UNITED STATES DISTRICT COURT OF APPEALS

ELEVENTH CIRCUIT

L. LIN WOOD, JR.,

Appellant,

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,

Appellees.
_____/

CASE NO. 20-14813-RR

INITIAL BRIEF OF APPELLANT

On appeal from the United States District Court, Northern District of Georgia

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APPELLANT'S CERTIFICATE OF INTERESTED PERSONS

Appellant, L. LIN WOOD, JR., pursuant to Fed. R. Civ. P. 26.1, and 11th Cir. R. 26.1-3, hereby submit this Certificate of Interested Persons, as follows:

Batten Sr., Timothy C. – United States Northern District Court Judge

Beale, Steven - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Belinfante, Joshua B. – Counsel for State Defendant-Appellees

Brewster, Henry J. - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Callais, Amanda R. - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Coppedge, Susan P. - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Elias, Marc E. - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Frenkel, Jessica R. - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Hyatt, Heath - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Johnson, Melanie L. - Counsel for State Defendant-Appellees

Knapp, Jr., Halsey G. - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Krevolin and Horst, LLC- Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

L. Lin Wood, P.C. - Counsel for Appellant

Le, Anh - Appellee

Lewis, Joyce Gist - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Mashburn, Matthew- Appellee

Miller, Carey A. - Counsel for State Defendant-Appellees

Perkins Coie LLP - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Raffensperger, Brad – Appellee

Robbins Ross Alloy Belinfante Littlefield, LLC - Counsel for State Defendant-Appellees

Sparks, Adam M. - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Sullivan, Rebecca N. – Appellee

Wood, Jr., L. Lin. – Appellant

Worley, David J. – Appellee

STATEMENT REGARDING ORAL ARGUMENT

Appellant believes that oral argument would benefit the Court. This appeal involves important constitutional issues regarding the dilution and impairment of Plaintiff's fundamental right to vote, as a result of the Defendants' illegal and unconstitutional procedures for receiving and processing absentee ballots and their use of the unreliable Dominion Voting Systems hardware and software in the 2021 Georgia Senatorial Runoff Election. These procedures, which remain in place, violated Plaintiff's rights to Equal Protection, due process, and under the Guarantee Clause of the United States Constitution. Although the election has already taken place, the Defendants' constitutional violations of Plaintiff's rights are ongoing. Plaintiff has demanded nominal damages below together with other relief in the Complaint. Unless this Court intervenes, said unconstitutional procedures will continue to impair Plaintiff's right to vote in the future.

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U.S. Const. Art. I, § 4, cl. 1

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U.S. Const. amend XIV

U.S. Const. amend XIV, § 1

JURISDICTIONAL STATEMENT

This is an appeal of an interlocutory order of a district court of the United States refusing an application for an injunction, which appeal is authorized by 28 U.S.C. § 1292(a)(1). *See Bognet v. Secretary Commonwealth of Pennsylvania, et al.* 2020 WL 6686120 *5 (3d Cir. November 13, 2020) (recognizing the immediate appealability of voter and candidates motion for temporary restraining order and

preliminary injunction.); *Schaivo v. Schaivo*, 403 F. 3d 1223, 1225 (when denial of TRO might have serious, perhaps irreparable consequence, same can be effectively challenged only by immediate appeal). This appeal also involves review of the dismissal of Plaintiff's Verified Complaint below and the Final Judgment entered against Plaintiff, rendering the Order appealed final.

Further, as argued in Appellant's response to the Court's jurisdictional question, filed February 12, 2021, the controversy is not moot for if the result is permitted to stand, and if the same challenged election procedures are employed in future elections, the Appellant (and the citizens of Georgia) will be permanently harmed by the Defendants' infringement on Appellant's voting rights. *See New Ga. Project v. Raffensperger*, 2020 WL 5200930 at *26-27 (N.D. Ga. August 31, 2020)(concluding that the movant satisfied balance of harms/public interest factors, as "Plaintiffs will be forever harmed if they are unconstitutionally deprived of their right to vote"). Thus, this appeal presents this Court with the opportunity to review the challenged election procedures before their inevitable repetition. *See Hall v. Secretary State of Alabama, 902 F. 3d 1294 (11th Cir. 2018)* (discussing the "capable of repetition, yet evading review" exception to mootness). Additionally, the Plaintiff demanded nominal damages, as well as other relief in the court below. The present appeal therefore involves a live case or controversy and is not moot. *See Uzuegbunam v. Preczewski, 592 U.S. __ at 11–12 (March 8, 2021) (Slip Opinion)*

(a single claim for "nominal damages" is enough to keep a lawsuit alive even when the Defendant has stopped the challenged conduct and the Plaintiff suffered no actual monetary damages.).

STATEMENT OF ISSUES

1. Whether the District Court erred in denying injunctive relief and dismissing the case were the runoff election was conducted in an unlawful manner rendering it unconstitutional and violative of the Plaintiff's fundamental right to vote.

2. Whether the Appellees instituted procedures for processing absentee ballots that conflict with State law and are unconstitutional.

3. Whether the Appellees' procedures for receiving and processing absentee ballots, and their use of the unreliable Dominion Voting System hardware and software violates Appellant's rights to Equal Protection, Due Process, and under the Guarantee Clause of the United States Constitution.

STATEMENT OF THE CASE AND FACTS

Appellant/Plaintiff, an individual residing in Fulton County, Georgia, is a qualified, registered "elector" who possesses all of the qualifications for voting in the State of Georgia. See O.C.G.A. §§ 21-2-2(7), 21-2-216(a); (see also Verified Compl. for Decl. and Inj. Relief (D. E. 1, the "Complaint", at paragraph 3). Plaintiff sought declaratory and injunctive relief from the district court below, among other

things, enjoining the January 5, 2021 Senatorial Runoff election from proceeding while the unconstitutional procedures described herein were in place, and a declaring the election procedures described herein, defective and requiring Defendants to cure their violation. As a result of the Appellees'/Defendants' violations of the United States Constitution and other election laws, Plaintiff alleged below the Georgia's election tallies are suspect and tainted with impropriety. The Complaint also sought nominal damages within each of its three counts.

