No. 20-13360

In the United States Court of Appeals for the Eleventh Circuit

THE NEW GEORGIA PROJECT, et al.,

Plaintiffs-Appellees,

v.

BRAD RAFFENSPERGER, et al.,

Defendants-Appellants.

PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO DEFENDANTS-APPELLANTS' MOTION TO STAY INJUNCTION PENDING APPEAL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA
NO. 1:20-CV-1986-ELR

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rules 26.1-1 through 26.1-3, counsel for Plaintiffs-Appellees hereby certify that the following persons and entities were omitted from earlier filed Certificates of Interested Persons:

1. Consovoy McCarthy PLLC: Counsel for amici curiae The Republican National Committee and Georgia Republican Party, Inc.

2. Georgia Republican Party, Inc.: amicus curiae

3. Mansinghani, Mithun: Counsel for amici curiae States of Oklahoma, Arizona, Arkansas, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Tennessee, Texas, South Carolina, South Dakota, and West Virginia

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9. The Republican National Committee: amicus curiae

/s/ Kevin J. Hamilton
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CORPORATE DISCLOSURE STATEMENT

Counsel for Plaintiffs-Appellees certify that Plaintiffs-Appellees are one nonprofit organization and three individuals. Counsel for Plaintiffs-Appellees further certify that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

The day before Wisconsin's April 2020 primary, the U.S. Supreme Court approved an extension of Wisconsin's election day receipt deadline so that ballots postmarked by election day but received within six days would be counted. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207–08 (2020) ("*RNC*"). Since then, multiple courts have found what the Wisconsin court—and then the Supreme Court—presciently anticipated in the pandemic's early weeks. Under circumstances widely taxing for the U.S. Postal Service ("USPS") and elections administrators, many ballots are arriving late and not being counted due to no fault of voters. Short extensions of ballot receipt deadlines are therefore needed to protect against this otherwise certain—and unconstitutional—disenfranchisement of thousands of lawful voters.

That is precisely what the district court here did in granting Plaintiffs' preliminary injunction in part by ordering that ballots postmarked by election day but received within 72 hours of Georgia's Election Day Receipt Deadline (the "Deadline") must be counted. O.C.G.A. § 21-2-386(a)(1)(F). Similarly, on Monday, the same Wisconsin federal court that issued the order in *RNC* extended Wisconsin's receipt deadline for the November election by six days. *Democratic Nat'l Comm. v. Bostelmann*, No. 3:20-cv-249-wmc, ECF No. 538 at 51 (W.D. Wis. Sept. 21, 2020). Last week, a Michigan court extended that state's receipt deadline for ballots

postmarked by election day by 14 days, Michigan's election certification date. *Mich. All. for Retired Americans v. Benson*, No. 20-000108-MM (Mich. Ct. of Claims Sept. 18, 2020). And the Pennsylvania Supreme Court ordered a three-day extension for absentee ballots there. *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644, at *31 (Pa. Sept. 17, 2020); *see also id*. at *18 (extension will "reduce voter disenfranchisement resulting from the conflict between the Election Code and the USPS delivery standards, given the expected number of Pennsylvanians opting to use mail-in ballots during the pandemic").

The extension at issue here, granted by the district court after careful consideration in a comprehensive 70-page order, is the most modest among these already modest extensions. Although Plaintiffs urged a five-business-day extension, the court crafted a shorter *72-hour* extension "to honor the State's legitimate interest in certifying the election." ECF No. 134 at 68.[1] Based on the extensive (and largely unrefuted) evidentiary record, the court concluded that "the risk of disenfranchisement is great," and "narrowly tailored injunctive relief is appropriate." *Id*. In the course of those proceedings, Defendants-Appellants ("State Defendants") did *not* offer any rebuttal expert or contest that the Deadline has and will disenfranchise thousands of Georgia voters and that COVID-19 has driven up the

[1] References to the record below refer to the document's ECF number and ECF page number. *See* 11th Cir. R. 27-1(a)(11).

need to vote absentee exponentially, subjecting more voters to the Deadline's disenfranchising effects. Even now, State Defendants do not contest "the existence of COVID-19 and the potential for it to affect voters casting absentee ballots in the November election." State Defs.' Mot. to Stay ("Mot.") at 5.

