prohibit a federal court from granting "relief against state officials on the basis of state law, whether prospective or retroactive." 465 U.S. at 106; *see also id.* at 117 ("[A] federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when . . . the relief sought and ordered has an impact directly on the state itself."). This is true even where, as here, state law claims are thinly cloaked in federal causes of action. *See, e.g.*, *Balsam v. Sec'y of State*, 607 F. App'x 177, 183–84 (3d Cir. 2015) (holding Eleventh Amendment bars state law claims even when "premised on violations of the federal Constitution"); *Massey v. Coon*, No. 87-3768, 1989 WL 884, at *2 (9th Cir. Jan. 3, 1989) (affirming dismissal of suit where "on its face the complaint states a claim under the due process and equal protection clauses of the Constitution, [but] these constitutional claims are entirely based on the failure of defendants to conform to state law"); *Six v. Newsom*, 462 F. Supp. 3d 1060, 1073 (C.D. Cal. 2020) (denying temporary restraining order in part because Fifth and Fourteenth Amendment claims were predicated on violations of state law); *Acosta v. Democratic City Comm.*, 288 F. Supp. 3d 597, 626 (E.D. Pa. 2018) ("Even when voters attempt to 'tie their state law claims into their federal claims,' the Eleventh Amendment bars the state law claims." (quoting *Balsam*, 607 F. App'x at 183)); *Thompson v. Alabama*, No. 2:16-CV-783-WKW, 2017 WL 3223915, at *8 (M.D. Ala. July 28, 2017) (denying injunction where plaintiffs' federal constitutional claims rested on premise that state officials were violating state law).

Here, Plaintiffs' causes of action are nothing more than state law concerns masquerading as federal claims. They repeatedly note that their true concern is their (mistaken) belief that Defendants' actions conflict with the Georgia Election Code. *See* Mot. ¶¶ 1–2 (claiming that Defendants' actions violate Georgia law); *id.* ¶ 4 ("Plaintiffs seek nothing more than that

Defendants comply with Georgia law."); *id.* ¶ 8 ("Plaintiffs are seeking an order prohibiting [actions] in violation of the Georgia Election Code."); Mem. at 2 ("Defendants have violated Individual Plaintiffs' rights to freedom [of] association and equal protection as a result of their rules and procedures adopted in direct conflict with [state law]."); *id.* at 6 (noting that Defendants "have imposed new and unauthorized procedures and requirements that are in direct conflict with Georgia statutes"); *id.* at 9 (noting that Plaintiffs' requested relief is "preliminary and permanent injunctions prohibiting Defendants' violations of Georgia election statutes"). This is not how the Constitution works. *See, e.g.*, *Shipley v. Chi. Bd. of Election Comm'rs*, 947 F.3d 1056, 1062 (7th Cir. 2020) ("A violation of state law does not . . . 'transgress against the Constitution.'" (quoting *Kasper v. Bd. of Election Comm'rs*, 814 F.2d 332, 342 (7th Cir. 1987))); *Martinez v. Colon*, 54 F.3d 980, 989 (1st Cir. 1995) ("[T]he Constitution is not an empty ledger awaiting the entry of an aggrieved litigant's recitation of alleged state law violations . . ."). At bottom, Plaintiffs' claims concern state court violations—no more, no less.[3]

While the Secretary and SEB are, as state officials, indisputably shielded by the Eleventh Amendment, in this case the members of the Richmond County Board of Elections are as well. Although counties are not ordinarily considered arms of the state for Eleventh Amendment purposes, the remedies Plaintiffs seek can *only* be enforced by state officials because they seek the invalidation of state laws. *See* Compl. ¶ 13 (making clear that Plaintiffs seek prospective relief to invalidate Drop Box Rule, Ballot Processing Rule, and Signature Matching Bulletin); *see also*

[3] Notably, federal courts regularly reject state law claims against state officials in litigation involving election administration. *See, e.g.*, *Ohio Republican Party v. Brunner*, 543 F.3d 357, 360–61 (6th Cir. 2008) (*Pennhurst* bars claim that Secretary of State violated state election law); *Acosta*, 288 F. Supp. 3d at 628 (Eleventh Amendment bars Pennsylvania Election Code claims); *Veasey v. Perry*, 29 F. Supp. 3d 896, 922 (S.D. Tex. 2014) (Eleventh Amendment bars claim that state officials violated state constitution); *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1358–59 (N.D. Ga. 2005) (same).