The named Defendants include Defendant Brad Raffensperger, in his official capacity as Secretary of State of Georgia and as Chairperson of Georgia's State Election Board, as well as the other members of the State Election Board in their official capacities - Rebecca N. Sullivan, David J. Worley, Matthew Mashburn, and Anh Le (hereinafter the "State Election Board"). (*See* D.E. 1, Compl., at paragraphs 5-6.) The Complaint alleges violations of the United States Constitution and the applicable Georgia Election laws in regard to the January 5, 2021 run-off election for Georgia's United States Senators. (See generally *id*.)

The Georgia Legislature established a clear and efficient process for handling absentee ballots. To the extent that there is any change in that process, that change must, under Article I, Section 4 of the Constitution, be prescribed by the Georgia Legislature. (*See* D.E. 1 Compl., at paragraph 11.)

Specifically, the unconstitutional procedures in this case involved the

unlawful and improper processing of absentee ballots. First, the Georgia Legislature instructed county registrars and clerks (the "County Officials") regarding the handling of absentee ballot signature verification O.C.G.A. §§21-2-386(a)(l)(B), 21-2-380.1. (*See* D.E. 1 Compl., at paragraphs 12-26.) The Georgia Election Code instructs those who handle absentee ballots to follow a clear procedure:

> Upon receipt of each [absentee] ballot, a registrar or clerk ***shall*** write the day and hour of the receipt of the ballot on its envelope. The registrar or clerk ***shall*** then compare the identifying information on the oath with the information on file in his or her office, ***shall*** compare the signature or make on the oath with the signature or mark on the absentee elector's voter card or the most recent update to such absentee elector's voter registration card and application for absentee ballot or a facsimile of said signature or maker taken from said card or application, and ***shall,*** if the information and signature appear to be valid and other identifying information appears to be correct, so certify by signing or initialing his or her name below the voter's oath...

O.C.G.A. § 21-2-386(a)(l)(B) (emphasis added); (*see* D.E. 1 Compl., at paragraph 12).

The Georgia Legislature also established a clear and efficient process to be used by County Officials if they determine that an elector has failed to sign the oath on the outside envelope enclosing the ballot or that the signature does not conform with the signature on file in the registrar's or clerk's office (a "defective absentee ballot"). *See* O.C.G.A. § 21-2-386(a)(l)(C); (D.E 1 Compl., at paragraph 14.) With respect to defective

absentee ballots:

> *If the elector has failed to sign the oath, or if the signature does not appear to be valid,* or if the elector has failed to furnish required information *or information so furnished does not conform with that on file in the registrar's or clerk's office,* or if the elector is otherwise found disqualified to vote, the registrar or clerk *shall* write across the face of the envelope "Rejected," giving the reason therefor. The board of registrars or absentee ballot clerk *shall* promptly *notify the elector of such rejection,* a copy of which notification *shall* be retained in the files of the board of registrars or absentee ballot clerk for at least one year.

O.C.G.A. § 21-2-386(a)(l)(C) (emphasis added); (*See* D.E. 1 Compl., at paragraph 14). The Georgia Legislature clearly contemplated the use of written notification by the county registrar or clerk in notifying the elector of the rejection. (*See* D.E. 1 Compl., at paragraph 14.) These legislative pronouncements were legally required to be followed in the runoff election, but they were not.

Later, in March 2020, Defendants Secretary Raffensperger, and the State Election Board, who administer the state elections (collectively the "Administrators") entered into a "Compromise and Settlement Agreement and Release" (the "Litigation Settlement") with the Democratic Party of Georgia, Inc., the Democrat Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee (the "Democrat Agencies"), *setting forth totally different standards to be followed by County Officials in processing*

absentee ballots in Georgia. (*See* D.E. 1 Compl., paragraph 15.) See also *Democratic Party of Georgia, Inc., et al. v. Raffensperger, et al*., Civil Action File No. 1:19-cv-05028-WMR, United States District Court for the Northern District of Georgia, Atlanta Division, Doc. 56-1 (DE 6, 30-35).

Although Secretary Raffensperger is authorized to promulgate rules and regulations that are "conducive to the fair, legal, and orderly conduct of primaries and elections," all such rules and regulations must be "consistent with law." O.C.G.A. §21-2-31(2); (*See* D.E. 1 Compl., at paragraph 16).

Under the Litigation Settlement, the Administrators agreed to change the statutorily prescribed process of handling absentee ballots in a manner that was not consistent with the laws promulgated by the Georgia Legislature. (*See id*.) The Litigation Settlement provides that the Secretary of State would issue an "Official Election Bulletin" to County Officials overriding the prescribed statutory procedures. The unauthorized Litigation Settlement procedure, set forth below, is more cumbersome, and made it much more difficult to follow the statute with respect to defective absentee ballots. (*See id*.)

Under the Litigation Settlement, the following language added to the pressures and complexity of processing defective absentee ballots, making it less likely that they would be identified or, if identified, processed for rejection:

> County registrars and absentee ballot clerks *are required,* upon receipt of each mail-in absentee ballot, to compare the signature or make of the elector on the mail-in absentee ballot envelope with the signatures or marks in eNet and on the application for the mail-in absentee ballot. If the signature does not appear to be valid, registrars and clerks are required to follow the procedure set forth in O.C.G.A. § 21- 2-386(a)(l)(C). When reviewing an elector's signature on the mail-in absentee ballot envelope, the registrar or clerk must compare the signature on the mail-in absentee ballot envelope to each signature contained in such elector's voter registration record in eNet and the elector's signature on the application for the mail-in absentee ballot.
> ***If the registrar or absentee ballot clerk determines that the voter's signature on the mail-in absentee ballot envelope does not match any of the voter's signatures on file in eNet or on the absentee ballot application, the registrar or absentee ballot clerk must seek review from two other registrars, deputy registrars, or absentee ballot clerks. A mail-in absentee ballot shall not be rejected unless a majority of the registrars, deputy registrars, or absentee ballot clerks reviewing the signature agree that the signature does not match any of the voter's signatures on file in eNet or on the absentee ballot application. If a determination is made that the elector's signature on the mail-in absentee ballot envelope does not match any of the voter's signatures on file in eNet or on the absentee ballot application, the registrar or absentee ballot clerk shall write the names of the three elections officials who conducted the signature review across the face of the absentee ballot envelope, which shall be in addition to writing "Rejected" and the reason for the rejection as required under O.C.G.A. § 21-2-386(a)(l)(C).*** Then, the registrar or absentee ballot clerk shall commence the notification procedure set forth in O.C.G.A. § 21-2-386(a)(l)(C) and State Election Board Rule 183-1-14-.13.