The evidence paints a clear (and alarming) picture. In Georgia's June primary, the Deadline disenfranchised more than 7,200 voters. ECF No. 105-1 at 14. In November, undisputed expert analysis projects that number will skyrocket to over *62,000* if voters cast the 4 million absentee ballots they are anticipated to cast. ECF No. 59-1 at 32.[2] The 72-hour extension ordered by the district court will ensure that tens of thousands of lawful voters are not disenfranchised as a result of delays in mailing and delivering ballots by both the USPS and elections administrators. It is axiomatic that, "[t]he right to vote *includes the right to have the ballot counted*." *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (citation and quotation omitted) (emphasis added). If a voter is standing in line on election day when the polls close, their ballot is counted. The court's order simply provides the same protections to voters who cast their ballots by mail by election day, while at the same time cabining that relief to voters whose ballots are not delayed more than 72-hours in transit.

[2] State Amici's insistence that there was "no evidence that a substantial number of Georgia voters will be wholly unable to comply with the deadline" overlooks this very evidence that demonstrates just that. State Amici Br. at 35. They also ignore that this evidence was entirely unrebutted and undisputed.

The district court acted well within its discretion to grant this narrow relief, and this Court should deny State Defendants' motion to stay. Ignoring the requisite factors courts consider in granting a stay (none of which they satisfy), State Defendants instead argue that the court's order will sow chaos and confusion, claiming it would change the rules too close to the November election. But it is the stay that State Defendants seek that, if granted, would alter the rules in an election that is already underway; indeed, absentee ballots have been going out to voters for over a week. State Defendants also fail to explain why they waited *nearly a month* after the court entered its order to seek this relief. In that time, the extension of the Deadline has been widely publicized, and voters have come to rely upon it. Thus, concerns about voter confusion weigh *against* granting the stay, not for it.

II. BACKGROUND

Nearly six months before the November election, and shortly after the pandemic began, Plaintiffs filed this lawsuit challenging five provisions of Georgia's election law, including the Deadline. ECF Nos. 1, 33. The day after Georgia's June 9 primary, Plaintiffs moved for a preliminary injunction to enjoin these provisions. ECF Nos. 57–59. On August 31, after extensive briefing on Plaintiffs' motion and State and County Defendants' motions to dismiss, as well as a hearing that was delayed at Defendants' request, *see* ECF Nos. 108, 120, the district court denied Defendants' motions and granted a partial preliminary injunction, ordering a modest

72-hour extension to the Deadline. ECF No. 134 at 67–69. The court denied the remainder of Plaintiffs' requested relief.

State Defendants waited four days to file a notice of appeal and motion to stay the injunction in the district court. ECF Nos. 136, 137. In the course of these proceedings it came to light that one State Defendant believes the appeal "is a mistake and a waste of the State's time and resources, and will lead to confusion on the part of county election officials." ECF No. 144-1. On September 16, concluding, among other things, that the preliminary injunction "simply extends a procedural safeguard already available to a certain subset of Georgia absentee voters to all eligible absentee voters during these extraordinary times," the court denied State Defendants' motion to stay. ECF No. 145 at 6. On September 18, State Defendants filed this motion to stay pending appeal. Meanwhile, elections officials have issued more than 1.2 million absentee ballots to voters since September 15. O.C.G.A. § 21-2-384(a)(2).[3]

III. LEGAL STANDARD

State Defendants bear the heavy burden of justifying "an intrusion into the ordinary processes of administration and judicial review." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotations omitted). It is an extraordinary remedy, only justified

[3] *See* Ga. Sec'y of State, *Absentee Files (HTTP Download)*, https://elections.sos.ga.gov/Elections/voterabsenteefile.do (last visited Sept. 24, 2020).

where the party seeking the stay can demonstrate (1) a strong showing they are likely to succeed on the merits; (2) they will suffer irreparable injury absent a stay; (3) a stay will not substantially injure other parties interested in the proceedings; and (4) the public interest favors a stay. *Id.* at 434; *Chafin v. Chafin*, 742 F.3d 934, 937 n.7 (11th Cir. 2013). To satisfy its burden, "the party seeking the stay must show more than the mere possibility of success on the merits or of irreparable injury." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317 (11th Cir. 2019). State Defendants fail to make *any* of these showings.

