

In the  
**United States Court of Appeals**  
for the Eleventh Circuit

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THE NEW GEORGIA PROJECT; REAGAN JENNINGS; CANDACE  
WOODALL; AND BEVERLY PYNE,

*Plaintiffs-Appellees,*

v.

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

*Defendants-Appellants.*

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On Appeal from the United States district court for the  
Northern District of Georgia, Atlanta Division.  
No. 1-20-CV-01986 — Eleanor Ross, *Judge*

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**BRIEF OF DEFENDANTS-APPELLANTS**

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N. Sullivan, David J. Worley, Matthew Mashburn, and Anh Le*

**CERTIFICATE OF INTERESTED PERSONS AND**  
**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rules 26.1-1 through 26.1-3, counsel for Appellants hereby certify that the below is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal.

1. Aiken, Fred: Member of the Cobb County Board of Registration and Elections and defendant in the underlying case.
2. Andrews, Wanda: Member of the Chatham County Board of Registrars and defendant in the underlying case.
3. Augusta Georgia Law Department: Counsel for defendants Sherry T. Barnes, Marcia Brown, Terrence Dicks, Bob Finnegan, and Tim McFalls, members of the Richmond County Board of Elections, in the underlying case.
4. Bahl, Neera: Member of the Cobb County Board of Registration and Elections and defendant in the underlying case.
5. Baldwin, Beauty: Member of the Gwinnett County Board of Registration and Elections and defendant in the underlying case.

6. Barger, Gerald: Member of the Rockdale County Board of Elections and Voter Registration and defendant in the underlying case.
7. Barham, Gary: Former defendant in the underlying case. Terminated 6-17-2020.
8. Barnes, Sherry T.: Member of the Richmond County Board of Elections and defendant in the underlying case.
9. Belinfante, Joshua Barrett: Counsel for Appellants.
10. Blender, Matthew: Member of the Forsyth County Board of Registrations and Elections and defendant in the underlying case.
11. Boughey, Timothy M.: Counsel for defendants David C. Fedack, Myesha Good, Maurice Hurry, Robert Proctor, and Daniel Zimmermann, members of the Douglas County Board of Elections and Registration, in the underlying case.
12. Brinson, Askew, Berry, Seigler, Richardson & Davis, LLP: Counsel for defendants Jesse Evans, Willa Fambrough, Charles Knapper, and Ann Till, members of the Athens-Clarke County

Board of Elections and Voter Registration, in the underlying case.

13. Brooks, Jessica M.: Member of the Cobb County Board of Registration and Elections and defendant in the underlying case.
14. Brown, Arch: Member of the Henry County Board of Elections and Registration and defendant in the underlying case.
15. Brown, Marcia: Member of the Richmond County Board of Elections and defendant in the underlying case.
16. Caldwell Propst & DeLoach, LLP: Counsel for Public Interest Legal Foundation, amicus curiae in the underlying case.
17. Callais, Amanda R.: Counsel for Appellees-Plaintiffs The New Georgia Project, Reagan Jennings, Candace Woodall and Beverly Pyne.
18. Callaway, Andy: Member of the Henry County Board of Elections and Registration and defendant in the underlying case.
19. Carr, Christopher Michael: Counsel for Appellants.
20. Chatham County Attorney: Counsel for defendant Colin Mcrae, member of the Chatham County Board of Registrars, in the underlying case.

21. Clark, Jr., James Clinton: Counsel for Uhland Roberts, Margaret Jenkins, Diane Scrimshire, and Eleanor White, members of the Columbus-Muscogee County Board of Elections in the underlying case.
22. Clemmons, Dee: Former defendant in the underlying case. Terminated 6-17-2020.
23. Cole, David Alan: Counsel for defendants David C. Fedack, Myesha Good, Maurice Hurry, Robert Proctor, and Daniel Zimmermann, members of the Douglas County Board of Elections and Registration, in the underlying case.
24. Consovoy McCarthy PLLC: Counsel for amici curiae The Republican National Committee and Georgia Republican Party, Inc.
25. Cook & Tolley, LLP: Counsel for defendants Jesse Evans, Willa Fambrough, Charles Knapper, and Ann Till, members of the Athens-Clarke County Board of Elections and Voter Registration, in the underlying case.
26. Cooney, Mary Carole: Member of the Fulton County Board of Registration and Elections and defendant in the underlying case.