Porter v. Gore, 354 F. Supp. 3d 1162, 1180 (S.D. Cal. 2018) (finding *Pennhurst* extends to claims against local officials where effect would be to invalidate state law). The Eleventh Amendment bar thus extends to each Defendant in this case.

C. Plaintiffs are not entitled to a temporary restraining order or preliminary injunction.

The Court should further deny Plaintiffs' motion because they have failed to show they are entitled to injunctive relief. "A preliminary injunction is an extraordinary remedy never awarded as of right," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008), and "should not be granted unless the movant clearly carries the burden of persuasion," *Canal Auth. v. Callaway*, 489 F.2d 567, 573 (11th Cir. 1974). To carry that burden, the moving party must show:

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

Duke v. Cleland, 954 F.2d 1526, 1529 (11th Cir. 1992); *see also Wood I*, 2020 WL 6817513, at *4 (noting that standards for TRO and preliminary injunction "are identical"). Plaintiffs fail to carry their burden on *any* of the factors for injunctive relief, and so their motion must be denied.

1. Plaintiffs have not shown a likelihood of success on the merits.

Despite their bullish claim that "the actions of Defendants at issue violate the unambiguous language of several Georgia election statutes," Mem. 5–6, Plaintiffs have neither pleaded and proved viable constitutional claims nor demonstrated any impermissible departure from the state's election laws. Accordingly, they cannot succeed on the merits of their claims.

a. Plaintiffs' vote-dilution claims are not a First Amendment violation.

Plaintiffs are unlikely to succeed on their ostensible First Amendment claim, *see* Mem. 5–7, an unwieldy amalgamation that, "like Frankenstein's Monster, has been haphazardly stitched together from [] distinct theories in an attempt to avoid controlling precedent." *Boockvar*, 2020

WL 6821992, at *4. Although seemingly suggesting a burden on the right to vote, Plaintiffs do not actually allege that they or their members were unable to vote, were otherwise burdened in their casting of ballots, or were unable to associate politically. Instead, their First Amendment claim ultimately concerns another grievance: that their "right to have their votes counted in a reliable manner without discount or cancellation" has been abridged. Compl. ¶ 71; *see also, e.g.*, *id.* ¶ 72 (alleging that "Defendants' adoption of procedures that conflict with Georgia statutes designed to assure that every absentee voter is qualified to vote and that enable numerous absentee voters to vote illegally effectively discounts and cancels the votes of the individual Plaintiffs"); *id.* ¶ 76 ("Defendants' new rules and procedures increase the likelihood that illicit absentee ballots will be included in the final and total count in future elections . . . .").

Vote dilution, however, is a viable basis for federal claims only in certain contexts, such as when laws structurally devalue one community's votes over another's. *See, e.g.*, *Bognet*, 980 F.3d at 355 ("[V]ote dilution under the Equal Protection Clause is concerned with votes being weighed differently."); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) ("[A]n individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."). Courts have repeatedly rejected Plaintiffs' "conceptualization of vote dilution—state actors counting ballots in violation of state election law"—as failing to state a concrete or cognizable harm under the U.S. Constitution. *Bognet*, 980 F.3d at 354; *accord Wood I*, 2020 WL 6817513, at *8–10 (considering Georgia's signature matching procedures and concluding that vote-dilution injury is not "cognizable in the equal protection framework").

Plaintiffs cannot identify a single apposite precedent adopting their theory under *any* constitutional provision, let alone the First Amendment. And there is no authority for

transmogrifying the vote-dilution line of cases into a requirement that federal judges manage election procedures and, in their zeal to enforce state election law, disenfranchise lawful voters based on a plaintiff's (speculative) claims of unlawful balloting. C*f. Short v. Brown*, 893 F.3d 671, 677–78 (9th Cir. 2018) ("Nor have the appellants cited any authority explaining how a law that makes it easier to vote would violate the Constitution.").[4] Instead, courts have routinely rejected such efforts. *See Minn. Voters All. v. Ritchie*, 720 F.3d 1029, 1031–32 (8th Cir. 2013); *Boockvar*, 2020 WL 5997680, at *67–68.