IV. ARGUMENT

A. The district court has jurisdiction over this case.

1. State Defendants have ample authority to redress Plaintiffs' injuries and order statewide relief.

Contrary to State Defendants' and Amici's arguments, Georgia's Secretary of State and State Election Board have the power and authority to enforce the district court's order and direct county elections officials to accept ballots postmarked by election day and received within 72 hours. State Defendants' reliance on *Jacobson v. Florida Secretary of State*, No. 19-14552, 2020 WL 5289377 (11th Cir. Sept. 3, 2020), to argue that Plaintiffs' injuries are "neither traceable nor redressable to [them]," Mot. at 47 (citation omitted), is misplaced and the court was correct to reject it. State Defendants have broader powers over election administration than Florida's Secretary of State. They are responsible for promulgating and enforcing *uniform*

state election policy, *to which all counties are subject*. O.C.G.A. §§ 21-2-50(b), 21-2-31; ECF No. 134 at 20 n.16. This power has been illustratively exercised in the current pandemic: just as the Secretary exercised his authority to mail absentee ballot applications to all registered voters in March, State Defendants can instruct counties on the extended Deadline. *See* ECF No. 59-33 at 2; ECF No. 134 at 19.

For those same reasons, arguments that the district court's statewide injunction disparately treats similarly situated voters because not all 159 counties were named as defendants fails. It ignores State Defendants' broad powers to promulgate uniform election rules statewide. O.C.G.A. §§ 21-2-50(b), 21-2-31. Indeed, the court explained that its order applied to "Defendants . . . *and all persons acting in active concert or participation with Defendants, or under Defendants' supervision, direction, or control*." ECF No. 145 at 2 (emphasis added). The court has clearly ordered State Defendants to implement the order statewide.[4]

2. The political question doctrine does not apply.

State Defendants' assertion that Plaintiffs' claim is nonjusticiable similarly fails. That Georgia has the constitutional authority to regulate "the Times, Places and Manner of holding Elections" under Article I, Section 4, hardly means that those

[4] The contention that Plaintiffs "cherry picked" certain Georgia counties as defendants is of no moment. Republican Amici Br. at 18. But it also ignores that the 17 counties named as Defendants include Georgia's most populous counties which, in recent elections, have accounted for more than half of *all* Georgia voters and are therefore the counties where many voters the Deadline disenfranchises live.

regulations can violate other constitutional provisions or escape judicial review. *See, e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (holding Section Two of the Fourteenth Amendment cannot violate Section One of that Amendment). The Elections Clause's grant of authority to the states is not a shield guarding against *any* constitutional challenges to state election laws under the guise of the political question doctrine—as this Court and the district court below know well. *See, e.g.*, *Lee*, 915 F.3d at 1318–27; *see also Ga. Coal. for People's Agenda v. Kemp*, 347 F. Supp. 3d 1251, 1269 (N.D. Ga. 2018).

State Defendants use the Elections Clause as a cudgel for their over-expansive view of the narrow doctrine. But the Elections Clause "functions as 'a default provision; it invests the States with responsibility for the mechanics of' elections, 'but only so far as Congress declines to pre-empt state legislative choices.'" *Ariz. v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013) (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997)). This grant of responsibility to the states "does not justify, without more, the abridgement of fundamental rights, such as the right to vote." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986); *see also U.S. Terms Limits, Inc. v. Thornton*, 514 U.S. 779, 833–34 (1995).

State Defendants' attempts to re-plant Plaintiffs' claim into the restricted boundaries of the non-justiciable political thicket are misplaced because the district court's narrow 72-hour extension is not a "question[] of policy with no judicially

manageable standards." Mot. at 49. Courts nationwide—including the Supreme Court—have regularly extended deadlines that unconstitutionally burdened voters or endorsed a lower court's extension, demonstrating that the question here is inherently manageable and justiciable. *See RNC.*, 140 S. Ct. at 1208; *see also Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016) (extending deadline in elections context); *Ga. Coal. for the Peoples' Agenda, Inc., v. Deal*, 214 F. Supp. 3d 1344, 1345 (S.D. Ga. 2016) (same); *Doe v. Walker*, 746 F. Supp. 2d 667, 681–83 (D. Md. 2010) (same); *Boockvar*, 2020 WL 5554644, at *31 (same); *Benson*, No. 20-000108-MM (same).

The modest, practicable nature of the district court's injunction undercuts State Defendants' efforts to recast Plaintiffs' requested relief as a policy decision unmoored from judicially manageable standards. Plaintiffs sought—and the court partially granted—a modest remedy to ensure that thousands of Georgians whose cast ballots will arrive just after the Deadline through no fault of their own will not be disenfranchised. *See* ECF Nos. 105-1 at 14; 59-1 at 32.[5] The court considered that claim and crafted its relief using judicially manageable standards. ECF No. 134 at 68. In fact, this is an even more modest remedy than the six-day extension the Supreme Court approved in April. *See RNC*, 140 S. Ct. at 1208.