(*See* D.E. 1 Compl., paragraph 18).

The second unconstitutional procedure at issue in this case relates to the unlawful opening and/or viewing of absentee ballots (mail-in ballots) in advance of the statutory date set for such opening. As with the identity verification procedures described above, the Defendants have also usurped the Georgia General Assembly's plenary power over the manner of conducting elections by impermissibly changing the laws regarding the time for opening and/or viewing of those ballots. (See D.E. 1 Compl., paragraph 27).

Particularly, the Legislature promulgated O.C.G.A. §21-2-386(a)(1)(A) which provides "the board of registrars or absentee ballot clerk shall keep safely, unopened, and stored in a manner that will prevent tampering and unauthorized access all official absentee ballots received from absentee electors prior to the closing of the polls on the day of the primary or election." (emphasis added). (See D.E. 1 Compl., paragraph 28).

Pursuant to the Georgia Legislature's clear directives, "after the opening of the polls on the day of the primary, election, or runoff, the registrars or absentee ballot clerks shall be authorized to open the outer envelope" on a mail-in absentee ballot. Id. at (a)(2) (emphasis added). Additionally, "a county election superintendent may, in his or her discretion, after 7:00 A.M. on the day of the primary, election, or runoff open the inner envelopes in accordance with the procedures prescribed in this subsection and beginning tabulating the

absentee ballots [after following certain notice procedures].” Id. at (a)(3). In short, mail-in absentee ballots may not be opened before election day under the Georgia Legislative framework for federal elections. (See D.E. 1 Compl., paragraph 29).

Nonetheless, Defendants usurped the Legislature’s power by enacting Rule 183-1-14-0.7-.15 (1). The Defendants adopted that Rule on an emergency basis on or about May 18, 2020. In direct conflict with the General Assembly’s above procedures, it provides that “beginning at 8:00 a.m. on the second Monday prior to election day, county election superintendents shall be authorized to open the outer envelope of accepted absentee ballots, remove the contents including the absentee ballots, and scan the absentee ballots using one or more ballot scanners, in accordance with this Rule, and may continue until all accepted absentee ballots are processed.” (emphasis added). This emergency rule was enacted for the June 2020 election, but was then extended on or about August 10, 2020 for use in the General Election. Thereafter, on less than 24-hour notice and with no time for meaningful public comment, the Defendants amended the rule to allow absentee ballots to be opened even earlier - three weeks before the election. This rule is in effect and was implemented in the January 5, 2021 senatorial runoff election. (See D.E. 1 Compl., paragraph 30).

This emergency rule is in direct contravention of the acts of the Georgia Legislature in its plenary power to direct the manner of the runoff election – the Legislature established its purpose for preventing early opening in the statute – to "prevent tampering and unauthorized access." The Georgia Election Code expressly prohibits the opening of absentee ballots before election day. In contrast, the Defendants' Rule expressly allows the opening of absentee ballots three-weeks before election day. The Code and the Rule are inconsistent and mutually exclusive. The Rule must be declared invalid and stricken and/or the Defendant should be in enjoined from employing the Rule. (See D.E. 1 Compl., paragraph 31).

Electors were adversely affected because mailed in ballots were illegally opened in advance of election day. In the November 3, 2020 election, for example, many voters went to the polls in early voting and on election day and were told they had already voted – a fraudulent mail-in ballot had been cast in their name. See Hearings of the Election Law Study Subcommittee of the Standing Senate Judiciary Committee, December 3, 2020, available at https://livestream.com/accounts/26021522/events/8730585/videos/214364915. At that point, the fraudulent votes cast in their name were already included in the pool of opened ballots, unable to be segregated and the valid elector was deprived of his or her right to vote. The same thing happened in the Senatorial

Runoff Election. This was inconsistent with the procedures mandated by the Georgia Legislature in the Election Code. (See D.E. 1 Compl., paragraph 32).

The third unconstitutional procedure in this case involves the Defendants' establishment of an unlawful method of delivering absentee ballots to election officials. (See D.E. 1 Compl., paragraph 33).

The Georgia Legislature established a clear procedure for voters to deliver absentee ballots to election officials. O.C.G.A. § 21-2-382 specifies how and where absentee ballots may be delivered to county election officials. Further, O.C.G.A. § 21-2-385(a) requires electors or certain authorized representatives of electors to "personally mail or personally deliver [their absentee ballots] to the board of registrars or absentee ballot clerk." (See D.E. 1 Compl., paragraph 34).

These statutes, which codify a specific and detailed procedure for requesting, delivering, processing, verifying and monitoring the tabulation of absentee ballots, are designed to protect Georgians from the universally acknowledged dangers of ballot harvesting through widespread mail-in absentee voting, which carries a significant risk of election irregularities and vote fraud. (See D.E. 1 Compl., paragraph 35).

Specifically, mail-in absentee voting creates opportunities to obscure the true identities of persons fraudulently claiming to be legitimate electors and

facilitates the collection of large quantities of purportedly valid absentee ballots by third-parties– commonly called "ballot harvesting" – that results in an extraordinary increase in the number of absentee ballots received by county election officials, including many that are not received and verified in accordance with the procedure required by applicable Georgia statutes. In fact, the Georgia Legislature set forth the very specific circumstances for returning an absentee ballot, and only authorizes those to be returned by caregivers or close family members. O.C.G.A. §21-2-385(a). (See D.E. 1 Compl., paragraph 36).

In contravention of the Election Code, Defendants adopted Rule 183-1-14-0.6-.14 authorizing the use of drop boxes in order to provide, as the rule states, "a means for absentee by mail electors to deliver their ballots to the county registrars." (See D.E. 1 Compl., paragraph 37).

By this rule, Defendants permitted and encouraged the installation and use of unattended drop boxes within Georgia's counties as a means for delivery of absentee ballots, and Defendants receipt thereof. There is no mechanism to ensure that a person who uses a drop box meets the requirements of the Election Code. (See D.E. 1 Compl., paragraph 38).