Ultimately, Plaintiffs have not alleged a cognizable vote-dilution claim. Nor have they submitted *any* evidence of voter fraud in Georgia tied to absentee balloting; to the contrary, the rules that they challenge have been in place for several elections and no indication of unlawful voting has emerged "despite a substantial increase in the total number of absentee ballots submitted by voters [in the 2020 General Election]." *Wood I*, 2020 WL 6817513, at *10 (rejecting vote-dilution claim where "it is not supported by the evidence"). Moreover, Plaintiffs have failed to adduce any evidence that their right to associate or vote was improperly curtailed by Defendants. Plaintiffs therefore cannot succeed on the merits of their First Amendment claim.

b. Plaintiffs' claim under the Equal Protection Clause fails.

Plaintiffs' equal protection claim, *see* Compl. ¶¶ 82–84, is similarly noncognizable.

First, Plaintiffs claim an injury stemming from "[t]he disparate treatment of the individual Plaintiffs who vote in person when compared to the treatment of absentee voters." *Id.* ¶ 82. But as another district court recently explained,

[4] Indeed, "if dilution of lawfully cast ballots by the 'unlawful' counting of invalidly cast ballots 'were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's "interest" in failing to do more to stop the illegal activity.'" *Bognet*, 380 F.3d at 355 (quoting *Boockvar*, 2020 WL 5997680, at *46).

> [i]t is well-settled that states may employ in-person voting, absentee voting, and mail-in voting and each method need not be implemented in exactly the same way.
>
> "Absentee voting is a fundamentally different process from in-person voting, and is governed by procedures entirely distinct from in-person voting procedures." It is an "obvious fact that absentee voting is an inherently different procedure from in-person voting." Because in-person voting is "inherently different" from mail-in and absentee voting, the procedures for each need not be the same.

Boockvar, 2020 WL 5997680, at *61 (citations omitted) (first quoting *ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1320 (10th Cir. 2008); and then quoting *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 830–31 (S.D. Ind. 2006)). Because "the inherent differences and opportunities afforded to in-person voters compared to mail-in and absentee voters provides sufficient reason to treat such voters differently," *id.* at *63, disparate treatment between in-person and absentee voters does not lend itself to a viable equal protection claim. And to the extent Plaintiffs suggest that any deviation from state law is an equal protection violation, such claims cannot be "based solely on state officials' alleged violation of state law that does not cause unequal treatment. . . . That is not how the Equal Protection Clause works." *Bognet*, 980 F.3d at 355.

Second, Plaintiffs contend that "[t]he disparate treatment of the 12th District Committee and its designated monitors who were prevented from observing vote counting and signature verification when compared to the treatment of Democrats similarly appointed violates" equal protection. Compl. ¶ 83. But this theory fails for want of even a hint of evidentiary support; the only piece of evidence submitted by Plaintiffs in connection with their motion does not address this supposed disparity, *see* Mot. Ex. A, and their motion does not even raise the issue. Plaintiffs thus cannot succeed on the merits of their unsupported equal protection claim.

c. Plaintiffs' state law claim fails.

In their motion, Plaintiffs suggest that Defendants' actions violate Georgia law, but they do not support that claim with any reasoning or explanation. *See* Mot. ¶¶ 1–2; Mem. 6. For this

reason alone, their motion should be denied as to any state law claims. But even if Plaintiffs intended to incorporate the allegations in their complaint—and could permissibly do so, *cf. Wright v. Farouk Sys., Inc.*, 701 F.3d 907, 911 n.8 (11th Cir. 2012) ("[P]leadings are only allegations, and allegations are not evidence of the truth of what is alleged.")—their motion would still fail. For the reasons discussed in Section III.B *supra*, any claims seeking to require Defendants to conform to Georgia law are precluded by the Eleventh Amendment. And even if Plaintiffs could survive this bar, they would still not be able to show a likelihood of success on the merits because their state law claim is based on a fundamentally flawed interpretation of Georgia's Election Code.