[5] Among the undisputed data was evidence that most late ballots will arrive within 72 hours of the polls closing. ECF No. 59-1 at 19. The district court's relief was not arbitrary by any means.

B. State Defendants are unlikely to succeed on the merits.

State Defendants fall far short of the necessary "strong showing" that they are likely to succeed on the merits of their appeal on either Plaintiffs' right-to-vote or procedural due process claims. *Nken*, 556 U.S. at 434.

1. The district court correctly concluded the Deadline burdened the right to vote without adequate justification.

As the district court found, it is undisputed that, absent an injunction, the Deadline will disenfranchise thousands of Georgia voters in November. *See* ECF Nos. 105-1 at 14 (7,281 ballots rejected in primary because of Deadline); *see also* 59-1 at 32 (estimating 62,000 absentee ballots cast in November election will be rejected by Deadline absent extension). The court methodically considered these facts and the elements of the *Anderson-Burdick* test, ECF No. 134 at 57–61, and concluded that, as applied to the November election, the Deadline severely burdens Georgia voters such that the State's interests, however "strong," cannot justify those burdens. *Id*. at 60. The court did not ignore the State's interests. Rather, it gave so much weight to them that Plaintiffs received less than half of their requested relief—a three-day extension versus the seven days they sought. *Id*. at 68 ("[T]he Court declines to grant Plaintiffs' specific request[.]").[6]

[6] At the preliminary-injunction hearing, Plaintiffs' counsel emphasized courts' flexibility in fashioning relief, including the ability to order a shorter-than-requested extension, because the "equitable power of [the] court" is "essential" and "the cornerstone to protecting the constitutional rights of American citizens confronted

Their contrary arguments misstate *Anderson-Burdick*. This analysis requires courts to "weigh the character and magnitude of the asserted First and Fourteenth Amendment injury against the state's proffered justifications for the burdens imposed by the rule, taking into consideration the extent to which those justifications require the burden to plaintiffs' rights." *Lee*, 915 F.3d at 1318 (citations omitted). Laws severely burdening voting rights—like the Deadline—must be "narrowly drawn to serve a compelling state interest. *Id*. (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). In assessing the severity of the burden, the court's inquiry is not (as State Defendants wrongly suggest, Mot. at 15) to consider the law's burdens on the *whole* electorate, but instead it must consider its burdens on the voters who the law *actually impacts*. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198, 201 (2008) (controlling op.) (explaining "[t]he burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a [photo ID]," not the burdens on all voters); *see also Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016).

This is precisely what the district court did. *See* ECF Nos. 134 at 57–58, 145 at 10. It acknowledged that the burdens the Deadline places on Georgia voters is severe—more than 7,200 Georgia voters were denied their right to vote in the June

with situations like this." Tr. at 111. *See Kansas v. Nebraska*, 135 S. Ct. 1042, 1058 (2015) ("flexibility [is] inherent in equitable remedies").

primary because of it. ECF No. 134 at 58. And the undisputed record demonstrates that the same fate would befall more than 62,000 voters in November, unless the Deadline was enjoined. *See* ECF No. 59-1 at 32. Because the Deadline's burdens are severe, it cannot survive unless it is "narrowly drawn to serve a compelling state interest." *Lee*, 915 F.3d at 1318.

The relatively low *rate* of disenfranchised voters is irrelevant. Mot. at 14. *Anderson-Burdick* is concerned with the thousands of voters disenfranchised by the law. In finding those voters suffered a severe burden on their voting rights when they "were disenfranchised for no error of their own," ECF No. 134 at 60, the court aligned with a long line of jurisprudence recognizing that disenfranchisement, even for a small number of voters, imposes severe burdens on voting rights. *See, e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 784–86 (1983) (holding unconstitutional a filing deadline that affected candidates who received less than 6% of statewide vote); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 593, 597 (6th Cir. 2012) (law likely unconstitutional even though it affected only 0.248% of total ballots cast). "[T]he basic truth [is] that even one disenfranchised voter—let alone several thousand—is too many." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014) *cert. denied*, 135 S. Ct. 1735 (2015) ("*LOWV*").