Defendants' Rule 183-1-14-0.6-.14 claims that a drop box "shall be deemed delivery pursuant to O.C.G.A. § 21-2-385." (See D.E. 1 Compl., paragraph 39).

This rule's definition of delivery is in direct conflict with the language of O.C.G.A. § 21-2-385, which the Georgia General Assembly amended in 2019 specifically to prohibit ballot harvesting. (See D.E. 1 Compl., paragraph 40).

O.C.G.A. § 21-2-385 now specifies only two options for the submission of an absentee ballot: "the elector shall then personally mail or personally deliver the same to the board of registrars or absentee ballot clerk . . . ." (See D.E. 1 Compl., paragraph 41).

O.C.G.A. § 21-2-382(a) establishes the precise locations where an election official may receive an absentee ballot from the individual voter or their caregivers or family member. These sites are defined as "additional registrar's offices or places of registration." (See D.E. 1 Compl., paragraph 42).

> Any other provisions of this chapter to the contrary notwithstanding, the board of registrars may establish additional sites as additional registrar's offices or places of registration for the purpose of receiving absentee ballots under Code Section 21-2-381 and for the purpose of voting absentee ballots under Code Section 21-2-385, provided that 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.

(See D.E. 1 Compl., paragraph 42).

O.C.G.A. § 21-2-2(27) defines a "polling place" to mean "the room provided in each precinct for voting at a primary or election." (See D.E. 1 Compl., paragraph 43).

O.C.G.A. § 21-2-382(b) provides that in larger population areas, such as Fulton, DeKalb, Gwinnett, and Cobb counties, the following sites would automatically serve as additional receiving locations for absentee ballots:

> any branch of the county courthouse or courthouse annex established within any such county shall be an additional registrar's or absentee ballot clerk's office or place of registration for the purpose of receiving absentee ballots . . . under Code Section 21-2-385.

(See D.E. 1 Compl., paragraph 44).

A drop box, however, is not included in the list of additional reception sites described in the exercise in O.C.G.A. § 21-2-382(a) and (b) and is not within the meaning of a "registrar's office or places of registration" in O.C.G.A. § 21-2-386. (See D.E. 1 Compl., paragraph 45).

A "registrar's office or places of registration" contemplates a building with staff capable of receiving absentee ballots and verifying the signature as required by the procedures prescribed in § 21-2-386. (See D.E. 1 Compl., paragraph 46).

A drop box cannot be deemed a location to apply for an absentee ballot "in person in the registrar's or absentee ballot clerk's office" as prescribed by § 21-2-381 nor can it be a location for an elector to appear "in person" to present the absentee ballot to the "board of registrars or absentee ballot clerk," as prescribed by § 21-2-385. (See D.E. 1 Compl., paragraph 47).

Pursuant to O.C.G.A. § 21-2-380.1, only the absentee ballot clerk can perform the functions or duties prescribed in the Election Code. The absentee ballot clerk "may be the county registrar or any other designated official who shall perform the duties set forth in this article." (See D.E. 1 Compl., paragraph 48).

Throughout the Georgia Election Code, the Legislature clearly contemplated a staffed office or building for voter registration, receipt of absentee ballot applications, and receipt of absentee ballots so that the voter can deliver the ballot "in person" or through their designated statutory agent. See e.g., O.C.G.A. § 21-2-385. (See D.E. 1 Compl., paragraph 49).

Drop boxes make it easier for political activists to conduct ballot harvesting to gather votes. When they are used there is a break in the chain of custody of those authorized by statute to collect and deliver absentee ballots, which produces opportunities for political activists to submit fraudulent absentee

ballots, and the opportunity for illicit votes to be counted is significantly increased. (See D.E. 1 Compl., paragraph 50).

The break in the chain of custody caused by the use of drop boxes increases the chances that an absentee voter will cast his or her vote under the improper influence of another individual and enhances opportunities for ballot theft or submission of illicitly generated absentee ballots. (See D.E. 1 Compl., paragraph 51).

The procedures outlined above dilute the Plaintiff's fundamental right to vote, treat his vote in a disparate manner and violate his constitutional rights to Equal Protection, Due Process and the Guarantee of a Republican form of Government under the U.S. Constitution. (See D.E. 1 Compl., paragraph 52).

Because the Constitution reserves for State Legislatures the power to set the times, places, and manner of holding federal elections, state executive officers acting under color of law, like Defendants in this case, have no authority to unilaterally exercise that power, much less flout or ignore the Election Code, as was done in this case. (See D.E. 1 Compl., paragraph 53).

Georgia's Legislature has not ratified the above material changes to statutory law mandated by the Defendants. (See D.E. 1 Compl., paragraph 54).

Additionally, Defendants' fourth constitutional violation involved the Defendants' use of the unreliable and compromised Dominion Voting Systems

hardware and software. Plaintiff presented sworn evidence in support of his Emergency Motion for Injunctive Relief (D.E. 2 and 34), which established the voting equipment was subjected to outside interference and manipulation to such a degree as to rise to the level of a constitutional violation. (See Compl. D.E. 1 paragraphs 55-71).

On December 28, 2021, before the runoff election, without first conducting an evidentiary hearing or considering the extensive sworn evidence presented, the District Court issued an Order (D.E. 35) that denied the Petitioner relief and determined that he lacked standing as a voter to challenge the unconstitutional procedures adopted by the Secretary of State and Election Board. A Final Judgment dismissing the case was entered by the Clerk on the same date. A week later, the January 5, 2021 Senatorial Runoff came and went without any judicial intervention, and the constitutionally defective procedures were used. As a result, the Plaintiff's voting rights were diluted, and his constitutional rights violated.

Thus, although the Complaint was dismissed on December 28, 2020, the underlying issue that permeates this appeal—whether the Appellee's current election procedures violate the Appellant's constitutional rights—will be repeated and will continue to evade review. Additionally, nominal damages were pled in the Complaint and formed the basis for relief. The violations are ongoing. As such, this

appeal involves a live case or controversy or in the alternative fits squarely within the exception to mootness as a case involving an issue capable of repetition yet evades review. Accordingly, Petitioner appealed the District Court's ruling to this Court.