First, Plaintiffs wrongly argue that the Drop Box Rule violates Georgia law. *See* Mem. 3. As support, they point to O.C.G.A. § 21-2-382, which allows county boards of registrars to "establish additional sites as additional registrar's offices . . . for the purpose of voting absentee ballots" so long as "any such site is a branch of the county courthouse, a courthouse annex, a government service center providing general government services, another government building generally accessible to the public, or a location that is used as an election day polling place, notwithstanding that such location is not a government building." O.C.G.A. § 21-2-382(a); *see also* Compl. ¶ 45. Plaintiffs argue that the statute does not expressly contemplate drop boxes—and thus prohibits them—but they misconstrue the statute. Section 21-2-382 allows counties to establish additional "sites"; in other words, "a piece of property set aside for a specific use," *Site*, *Black's Law Dictionary* (11th ed. 2019), or "a space of ground occupied or to be occupied by a building," *Site*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003). Under the Drop Box Rule, counties may only establish drop boxes on "county or municipal government property generally accessible to the public." Compl. Ex. A, at 1. That is *exactly* the sort of location allowed

by Section 21-2-382.[5] The Drop Box Rule thus does not conflict with—and is instead a reasonable construction of—Georgia law, and the SEB was empowered to promulgate it.[6]

Plaintiffs do not explain why their concerns about ballot harvesting—which are misplaced and unsubstantiated in any event—undercut the validity of the Drop Box Rule. *Cf.* Compl. ¶ 11 (claiming that Drop Box Rule "allow[s] absentee ballots to be delivered to unattended drop boxes" by unauthorized individuals "with no mechanism to ensure their legitimacy"). The Election Code already specifies who can deliver or mail a voter's absentee ballot, and the Drop Box Rule requires all drop boxes to "clearly display signage . . . regarding Georgia law related to absentee ballot harvesting." *Id.* Ex. A, at 2. Furthermore, while Plaintiffs characterize drop boxes as "unattended," the Drop Box Rule requires all drop boxes to "have adequate lighting and use a video recording device to monitor each drop box location." *Id.* Ex A, at 1. Plaintiffs' baseless speculation that drop boxes might lead to an increased *possibility* of voter fraud does not mean that any fraud will occur, much less that the use of drop boxes violates Georgia law. *See Boockvar*, 2020 WL 5997680, at *33 (rejecting plaintiffs' arguments that drop boxes might lead to future fraud because "there's no way of knowing whether these independent actors [who allegedly want to and will commit fraud] will ever surface"). Indeed, Plaintiffs fail to demonstrate why the supposed injuries incurred from drop boxes would be any different than what occurs when voters use the mail to return their ballots—a practice that even Plaintiffs must indisputably recognize is valid under Georgia law.

[5] Plaintiffs argue that drop boxes must be located in "a building with staff capable of receiving absentee ballots and verifying the signature," Compl. ¶ 46, but they ignore the plain language of Section 21-2-382(a) and its reference to "sites." They also claim that voters must deliver absentee ballots "in person," *id*. ¶ 49, but the statute simply requires an absentee voter to "personally mail or personally deliver" an absentee ballot. O.C.G.A. § 21-2-385(a). There is no requirement of "in person" delivery to a member of the board of registrars or an absentee ballot clerk, Compl. ¶ 47—nor could there be, since voters are allowed to vote by mail.

[6] Plaintiffs, incidentally, do not challenge the location of any specific drop box or argue that any specific drop box violates Georgia law.

Second, Plaintiffs are also wrong to suggest that the Signature Matching Bulletin exceeds Defendants' authority, *see* Compl. ¶ 9, as this argument was considered and rejected by Judge Grimberg of the Northern District of Georgia in a recent opinion. *See generally Wood I*, 2020 WL 6817513. As detailed by Judge Grimberg, the Secretary issued an earlier version of the Signature Matching Bulletin in March 2020 as part of a settlement agreement with Intervenor-Defendants. After the November election, a plaintiff sued the Secretary, claiming that the settlement agreement (and the language that Plaintiffs now challenge here) exceeded the Secretary's authority. *See id.* at *10. Judge Grimberg rejected that argument, holding that the settlement agreement was a valid "manifestation of Secretary Raffensperger's statutorily granted authority" and "does not override or rewrite state law." *Id.* (holding settlement agreement was lawful although not "a verbatim recitation of the statutory code"). Judge Grimberg's analysis applies squarely to this case.