Likewise, State Defendants' reliance on *RNC* for the proposition that courts cannot extend deadlines two months before election day is misplaced. The more

extensive six-day extension of Wisconsin's receipt deadline in that case was obtained in the days prior to the election out of necessity. The pandemic had just begun, and it was only just becoming evident that resulting delayed delivery of ballots to voters from elections officials and back again was going to become a serious issue. In the months since, the mail-delivery issues have gotten worse, *see*, *e.g.*, ECF Nos. 107-30, 107-31, while the number of voters likely to participate in the general election has grown exponentially. The much less robust record on which the Supreme Court approved of a *six-day* extension is reason to *deny* State Defendants' requested stay, not grant it.

State Amici mistakenly lean on *Rosario v. Rockefeller*, 410 U.S. 752 (1973), arguing that it justifies the widespread disenfranchisement that would follow from issuing the stay requested here, but *Rosario* held no such thing. In *Rosario*, the Court was clear that, even where a voter arguably *can* meet a deadline, the state still must demonstrate that the "particular deadline" is sufficiently "justified" and "necessary" under the circumstances to promote "a particularized legitimate purpose." *Id*. at 760–62. The Court emphasized that such deadlines cannot be enforced if "the asserted state interest can be attained by 'less drastic means,' which do not unnecessarily burden the exercise of constitutionally protected activity." *Kusper v. Pontikes*, 414 U.S. 51, 61 (1973). Here, the district court held that the unique pandemic

circumstances caused the Deadline to inflict severe burdens on voters and Georgia's interests did not justify the Deadline, absent a modest extension.[7]

2. The district court correctly concluded the Deadline violated voters' right to procedural due process.

State Defendants are also unlikely to succeed on the merits of their appeal of the district court's due process analysis. The court correctly applied the *Mathews v. Eldridge* balancing test in determining that the Deadline violates due process, considering: (1) the private interest that the official action affects; (2) the risk of erroneous deprivation of those interests and the probable value of any additional or substitute safeguards; and (3) the government's interest, including the safeguards' burdens. 424 U.S. 319, 335 (1976).

These considerations are distinct and separate from *Anderson-Burdick* analyses. Due process claims focus on the sufficiency of the process before the state deprives someone of their right to vote. The gravamen of procedural due process claims is whether voters have obtained sufficient process to justify a deprivation of a right. "[T]he deprivation by state action of a constitutionally protected interest in life, liberty, or property is not in itself unconstitutional; what is unconstitutional is

[7] Republican Amici's argument that the Deadline "does not implicate the right to vote at all," Republican Amici Br. at 23, is incorrect. This Court has recognized that a law applicable only to absentee ballots inflicts burdens on those voters. *Lee*, 915 F.3d at 1319 (recognizing burdens of signature-matching for vote-by-mail ballots "falls on vote-by-mail and provisional voters' fundamental right to vote"); *see also id*. at 1321; *see also infra* at 16.

the deprivation of such an interest *without due process of law*." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). An appropriate remedy orders more process. *Id*. at 126. The court correctly ordered more process by extending the Deadline.

First, the court recognized the interest at stake is "an individual's right to vote," one that is "entitled to substantial weight." ECF No. 134 at 62. "[I]t cannot be doubted that the right to vote is one of the fundamental personal rights included within the concept of liberty as protected by the due process clause." *United States v. Texas*, 252 F. Supp. 234, 250 (W.D. Tex. 1966), *aff'd* 384 U.S. 155 (1966).

State Defendants' argument that only state action can deprive individuals of liberty ignores that state action occurs when election officials reject absentee ballots arriving after the Deadline. *See Democratic Nat'l Comm. v. Bostelmann*, 3:20-cv-249-wmc, 2020 WL 1638374 at *12 n.14 (Apr. 2, 2020), *stayed in part on other grounds sub nom*. *DNC v. RNC*, Nos. 20-1538 & 20-1546 (7th Cir. Apr. 3, 2020), *stayed in part*, 140 S. Ct. 1205 (Apr. 6, 2020) ("Wisconsin here cannot enforce laws that, even due to circumstances out of its control, impose unconstitutional burdens on voters."); *see also Esshaki v. Whitmer*, No. 20-1336, 2020 WL 2185553, at *1 (6th Cir. May 5, 2020) (upholding determination that ballot-access signature deadline, in pandemic, was "not narrowly tailored *to the present circumstances*," and could not be enforced "unless the State provides some reasonable accommodations to aggrieved candidates"). Moreover, courts have regularly

extended election-related deadlines in the face of extreme circumstances prompted by weather or public-health catastrophes. *See supra* at 9.