SUMMARY OF ARGUMENT

The Plaintiff suffered an injury in fact and actual harm as a result of the unconstitutional absentee ballot processing procedures utilized in connection with the January 5, 2021 Senatorial Run-off Election. The procedures were illegal and in derogation of the state legislature's clear statutory scheme for elections and accordingly, were unconstitutional. The procedures were promulgated by the Defendants in violation of the non-delegation doctrine. Moreover, in issuing these procedures, the Defendants exceeded their statutory authority. These procedures violated the Plaintiff's constitutional rights to Equal Protection, Due Process and under the Guarantee Clause, and the same constitutional violations giving rise to this appeal are ongoing.

Because of the fundamental nature of the right to vote, courts have recognized voter dilution standing for individuals who are part of an aggrieved group, political parties and political groups, candidates, and Electoral College Electors. However, in contravention of these precedents, the District Court has ruled that the Petitioner lacks standing to challenge these unconstitutional changes in the election scheme

adopted by the State Legislature. Appellant desires to freely exercise his right to vote in future Georgia elections without the Appellees' constitutional violations impairing and diluting his vote. The Appellees can and will likely implement the same election procedures in the future because they remain in place. Appellant must be deemed to have standing to seek redress from the courts.

As a result, this Court should reverse the district court, direct that the district court conduct an evidentiary hearing and determine on the merits the Constitutionality of the election procedures used in the January 5, 2021 Senatorial Runoff Election, prohibit their use in the future, award Plaintiff nominal damages, and fashion any relief as the Court deems proper.

ARGUMENT

THE DISTRICT COURT ERRED IN DENYING INJUNCTIVE RELIEF AND IN DISMISSING THE APPELLANT'S CONSTITUTIONAL CLAIMS BECAUSE THE ELECTION WAS CONDUCTED IN AN UNCONSTITUTIONAL MANNER AND VIOLATIVE OF THE PLAINTIFF'S FUNDAMENTAL RIGHT TO VOTE

Standard of review

The Court of Appeals reviews a district court's decision to deny a preliminary injunction for abuse of discretion. *Fish v. Kobach*, 840 F. 3d 710, 723 (10th Cir. 2016). This Court reviews the district court's factual findings for clear error and its conclusions of law *de novo. Id.* Although review of a denial of a preliminary

injunction is normally limited to whether the district court abused its discretion, an appellate court under some circumstances may decide the merits of a case in connection with such a review. *Siegel v. Lepore*, 254 Fed. 3d 1163, 1171 n.4 (11th Cir. 2000). Additionally, this Court also reviews the dismissal of a Complaint De Novo. *Culverhouse* v. Paulson & Co., Inc., 813 Fed. 3d 991 (11th Cir. 2016).

Merits

A. The Appellant Has Standing to Maintain This Lawsuit

The requirements for standing, under Article III of the Constitution, are three-fold: First, the plaintiff must have suffered, or must face an imminent and not merely hypothetical prospect of suffering, an invasion of a legally protected interest resulting in a "concrete and particularized" injury. Second, the injury must have been caused by the defendant's complained-of actions. Third, the plaintiff's injury or threat of injury must likely be redressable by a favorable court decision. *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1159 (11th Cir. 2008). An injury sufficient for standing purposes is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, (1992).

In the voting context, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue," *Baker v. Carr*, 369 U.S. 186, 206,

(1962), so long as their claimed injuries are "distinct from a 'generally available grievance about the government,'" *Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018)(quoting *Lance v. Coffman*, 549 U.S. 437, 439, 1 (2007) (per curiam)).

Contrary to the District Judge's conclusion (D.E. 35 *generally*), Appellant Wood, consistent with several constitutional provisions specified in the Complaint and herein, established an injury sufficient for standing. Specifically, under the Fourteenth Amendment of the U.S. Constitution, a state may not "deny to any person within its jurisdiction the equal protection of the laws" or deny "due process." U.S. Const. amend. XIV. The Fourteenth Amendment is one of several constitutional provisions that "protects the right of all qualified citizens to vote, in state as well as federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). Because the Fourteenth Amendment protects not only the "initial allocation of the franchise," as well as "the manner of its exercise," *Bush v. Gore*, 531 U.S. 98, 104, (2000), "lines may not be drawn which are inconsistent with the Equal Protection Clause ...." *Id*. at 105 (citing *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966)).

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

Second, the Supreme Court has found that the Equal Protection Clause is violated where the state, "[h]aving once granted the right to vote on equal terms," through "later arbitrary and disparate treatment, value[s] one person's vote over that of another." *Bush*, 531 U.S. at 104-05 (2000); see also *Baker v. Carr*, 369 U.S. 186, 208 (1962) ("A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box.") (internal citations omitted). The Plaintiff supplied evidence in the form of numerous affidavits (D.E. 2 and 34) outlining numerous irregularities in the actual re-counting of votes including attributing the votes of one candidate to the other, the failure of counters to compare signatures on absentee ballots with other signatures on file, processing of absentee ballots that appear to be counterfeit because they had no creases indicative of having been sent by mail, and the manner in which they were bubbled in, not allowing observers sufficient access to meaningfully observe the counting and concluding fraudulent conduct occurred during the vote counting. These procedures were in effect during the Runoff. These irregularities rise to the level of an unconstitutional impairment and dilution of the Plaintiff's vote.

The second theory of voting harm requires courts to balance competing concerns around access to the ballot. On the one hand, a state should not engage in

practices which prevent qualified voters from exercising their right to vote. A state must ensure that there is "no preferred class of voters but equality among those who meet the basic qualifications." *Gray v. Sanders*, 372 U.S. 368, 379-80, 83 (1963). On the other hand, the state must protect against "the diluting effect of illegal ballots." *Id*. at 380. Because "the right to have one's vote counted has the same dignity as the right to put a ballot in a box," *id.*, the vote dilution occurs only where there is both "arbitrary and disparate treatment." *Bush*, 531 U.S. at 105. To this end, states must have "specific rules designed to ensure uniform treatment" of a voter's ballot. *Id*. at 106.

In *Bush*, the Supreme Court held that, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." 531 U.S. at 104-05. Plaintiff argued below that he has been subjected to arbitrary and disparate treatment because he voted under one set of rules, and other voters, through the guidance in the unlawful consent agreement, were permitted to vote invalidly under a different and unequal set of rules, and that this is a concrete and particularized injury.