In any event, Plaintiffs misconstrue the statute on which they rely. Section 21-2-386(a)(1)(B) requires the registrar or clerk to "compare the signature" on an absentee ballot envelope with the signatures "on the absentee elector's voter registration card . . . and application for absentee ballot." If the signature "appear[s] to be valid," then the registrar or clerk "so certif[ies] by signing or initialing his or her name below the voter's oath." *Id*. Contrary to Plaintiffs' representations, the statute does *not* require the signature on the absentee ballot envelope to match the signature on both the voter registration card and the absentee ballot application.[7] Plaintiffs argue that the Signature Matching Bulletin "eliminates" a statutory requirement "that the signature

[7] Plaintiffs allege, without specifics, that some "registrars and clerks failed to perform the required signature verification" in the general election. Compl. ¶ 56. It is unclear whether they mean registrars and clerks failed to check signatures *at all* or just failed to check signatures to Plaintiffs' liking. In either event, this bare-bones allegation is not enough to justify injunctive relief. Plaintiffs' late-filed affidavit—relaying a story the affiant claims they heard from a Richmond election official—is textbook hearsay and does not rescue this claim. *See* ECF No. 25 ¶¶ 15, 16.

on the absentee ballot envelope matches *both* the signature on the application for an absentee ballot *and* the signature on the absentee voter's voter registration card." Compl. ¶ 9 (emphases added); Mem. 3.[8] But Plaintiffs' draconian reading of Section 21-2-386(a)(1)(B) is far removed from the statutory text, which does not require the signatures on all three documents to match. Indeed, if Plaintiffs' construction were credited, then it would raise serious constitutional concerns that the statute could deprive voters of the fundamental right to vote, since it is a "basic fact that [an individual's] signature [can] vary" for "myriad [] potential reasons." *Frederick v. Lawson*, No. 1:19-cv-01959-SEB-MJD, 2020 WL 4882696, at *14 (S.D. Ind. Aug. 20, 2020); *see also Reynolds*, 377 U.S. at 555 n.29 ("The right to vote includes the right to have the ballot counted." (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting))).[9]

Finally, while Plaintiffs complain about the Ballot Processing Rule, they fail to acknowledge that the General Assembly has granted the Secretary and SEB significant authority to manage Georgia's election system, including the absentee voting system. *See* O.C.G.A. § 21-2-50(b) (Secretary is Georgia's chief election official); *id.* § 21-2-31 (delegating authority to SEB to promulgate election rules); *Wood*, 2020 WL 6817513, at *2; *Curling v. Raffensperger*, 403 F. Supp. 3d 1311, 1345 (N.D. Ga. 2019) (SEB is "charged with enforcing Georgia's election code under state law"). Plaintiffs also fail to mention that, when a plaintiff challenges a regulation issued

[8] If Plaintiffs are claiming that the Signature Matching Bulletin does not "require[e] the verification of every absentee voter's signature," Mem. 6, they are mistaken. The very first sentence discusses signature matching: "Verifying that a voter's signature on his or her absentee ballot matches his or her signature on the absentee ballot application or in the voter registration record is required by Georgia law and is crucial to secure elections." Compl. Ex. C, at 1.

[9] Indeed, as an expert in *Frederick* testified, "determining whether a signature is genuine is difficult even for a trained expert, as signatures are written in different styles with varying levels of readability and variability. . . . [T]he rate of error among laypersons is generally attributable to an incorrect determination that 'variations' between one individual's signatures are instead 'differences' between multiple individuals' signatures." 2020 WL 4882696, at *14.

by an agency with rulemaking authority, state courts apply a highly deferential standard of review. *See Albany Surgical, P.C. v. Dep't of Cmty. Health*, 257 Ga. App. 636, 637 (2002). The Ballot Processing Rule was a reasonable, lawful exercise of the Secretary and SEB's delegated authority.

Plaintiffs, in short, have failed to identify any violation of Georgia law, let alone one that could be constitutionally remedied by this Court. Their motion should be denied.

d. Plaintiffs have not alleged viable Elections or Electors Clause claims.