Second, as the district court recognized, the risk of erroneous deprivation is "high due to massive delays and exigent circumstances caused by COVID-19." ECF No. 134 at 62. State Defendants argue that no erroneous deprivation of absentee voting can *ever* occur because "voters lack the right to cast a ballot at any time or in any particular manner." Mot. at 56. But this overlooks that once "the State has provided voters with the opportunity to vote by absentee ballot, the State must now recognize that the privilege of absentee voting is certainly deserving of due process." *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018) (quotations omitted); *see also Lee*, 915 F.3d at 1319. Additional safeguards to prevent erroneous deprivation through a reasonable Deadline extension "would be a valuable measure to address the risk of absentee voter disenfranchisement." ECF No. 134 at 62. The probable value of these safeguards is substantial, allowing, as the undisputed record reflects, thousands of votes to count. ECF Nos 59-1 at 32, 105-1 at 14.

Third, the court considered the State's interests and correctly concluded the "additional procedures impose a minimal burden on Defendants, because they already have an extended deadline" for overseas and military voters. ECF No. 134 at 63. The court's *Mathews* balancing—which considered the evidence, the State's burdens, and the fundamental right at stake—is likely to be sustained on appeal.

C. State Defendants will not suffer irreparable harm absent a stay.

State Defendants also fall short of the required "strong showing" that a stay pending appeal will prevent irreparable harm. *Nken*, 556 U.S. at 427.

First, contrary to State Defendants' characterizations, *Purcell v. Gonzalez*, 549 U.S. 1 (2006), has nothing to do with irreparable harm. Even if it did, *Purcell* is distinguishable because it involved an appellate court reversing a lower court and ordering new relief three weeks before election day. *See id.* at 2. The injunction threatened to cause widespread voter confusion because of conflicting court orders before election day. *See id.* at 2–4. In contrast, the order here extends the Deadline that already applies to military and overseas voters to all absentee voters during a pandemic. *See* O.C.G.A. § 21-2-386(a)(1)(G). The court's injunction was issued more than *two months* before the election. A conflicting order from this Court will generate voter confusion, not alleviate it. *See infra* at 20–21.

Courts—including the Supreme Court—routinely grant injunctive relief to protect voting rights in the weeks before elections and often issue relief much closer to upcoming elections than the district court's order.[8] Moreover, the court granted

[8] *See, e.g.*, *RNC*, 140 S. Ct. at 1208 (extending receipt deadline *the day before* the election); *Bostelmann*, ECF No. 538 at 51 (six weeks before election day); *Thomas v. Andino*, No. 3:20-cv-01552, ECF No. 65 at 36 (D.S.C. May 25, 2020) (two weeks before election); *Ga. State Conf. NAACP v. Georgia*, No. 1:17-cv-1397-TCB, 2017 WL 9435558, at *6 (N.D. Ga. May 4, 2017) (six weeks before election); *Fla. Democratic Party v. Detzner*, No. 16-CV-607, 2016 WL 6090943, at

the 72-hour extension only after considering extensive briefing, reviewing Plaintiffs' expert reports, and holding a hearing. This was not the case decided on an election's eve with "inadequate time to resolve the factual disputes." *Purcell*, 549 U.S. at 5–6.

Second, State Defendants' concerns that the extension might impact some post-election administrative steps are speculative and insufficient to support the extraordinary relief of a stay. *See, e.g.*, *Ga. Muslim Voter Project v. Kemp*, 918 F.3d 1262, 1267 (11th Cir. 2019); *Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d 906, 953 (S.D. Miss. 2014) (rejecting argument State will be harmed absent stay because allegations of "confusion and practical difficulties" of implementing injunctive relief were "speculative"). For example, the post-election, pre-certification audits, *see* Mot. at 59, must be completed "prior to final certification of the contest." O.C.G.A. § 21-2-498(c)(1). This certification occurs 17 days after election day and a full two weeks after the deadline for return of absentee ballots even under the district court's order. O.C.G.A. § 21-2-499(b). Notably, there is no requirement that all ballots must be received for the audit to occur. *See generally* O.C.G.A. § 21-2-498. Nor could there be, since ballots from military and overseas voters and cure ballots are also processed after election day. *See* O.C.G.A. § 21-2-386(a)(1)(G); O.C.G.A. §§ 21-2-

*9 (N.D. Fla. Oct. 16, 2016) (three weeks before election); *Sanchez v. Cegavske*, 214 F. Supp. 3d 961, 966 (D. Nev. 2016) (four weeks before election); *LOWV*, 769 F.3d at 248–49 (five weeks before election); *Bryanton v. Johnson*, 902 F. Supp. 2d 983, 1006 (E.D. Mich. 2012) (four weeks before election); *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1377 (N.D. Ga. 2005) (three weeks before election).