27. Daniell, Phil: Member of the Cobb County Board of Registration and Elections and defendant in the underlying case.
28. Day, Stephen: Member of the Gwinnett County Board of Registration and Elections and defendant in the underlying case.
29. DeKalb County Law Department: Counsel for defendants Anthony Lewis, Susan Motter, Dele Lowman Smith, Samuel E. Tillman, and Baoky N. Vu, members of the DeKalb County Board of Registration and Elections, in the underlying case.
30. Denton, Alexander Fraser: Counsel for Appellants.
31. Dicks, Terrence: Member of the Richmond County Board of Elections and defendant in the underlying case.
32. Elias, Marc E.: Counsel for Appellees-Plaintiffs The New Georgia Project, Reagan Jennings, Candace Woodall, and Beverly Pyne.
33. Evans, Jesse: Member of the Athens-Clarke County Board of Elections and Voter Registration and defendant in the underlying case.
34. Fambrough, Willa: Member of the Athens-Clarke County Board of Elections and Voter Registration and defendant in the underlying case.

35. Fedack, David C.: Member of the Douglas County Board of Elections and Registration and defendant in the underlying case.
36. Ficklin, Henry: Member of the Macon-Bibb County Board of Elections and defendant in the underlying case.
37. Finnegan, Bob: Member of the Richmond County Board of Elections and defendant in the underlying case.
38. Forys, Matthew C.: Counsel for Landmark Legal Foundation, amicus curiae in the underlying case.
39. Freeman Mathis & Gary, LLP: Counsel for defendants David C. Fedack, Myesha Good, Maurice Hurry, Robert Proctor, and Daniel Zimmermann, members of the Douglas County Board of Elections and Registration, in the underlying case; and counsel for defendants Diane Givens, Dorothy Foster Hall, Darlene Johnson, Patricia Pullar, and Carol Wesley, members of the Clayton County Board of Elections and Registration, in the underlying case.
40. Georgia Attorney General's Office: Counsel for Appellants.
41. Georgia Republican Party, Inc.: Amicus curiae.



42. Givens, Diane: Member of the Clayton County Board of Elections and Registration and defendant in the underlying case.
43. Good, Myesha: Member of the Douglas County Board of Elections and Registration and defendant in the underlying case.
44. Hall, Dorothy Foster: Member of the Clayton County Board of Elections and Registration and defendant in the underlying case.
45. Hamilton, Kevin J.: Counsel for Appellees-Plaintiffs The New Georgia Project, Reagan Jennings, Candace Woodall, and Beverly Pyne.
46. Hancock, Jack Reynolds: Counsel for defendants Diane Givens, Dorothy Foster Hall, Darlene Johnson, Patricia Pullar, and Carol Wesley, members of the Clayton County Board of Elections and Registration, in the underlying case.
47. Hand, Benny G.: Member of the Albany-Dougherty County Joint Board of Registration and Elections and defendant in the underlying case.
48. Hart, Ralph Jonathan: Counsel for defendants Colin Mcrae, Wanda Andrews, William L. Norse and Jon Pannell, members of the Chatham County Board of Registrars, in the underlying case.

49. Hawkins, John Matthew: Counsel for defendants Jesse Evans, Willa Fambrough, Charles Knapper, and Ann Till, members of the Athens-Clarke County Board of Elections and Voter Registration, in the underlying case.
50. Haynie, Litchfield & White, PC: Counsel for defendants Fred Aiken, Neera Bahl, Jessica M. Brooks, Phil Daniell, and Darryl O. Wilson, members of the Cobb County Board of Registration, in the underlying case.
51. Hicks, Darry: Member of the Fayette County Board of Elections and Voter Registration and defendant in the underlying case.
52. Holstein, Stephanie R.: Counsel for Appellees-Plaintiffs The New Georgia Project, Reagan Jennings, Candace Woodall, and Beverly Pyne.
53. Hurry, Maurice: Member of the Douglas County Board of Elections and Registration and defendant in the underlying case.
54. Ingram, Randy: Member of the Forsyth County Board of Registrations and Elections and defendant in the underlying case.