Counts I and II of Plaintiffs' complaint allege that the Drop Box Rule, Ballot Processing Rule, and Signature Matching Bulletin are beyond the authority granted to Defendants by the Georgia General Assembly and thus in violation of the Elections and Electors Clauses of the U.S. Constitution. Although these claims are not included in their motion for preliminary injunctive relief, Plaintiffs cannot succeed on the merits even if they were properly raised.

The Elections Clause vests authority in "the Legislature" of each state to regulate presidential elections. U.S. Const. art. II, § 1, cl. 2. The U.S. Supreme Court has held, however, that state legislatures can delegate this authority—including to state officials like the Secretary and SEB. *See, e.g., Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 807 (2015) (noting that Elections Clause does not preclude "the State's choice to include" state officials in lawmaking functions so long as such involvement is "in accordance with the method which the State has prescribed for legislative enactments" (quoting *Smiley v. Holm*, 285 U.S. 355, 367 (1932))); *Corman*, 287 F. Supp. 3d at 573 ("The Supreme Court interprets the words 'the Legislature thereof,' as used in that clause, to mean the lawmaking processes of a state." (quoting *Ariz. State Legislature*, 576 U.S. at 816)).

Here, the Secretary and the other Defendants acted consistently with the authority granted to them by under Georgia law. As Plaintiffs admit in their complaint, the SEB is empowered to "promulgate rules and regulations" governing the state's elections, O.C.G.A. § 21-2-31(1)–(2),

and as discussed above, the Secretary lawfully issued the Signature Matching Bulletin. Accordingly, the Drop Box Rule, the Ballot Processing Rule, and the Signature Matching Bulletin each constitute lawful exercises of Defendants' authority. And because Defendants acted pursuant to the dictates of Georgia's election laws, no violation of the Elections or Electors Clause occurred. *See Wood I*, 2020 WL 6817513, at *10–11.

2. Plaintiffs have failed to show irreparable harm.

"A showing of irreparable harm is 'the *sine qua non* of injunctive relief.'" *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) (quoting *Frejlach v. Butler*, 573 F.2d 1026, 1027 (8th Cir. 1978)). "[T]he absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000). Such injury must be "actual and imminent," not "remote [or] speculative." *Id.* (quoting *Gen. Contractors*, 896 F.2d at 1285).

Plaintiffs' haphazard attempts to manufacture cognizable injuries repeatedly come up short. In their motion, Plaintiffs argue that because absentee ballots are "the largest source of *potential* voter fraud," Defendants' actions "will encourage and facilitate vote harvesting," thereby diluting the relative weight of Plaintiffs' votes compared to their Democratic Party counterparts. Mem. 8 (emphasis added). But the mere "potential" for fraud that may or may not "encourage" or "facilitate" improper behavior is far too slender a reed to support a finding of imminent, irreparable harm. Plaintiffs further fail to acknowledge that these very same standards of election administration were enforced and upheld *just one month* ago during the November election. *See generally, e.g., Wood I*, 2020 WL 6817513 (upholding Georgia's signature matching regime); *Wood II*, 2020 WL 7094866 (affirming); *Pearson* Tr. (upholding Georgia's signature matching regime and absentee processing); *Boland v. Raffensperger*, No. 2020CV343018 (Ga. Super. Ct.

Dec. 8, 2020) (dismissing state court contest challenging Georgia's signature matching processes) (attached as Ex. 2). These plaintiffs were unable to identify any judicially cognizable form of irreparable injury, and for the same reasons Plaintiffs fail to do so here.

Moreover, by putting forth "quintessential generalized grievance[s]," Plaintiffs have also failed to present any evidence in their motion as to how they will suffer "any particularized harm as [] voter[s]" by the denial of their motion. *Wood I*, 2020 WL 6817513, at *12. Plaintiffs' vague references to "injury to their constitutional rights," Mem. 9, cannot, without any supporting evidence or even elaboration, satisfy the significant showing required by this factor.