For the purposes of determining whether Appellant has standing, is it not "necessary to decide whether [Plaintiff's] allegations of impairment of his vote" by Defendants' actions "will, ultimately, entitle them to any relief," *Baker*, 369 U.S. at 208; whether a harm has occurred is best left to this court's analysis of the merits of

Appellant's claims. Instead, the appropriate inquiry is, "[i]f such impairment does produce a legally cognizable injury," whether Appellant "is among those who have sustained it." *Baker*, 369 U.S. at 208.

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

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

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

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

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

Additionally, the inability of a voter to pay a poll tax, for example, is not required to challenge a statute that imposes a tax on voting, *see Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966), and the lack of an acceptable photo identification is not necessary to challenge a statute that requires photo identification to vote in person. Because Plaintiff Wood has demonstrated that the unlawful "Consent Agreement" as well as the illegal drop boxes and early opening of absentee ballots subjected him to arbitrary and disparate treatment, vis-à-vis, other voters, he has clearly suffered a sufficient injury. See also *Roe v. Alabama*, 43 F. 3d 574, 580-581 (11th Cir. 1995)(voter and candidates in statewide election had standing to allege violation of their constitutional rights based on the counting of improperly completed absentee ballots, which diluted votes of the voters who met requirements of absentee ballot statute and those who went to the polls on election day.)

In the instant case, the Appellant has shown below that as a registered voter, he has legal standing to maintain the challenge to the Appellees' unconstitutional election procedures used in the runoff election. *Accord Citizens for Legislative*

Choice v. Miller, 993 F. Supp. 1041, 1044-1045 (E.D. Mich. 1998)(voters who wished to vote for specific candidates in an election had standing to challenge constitutionality of a state constitutional amendment establishing term limits for state legislators). The lower court, while denying that the Petitioner/voter had standing to challenge the Secretary's unauthorized procedures and the vote dilution they caused, it stated that "the alleged injuries are paradigmatic generalized grievances unconnected to Wood's individual vote" and "he would need to show an 'individual burden[]' on his right to due process" to demonstrate that he has standing to pursue his due process claims. (*See* DE 35 Order., at 18). Most respectfully, the reasoning below fails to provide any protection to Appellant Wood, or any individual citizen's fundamental right to vote. For, Appellant has alleged more than just an "individual burden[]' on his right to due process" (*See* D.E. 1 Comp., at *generally*). But the lower court has denied Appellant his right to seek redress from the courts. As the holder of the fundamental right to vote, Appellant must be deemed to have standing to seek redress for vote dilution and impairment.

The Respondents' procedures for verifying signatures and rejecting absentee ballots was unconstitutional, as was there use of ballot drop boxes and their early opening of mail-in votes. Same valued absentee votes more than in person votes, and impermissibly diluted the Petitioner's in person vote. Accordingly, the lower court erred in concluding the Petitioner lacked standing.

B. The Appellees Instituted Procedures for Receiving and Processing Absentee Ballots That Conflict with State Law and is Unconstitutional

The Elections Clause of the United States Constitution states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives *shall be prescribed in each State by the Legislature thereof;* but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." U.S. Const. Art. I, § 4, cl. 1 (emphasis added). Regulations of congressional and presidential elections, thus, "must be in accordance with the method which the state has prescribed for legislative enactments." *Smiley v. Holm*, 285 U.S. 355, 367 (1932); *see also Ariz. St. Leg. v. Ariz. Indep. Redistricting Comm'n,* 576 U.S. 787, 807-08 (2015); *(see* D.E. 1 Compl. at 4). In Georgia, the "legislature" is the General Assembly (the "Georgia Legislature"). *See* Ga. Const. Art. III, § I, Para. I; *(see id*).

The Supreme Court of Georgia has recognized that statutes delegating legislative authority violate constitutional nondelegation and separation of powers. *Premier Health Care Investments, LLC. v. UHS of Anchor*, LP, 220 WL 5883325 (Ga. 2020). The non-delegation doctrine is rooted in the principle of separation of powers in that the integrity of the tripartite system of government mandates the

general assembly not divest itself of the legislative power granted to it by the State Constitution. *Department of Trans. v. City of Atlanta*, 260 Ga. 699, 703 (Ga. 1990)(finding OCGA § 50-16-180 through 183 created an impermissible delegation of legislative authority). See also *Mitchell v. Wilkerson, 258 Ga. 608, 610 (Ga. 1988)*(election recall statute's attempt to transfer the selection of the reasons to the applicant amounted to an impermissible delegation of legislative authority.)

Because the Constitution reserves for state legislatures the power to set the time, place, and manner of holding federal elections, state executive officers have no authority to unilaterally exercise that power, much less flout existing legislation, nor to ignore existing legislation. While the Elections Clause "was not adopted to diminish a State's authority to determine its own lawmaking processes," it does hold states accountable to their chosen processes in regulating federal elections. *Ariz. St. Leg.,* 135 S. Ct. at 2677, 2668.

In *North Fulton Med. Center v. Stephenson*, 269 Ga. 540 (Ga. 1998), a hospital outpatient surgery center which had already relocated to a new site and commenced operations applied to the State Health Planning Agency for a certificate of need under the agency's second relocation rule, which certificate was provided by the agency. A competitor sought appellate relief and the

Georgia Supreme Court held that the agency rule conflicted with the State Health Planning Act, and thus, was invalid and had to be stricken. Additionally, the supreme court held that the rule was the product of the agency's unconstitutional usurpation of the general assembly's power to define the thing to which the statute was to be applied. *Id* at 544. See also *Moore v. Circosta*, 2020 WL 6063332 (MDNC October 14, 2020)(North Carolina State Board of Elections exceeded its statutory authority when it entered into consent agreement and eliminated witness requirements for mail-in ballots).

The Framers of the Constitution were concerned with just such a usurpation of authority by State administrators. In Federalist No. 59, Alexander Hamilton defended the Elections Clause by noting that "a discretionary power over elections ought to exist somewhere (emphasis supplied) and then discussed why the Article 1, Clause 4 "lodged [the power]… primarily in the [State legislatures] and ultimately in the [Congress]." He defended the right of Congress to have the ultimate authority, observing that even though granting this right to states was necessary to secure their place in the national government, that power had to be subordinate to the Congressional mandates to prevent what could arise as the "sinister designs in the leading members of a few of the State legislatures."