386(a)(1)(C), 21-2-419. Additionally, the 72-hour extension's impact on runoff elections is minimal because those elections are not held until December 1, 2020, or January 5, 2021. O.C.G.A. § 21-2-501(a)(3), (4).

Third, State Defendants raise for the first time the argument that the Deadline somehow "increases the possibility of double voting." Mot. at 60. This was not an issue raised before the district court and, as such, cannot be considered on appeal. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004). But the court's rejection of more generalized voter integrity concerns applies, here, too: it is difficult to "understand how assuring that all eligible voters are permitted to vote undermines the integrity of the election process. To the contrary, it strengthens it." ECF No. 145 at 5 (citing *Kemp*, 341 F. Supp. 3d at 1340). State Defendants do not support their novel argument with *any* evidence, let alone explanation as to how a modest extension results in double voting. Such baseless concerns are not actual and imminent harms and fall far short of the strong showing required for a stay.

D. Plaintiffs will suffer irreparable harm if this Court grants a stay.

State Defendants seek to reverse relief the district court granted nearly one month ago and return Georgia voters to a position where many—including Plaintiffs and their constituents—face certain disenfranchisement. As the court explained, "Plaintiffs will be forever harmed if they are unconstitutionally deprived of their right to vote." ECF No. 134 at 65. They face irreparable harm in the absence of

injunctive relief. *Id*. at 60; *LOWV*, 769 F.3d at 247. A stay will restore the Deadline that disenfranchised 7,281 voters in June and promises to disenfranchise even more if this Court grants State Defendants' motion.

Indeed, the significant disenfranchisement is likelier given that State Defendants seek to reverse the status quo that has existed for nearly a full month—when more than 1.2 million voters have been issued absentee ballots and news coverage of the 72-hour extension has been widely publicized.[9] Thousands of voters already anticipate that they have a failsafe for returning their ballots, and, if this Court grants a stay, confusion and increased disenfranchisement are certain to ensue.

E. A stay will harm the public's interest in voting rights.

Disenfranchisement is never in the public's interest. ECF No. 134 at 66–67 (collecting cases). State Defendants argue that the public interest favors a stay because of a mere risk of uncertainty and confusion. Mot. at 23. Their speculative parade of horribles ignores the *undisputed* record evidence before the court below and this Court on appeal that thousands of voters will be disenfranchised by the Deadline if the order is stayed. *See* ECF No. 105-1 at 14; ECF No. 59-1 at 32. Staying

[9] *See, e.g.*, Mark Niesse, *Judge rules Georgia ballots mailed by Election Day must be counted*, Atlanta Journal Constitution (Aug. 31, 2020), https://www.ajc.com/politics/judge-extends-georgia-deadline-to-return-absentee-ballots/OEETBUYMWJASHCW3YMVCKTPPYI/.

the district court's safeguard now is more likely to cause confusion and disenfranchisement than allowing the injunction to remain in place.

This Court, under similar circumstances, recognized that "[a] stay would disenfranchise many eligible electors whose ballots were rejected" by a process "due to no fault of the voters." *Lee*, 915 F.3d at 1327. This disenfranchisement "would be harmful to the public's perception of the election's legitimacy" because "the public interest is served when constitutional rights are protected." *Id*.; *see also Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012) ("The public interest . . . favors permitting as many qualified voters to vote as possible."). The same is true here.

V. CONCLUSION

For the above-stated reasons, Plaintiffs respectfully urge this Court to decline State Defendants' request to stay the district court's narrow preliminary injunction order pending appeal.

Dated: September 24, 2020 */s/ Kevin J. Hamilton*

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 5,195 words as counted by the word-processing system used to prepare the document.

Respectfully submitted this 24th day of September, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Respectfully submitted this 24th day of September, 2020.

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