3. Neither the balance of the equities nor the public interest favors injunctive relief.

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

First, their case is untimely. Plaintiffs have waited until the eve of early voting in this high-profile election to bring their claims, the factual underpinnings of which have been known to Plaintiffs for several months now. At a minimum, this constitutes an unreasonable delay in filing, which greatly prejudices the administration of the election and is furthermore barred by the equitable doctrine of laches. *See, e.g.*, *Smith v. S.C. Election Comm'n*, 874 F. Supp. 2d 483, 498 (D.S.C. 2012) (considering laches under balance of equities prong of preliminary injunction standard); *Wood I*, 2020 WL 6817513 (finding laches barred similarly delayed claims); *Pearson* Tr. 43 (similar); *Boland*, slip op. at 3 (laches barred plaintiff's claims based "on procedures which were adopted long before the election and upon which elections officials and voters alike relied").[10]

[10] Such an inexcusable delay also weakens any claim to irreparable injury. *See, e.g.*, *GTE Corp. v. Williams*, 731 F.2d 676, 679 (10th Cir. 1984) ("A preliminary injunction is sought upon the theory

Second, Plaintiffs have failed to demonstrate how their preferred remedies will benefit the voters of Georgia. "[A]llowing for easier and more accessible voting for all segments of society serves the public interest." *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1224 (N.D. Fla. 2018). Moreover, the public interest is best "served by ensuring that qualified absentee voters have the opportunity to vote and, more importantly, have their votes counted." *Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1347 (N.D. Ga. 2018). Plaintiffs' lawsuit is in direct opposition to these principles of greater access to the franchise. Based on nothing more than vague concerns of potential fraud and unsubstantiated allegations of injury, Plaintiffs seek to eliminate safe and accessible ballot return options for millions of Georgians and undo the state's tried and true election administration, objectives that would serve to hinder—not safeguard—the franchise. *See Paher*, 457 F. Supp. 3d at 935 ("[E]ven accepting Plaintiffs' purported harm to them of being disenfranchised due to vote dilution, such disenfranchisement could be, even more concretely, claimed in the absence of the Plan (and additionally by confusion that may result by the Court enjoining the Plan . . .)."). Their motion should therefore be denied.

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

Relatedly, even if Plaintiffs had pleaded and proved legitimate constitutional claims (they have not), they filed a case asking a federal court to issue an injunction that would drastically alter state voting procedures *less than one week* before the state was set to begin using those procedures. This very action blatantly ignores the U.S. Supreme Court's repeated admonition that such late-hour disruptions should be scrupulously avoided. While the Supreme Court's decision in *Purcell*

---

that there is an urgent need for speedy action to protect the plaintiff's rights. By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action and cannot complain of the delay involved pending any final relief to which it may be entitled after a trial of all the issues." (quoting *Gillette Co. v. Ed Pinaud, Inc.*, 178 F. Supp. 618, 622 (S.D.N.Y. 1959))).

v. Gonzalez certainly does not *prohibit* the federal judiciary from interceding close to elections to defend the Constitution, it advises federal courts to tread carefully when deciding whether to do so. *See* 549 U.S. 1, 5–6 (2006) (per curiam) (staying injunction due to "the imminence of the election and the inadequate time to resolve the factual disputes" in order to allow election to proceed with settled rules). Here, granting an injunction would inject confusion for administrators and voters. Even if Plaintiffs' constitutional claims were not woefully insufficient, the weight of recent precedent clearly demonstrates that an injunction would be inappropriate in this case.

Indeed, one need only look at the Supreme Court's election jurisprudence in the last eight months to see the Court's repeated warning to tread carefully close to elections. It has invoked this principle to stay remedial injunctions even when confronted with demonstrable constitutional violations caused by ballot receipt deadlines, *see Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1206 (2020), and absentee ballot witness requirements, *see Andino v. Middleton*, No. 20A55, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020). And, particularly relevant here, it has also affirmed district courts' decisions to stay their hands when asked to invalidate procedures announced by states' election officials. *See, e.g.*, *Moore v. Circosta*, No. 20A72, 2020 WL 6305036, at *1 (U.S. Oct. 28, 2020) (affirming district court's denial of injunction against consent decree entered by Secretary of State). While many of these decisions have been issued without opinions, those that have included the Justices' reasoning have emphasized that "federal courts ordinarily should not alter state election rules in the period close to an election." *Andino*, 2020 WL 5887393, at *1 (Kavanaugh, J., concurring). Plaintiffs' claims in this case certainly provide no basis for this Court to derogate from that frequently invoked principle.