Hamilton feared that the state legislatures might conspire against the Union but also that "influential characters in the State administrations" might

"prefer[] their own emolument and advancement to the public weal." But in concluding his defense of this constitutional compromise, Hamilton noted that the Clause was designed to commit to the guardianship of election "those whose situation will uniformly beget an immediate interest in the faithful and vigilant performance of the trust."

The procedures employed by the Defendants during the election constitute a usurpation of the legislator's plenary authority. This is because the procedures are not consistent with- *and in fact conflict with*- the statute adopted by the Georgia Legislature governing processing of absentee ballots. First, the Litigation Settlement overrides the clear statutory authorities granted to County Officials individually and forces them to form a committee of three if any one official believes that an absentee ballot is a defective absentee ballot. Such a procedure creates a cumbersome bureaucratic procedure to be followed with each defective absentee ballot – and such ballots simply will not be identified by the County Officials.

Second, the Litigation Settlement allows a County Official to compare signatures in ways not permitted by the statutory structure created by the Georgia Legislature. The Georgia Legislature prescribed procedures to ensure that any request for an absentee ballot must be accompanied by sufficient identification of the elector's identity. *See* O.C.G.A. § 21-2-381 (b)(1) (providing, in pertinent part, "In order to be found eligible to vote an

absentee ballot in person at the registrar's office or absentee ballot clerk's office, such person shall show one of the forms of identification listed in Code Section 21-2-417..."); Under O.C.G.A. § 21-2-220(c), the elector must present identification, but need not submit identification if the electors submit with their application information such that the County Officials are able to match the elector's information with the state database, generally referred to as the eNet system.

The system for identifying absentee ballots was carefully constructed by the Georgia Legislature to ensure that electors were identified by acceptable identification, but at some point in the process, the Georgia Legislature mandated the system whereby the elector be identified for each absentee ballot. Under the Litigation Settlement, any determination of a signature mismatch will lead to the cumbersome process described in the settlement, which was not intended by the Georgia Legislature, which authorized those decisions to be made by single election officials.

In short, the Litigation Settlement by itself has created confusion, misplaced incentives, and undermined the confidence of the voters of the State of Georgia in the electoral system. Neither it nor any of the activities spawned by it were authorized by the Georgia Legislature, as required by the United States Constitution.

"A consent decree must of course be modified, if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under Federal law." *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367388 (1992).

Moreover, Appellees' use of unsupervised ballot drop boxes and their early opening of mail-in ballots was also the product of Appellees' usurpation of legislative authority because their procedures in this regard, as described above, conflict with the existing legislation. As such, the lower court should be reversed, and the relief requested below should be granted.

C. The Appellees' Procedures for Receiving and Processing Absentee Ballots Violates Appellant's Rights to Equal Protection under the United States Constitution

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. This constitutional provision requires "that all persons similarly situated should be treated alike." *City of Cleburne v. Clerburn Living Center*, 473 U.S. 432, 439 (1985).

And this applies to voting. "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). The Appellees have failed to ensure that Georgia voters are treated equally regardless of

whether they vote in person or through absentee ballot. Under the Equal Protection Clause of the 14th amendment, a state cannot utilize election practices that unduly burden the right to vote or that dilute votes.

When deciding a constitutional challenge to state election laws, the flexible standard outlined in *Anderson v. Celebrezze,* 460 U.S. 780 (1983) and *Burdick v. Takushi,* 504 U.S. 428 (1992) applies. Under *Anderson* and *Burdick,* courts must "weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden and consider the extent to which the State's concerns make the burden necessary." *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358 (1997) (citations and quotations omitted). "[E]ven when a law imposes only a slight burden on the right to vote, relevant and legitimate interests of sufficient weight still must justify that burden." *Democratic Exec. Comm. of Fla. v. Lee,* 915 F.3d 1312, 1318-19 (11th Cir. 2019).

"To establish an undue burden on the right to vote under the *Anderson-Burdick* test, Plaintiffs need not demonstrate discriminatory intent behind the signature-match scheme or the notice provisions because we are considering the constitutionality of a generalized burden on the fundamental right to vote, for which we apply the *Anderson-Burdick* balancing test instead of a traditional equal protection inquiry." *Lee,* 915 F.3d at 1319.

Plaintiff's equal protection claim is straightforward: states may not, by arbitrary action or other unreasonable impairment, burden a citizen's right to vote. *See Baker v. Carr,* 369 U.S. 186, 208 (1962) ("citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution"). "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush,* 531 U.S. at 104-05. Among other things, this requires "specific rules designed to ensure uniform treatment" in order to prevent "arbitrary and disparate treatment to voters." *Id.* at 106-07; *see also Dunn v. Bloomstein,* 405 U.S. 330, 336 (1972) (providing that each citizen "has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction").

"The right to vote extends to all phases of the voting process, from being permitted to place one's vote in the ballot box to having that vote actually counted. Thus, the right to vote applies equally to the initial allocation of the franchise as well as the manner of its exercise. Once the right to vote is granted, a state may not draw distinctions between voters that are inconsistent with the guarantees of the Fourteenth Amendment's equal protection clause." *Pierce v. Allegheny County Bd. of Elections*, 324 F.Supp.2d 684, 695 (W.D. Pa.

2003) (citations and quotations omitted). "[T]reating voters differently" thus "violate[s] the Equal Protection Clause" when the disparate treatment is the result of arbitrary, ad hoc processes. *Charfauros v. Bd. of Elections,* 249 F.3d 941, 954 (9th Cir. 2001). Indeed, a "minimum requirement for non-arbitrary treatment of voters [is] necessary to secure the fundamental right [to vote]." *Bush,* 531 U.S. at 105.

Simply put, Appellees are not part of the Georgia Legislature and cannot exercise legislative power to enact rules or regulations regarding the handling of defective absentee ballots that are contrary to the Georgia Election Code. By entering the Litigation Settlement, establishing ballot drop boxes, and opening mail-in ballots early, however, Defendants unilaterally and without authority altered the Georgia Election Code. Indeed, the lower court, while denying that the Petitioner/voter had standing to challenge the Secretary's unauthorized procedures and the vote dilution they caused, acknowledged that "vote dilution under the Equal Protection Clause is concerned with votes being weighted *differently*." (*See* DE 35 Order., at 18)(citing *Rucho v. Common Cause*, _ U.S. _, S. Ct. 2484, 2501 (2019). In the instant case, the result is that absentee ballots have been processed *differently* by County Officials than the process created by the Georgia Legislature and set forth in the Georgia Election Code.