IV. CONCLUSION

For these reasons, Intervenor-Defendants respectfully request that the Court deny Plaintiffs' emergency motion for temporary restraining order and preliminary injunction.

Dated: December 15, 2020.

Respectfully submitted,

/s/ Joyce Gist Lewis
Halsey G. Knapp, Jr.
Georgia Bar No. 425320
Joyce Gist Lewis
Georgia Bar No. 296261
Adam M. Sparks*
Georgia Bar No. 341578
KREVOLIN & HORST, LLC
1201 W. Peachtree Street, NW
Suite 3250, One Atlantic Center
Atlanta, GA 30309
Telephone: (404) 888-9700
Facsimile: (404) 888-9577
hknapp@khlawfirm.com
jlewis@khlawfirm.com
sparks@khlawfirm.com

Marc E. Elias*
Amanda R. Callais*
John M. Geise*
Henry J. Brewster**
PERKINS COIE LLP
700 Thirteenth Street NW, Suite 800
Washington, D.C. 20005
Telephone: (202) 654-6200
melias@perkinscoie.com
acallais@perkinscoie.com
jgeise@perkinscoie.com
hbrewster@perkinscoie.com

Laura Hill**
Jonathan P. Hawley**
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101
Telephone: (206) 359-8000
lhill@perkinscoie.com
jhawley@perkinscoie.com

Torryn Taylor Rodgers**
PERKINS COIE LLP
505 Howard Street, Suite 1000
San Francisco, California 94105
Telephone: (415) 315-7000
Facsimile: (415) 315-7050
trodgers@perkinscoie.com

Counsel for Intervenor-Defendants

* *Pro Hac Vice Application Granted*
***Pro Hac Vice Application Forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2020, I electronically filed this document with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

Dated: December 15, 2020

/s/ Joyce Gist Lewis
Joyce Gist Lewis
Georgia Bar No. 296261

United States District Court
Northern District Of Georgia
Atlanta Division

Coreco Jaqan Pearson, et al., Plaintiff, vs. Brian Kemp, et al., Defendant.	)	Civil Action File No. 1:20-CV-4809-TCB Atlanta, Georgia Monday December 7, 2020 10:00 a.m.

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

APPEARANCES:

FOR THE PLAINTIFFS:	Sidney Powell Harry MacDougald Attorneys at Law
FOR THE DEFENDANTS:	Carey Allen Miller Joshua Barret Belinfante Charlene Swartz McGowan Melanie Leigh Johnson Attorneys at Law

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

Proceedings recorded by mechanical stenography, transcript produced by CAT.

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

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

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

President.

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

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

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

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

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

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

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

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

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

THE COURT: All right. Thank you, sir.

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(noise from courtroom audio system).

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

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

authority for the relief that they seek.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Thank you, sir.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Where does that exist?

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

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

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

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

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

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

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

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

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

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

THE COURT: How would that happen?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And that is one of the problems with the Plaintiffs' argument. They keep telling you that they can't go to State Court because they have Federal constitutional claims. Those can be litigated in State Court pursuant to 1983. They also say on laches that -- it is interesting, they have cited to you and read to you numerous aspects of the *Curling* case, and they say that going back to 2006 somebody thought that there was something wrong with these machines. Well if that's the case, then it makes the laches argument even stronger. These are the arguments that they are about the machines. They certainly could have been litigated prior to after the certification of the election.

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

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

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

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

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

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

MS. CALLAIS: No, Your Honor.

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

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

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

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

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

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

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

The motion for temporary restraining order that was

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

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

* * * * *

REPORTER'S CERTIFICATION

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

_____

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

Date: December 8, 2020

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

PAUL ANDREW BOLAND,

Plaintiff,

v.

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

Defendants,

and

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

Intervenor-Defendants.

Civil Action No. 2020CV343018

Final Order

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

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

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

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

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

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

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

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

O.C.G.A. § 21-2-520(2).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This 8th day of December, 2020.

Judge Emily K. Richardson
Superior Court of Fulton County

Prepared by:
/s/ Kevin J. Hamilton
Kevin J. Hamilton
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101
Telephone: (206) 359-8000
khamilton@perkinscoie.com

Edited by the Court.