Thus, the rules and regulations set forth in the Litigation Settlement created an arbitrary, disparate, and ad hoc process for processing defective absentee ballots, and for determining which of such ballots should be "rejected," contrary to Georgia law. *See* O.C.G.A. § 21-2-386. This disparate treatment is not justified by, and is not necessary to promote, any substantial or compelling state interest that cannot be accomplished by other, less restrictive means. As such, Appellant has been harmed by Appellees' violations of his equal protection rights, and the lower court committed reversible error when it dismissed his claims and failed to recognize his standing to maintain his Constitutional challenges.

If the same procedures continue in future elections, then Georgia's election results will continue to be improper, illegal, and therefore unconstitutional. The fact that the January 5, 2021, election procedures with respect to which Wood seeks relief has already occurred does not moot the Plaintiff's lawsuit. The Plaintiff's fundamental right to vote continues to be impaired, and the constitutionally improper procedures will be implemented in future elections, absent Court intervention. *Siegel,* 234 F. 3d at 1372.

D. The Appellees' Election Procedures Violated Due Process

The procedures utilized in the runoff election as described in the Verified Complaint violate the Plaintiff's right to due process. The abrogation of the absentee ballot signature verification statute, of the requirement that absentee ballots not be opened before election day, the installation of unauthorized ballot drop boxes, and the use of the compromised Dominion voting machines, when considered singularly and certainly when considered collectively, render the election procedures for the runoff so defective and unlawful as to constitute a violation of Plaintiff's right to procedural due process under the Fourteenth Amendment to the Constitution.

The United States Supreme Court and other federal courts have repeatedly recognized that when election practices reach the point of patent and fundamental unfairness, the integrity of the election itself violates Plaintiff's substantive due process right. *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978); *Duncan v. Poythress*, 657 F.2d 691, 702 (5th Cir. 1981); *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1183-84 (11th Cir. 2008); *Roe v. State of Ala. By & Through Evans*, 43 F.3d 574, 580-82 (11th Cir. 1995); *Roe v. State of Ala.*, 68 F.3d 404, 407 (11th Cir. 1995); *Marks v. Stinson*, 19 F. 3d 873, 878 (3rd Cir. 1994).

The Defendants' unconstitutional rule making discussed above represents an intentional failure to follow election law as enacted by the Georgia legislature. These

unauthorized acts violate Plaintiff's procedural due process rights. *Parratt v. Taylor*, 451 U.S. 527, 537-41 (1981), overruled in part on other grounds by *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Hudson v. Palmer*, 468 U.S. 517, 532 (1984). Accordingly, the District Court erred and should be reserved.

E. The Appellees' Election Procedures Give Rise to a Guarantee Clause Claim

Article IV, Section 4 of the U.S. Constitution provides that "the United States shall guarantee to every State in this Union a Republican Form of Government." ("Guarantee Clause"). This Court and other federal courts are institutions of the United States that are constitutionally compelled to enforce the Guarantee Clause.

The Defendants' implementation of the above unauthorized Rules directly conflicts with the Georgia Election Code. The Supreme Court has recognized that the right to vote is inherent in the republican form of government envisioned by the Guarantee Clause. An election system that does not provide for the certainty of a free and fair election is not providing a democratic or republican form of government. Indeed, when State action, like the Defendants actions in this case, causes election fraud, loss and/or dilution of the fundamental right to vote, Plaintiff's complaint elevated into a Guarantee Clause claim, mandating judicial protection of the right to vote. The Supreme Court has recognized that not all claims under the Guarantee Clause present nonjusticiable political questions, and courts should

address the merits of such claims at least in some circumstance. *New York v. United States*, 112 S. Ct. 2408, 2432-2433 (1992). This case merits the Court's invocation of the Guarantee Clause.

Furthermore, use of unreliable and comprised Dominion voting machines is contrary to the root philosophy of providing for an accountable government – the fundamental feature of a republican form of government. Defendants' interference with the right to vote calls for no less than active judicial protection. When, as here, as a result of fraud and unconstitutional actions, state election procedures result in the election of illegitimate office holders, not only are voter interests diluted, but the republican form of government is undermined. This Court is compelled under the circumstances of this case to invoke the Guarantee Clause and actively protect the Appellant's fundamental right to vote. *Mountain States Legal Foundation v. Denver School District #1*, 459 F. Supp. 357, 361 (D. Col. 1978).

If the certified result is permitted to stand, and upcoming elections are run according to the same unconstitutional process, the Plaintiff (and the citizens of Georgia) will be permanently harmed by the Defendants' infringement on Plaintiff's voting rights. *New Ga. Project v. Raffensperger,* 2020 WL 5200930 at *26-27 (concluding that movant satisfied balance of harms/public interest factors, as "Plaintiffs will be forever harmed if they are unconstitutionally deprived of their right to vote").

As a result, this Court should reverse the district court and remand this case for further proceedings, including an evidentiary hearing and a determination as to the Constitutionality of the election procedures used in the January 5, 2021 Senatorial Runoff Election and fashion appropriate relief including an award for nominal damages.

CONCLUSION

For the reasons stated above, the District Court's order should be reversed, and this case remanded for further proceedings on the merits to redress the ongoing violations of Plaintiff's constitutional rights, so that complete relief may be afforded, including nominal damages. Further, the Defendants should not be permitted to employ the constitutionally defective procedures in future elections.

CERTIFICATE OF COMPLIANCE

I hereby certify that this submission contains 10,614 words according to Microsoft Word's word count function (Version 2008), and as such does not exceed the 13,000-word limit imposed by Rule 32 and complies with the requirements of Rule 28 and 32(g).

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2021, I electronically filed the foregoing **INITIAL BRIEF OF APPELLANT** through the Court's CM/ECF system, which will send a Notice of Electronic Filing to all participants who are registered CM/ECF users in this matter.

/s/ L. Lin Wood, Jr.

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