55. Jacoutot, Bryan F.: Counsel for defendants Beauty Baldwin, Stephen Day, John Mangano, Alice O'Lenick, and Ben Satterfield, members of the Gwinnett County Board of Registration and Elections, in the underlying case; and defendants Darry Hicks, Addison Lester, and Aaron Wright, members of the Fayette County Board of Elections and Voter Registration, in the underlying case.
56. James, Karen: Member of the Rockdale County Board of Elections and Voter Registration and defendant in the underlying case.
57. Jarrard & Davis LLP: Counsel for defendants Matthew Blender, Randy Ingram, Barbara Luth, Joel Natt, and Carla Radzikinas, members of the Forsyth County Board of Registrations and Elections in the underlying case; defendants Arch Brown, Andy Callaway, Donna Morris-McBride, Dan Richardson, Mildred Schmelz, Vivian Thomas, and Johnny Wilson, members of the Henry County Board of Elections and Registration, in the underlying case; defendants Phil Johnson, Kelly Robinson, and Dustin Thompson, members of the Newton County Board of

Elections and Registration, in the underlying case; and defendants Benny G. Hand, Pamela Middleton, Dontravious Simmons, Annabelle T. Stubbs, and Frederick Williams, members of the Albany-Dougherty County Joint Board of Registration and Elections, in the underlying case.

58. Jaugstetter, Patrick D.: Counsel for defendants Arch Brown, Andy Callaway, Donna Morris-McBride, Dan Richardson, Mildred Schmelz, Vivian Thomas, and Johnny Wilson, members of the Henry County Board of Elections and Registration, in the underlying case.
59. Jenkins, Margaret: Member of the Columbus-Muscogee County Board of Elections and defendant in the underlying case.
60. Jennings, Reagan: Appellee-Plaintiff.
61. Johnson, Aaron: Member of the Fulton County Board of Registration and Elections and defendant in the underlying case.
62. Johnson, Darlene: Member of the Clayton County Board of Elections and Registration and defendant in the underlying case.
63. Johnson, Melanie Leigh: Counsel for Appellants.

64. Johnson, Phil: Member of the Newton County Board of Elections and Registration and defendant in the underlying case.
65. Josey, Virginia Candace: Counsel for defendants Henry Ficklin, Mike Kaplan, Cassandra Powell, Herbert Spangler, and Rinda Wilson, members of the Macon-Bibb County Board of Elections, in the underlying case.
66. Kaplan, Mike: Member of the Macon-Bibb County Board of Elections and defendant in the underlying case.
67. Knapp, Jr., Halsey G.: Counsel for Appellees-Plaintiffs The New Georgia Project, Reagan Jennings, Candace Woodall, and Beverly Pyne.
68. Knapper, Charles: Member of the Athens-Clarke County Board of Elections and Voter Registration and defendant in the underlying case.
69. Krevolin & Horst, LLC: Counsel for Appellees-Plaintiffs The New Georgia Project, Reagan Jennings, Candace Woodall, and Beverly Pyne.
70. Lake, Brian Edward: Counsel for Appellants.

71. Landmark Legal Foundation: Amicus curiae in the underlying case
72. LaRoss, Diane Festin: Counsel for defendants Beauty Baldwin, Stephen Day, John Mangano, Alice O'Lenick, and Ben Satterfield, members of the Gwinnett County Board of Registration and Elections, in the underlying case; and defendants Darry Hicks, Addison Lester, and Aaron Wright, members of the Fayette County Board of Elections and Voter Registration, in the underlying case.
73. Le, Anh: Member of the Georgia State Election Board and Appellant-Defendant.
74. Lester, Addison: Member of the Fayette County Board of Elections and Voter Registration and defendant in the underlying case.
75. Lewis, Anthony: Member of the DeKalb County Board of Registration and Elections and defendant in the underlying case.
76. Lewis, Joyce Gist: Counsel for Appellees-Plaintiffs The New Georgia Project, Reagan Jennings, Candace Woodall, and Beverly Pyne.

77. Linkous, III, William J.: Counsel for defendants Aldren Sadler, Sr., Karen James, and Gerald Barger, members of the Rockdale County Board of Elections and Voter Registration, in the underlying case.
78. Luth, Barbara: Member of the Forsyth County Board of Registrations and Elections and defendant in the underlying case.
79. MacDougald, Harry W.: Counsel for Public Interest Legal Foundation and Landmark Legal Foundation, amicus curiae in the underlying case.
80. Mack, Rachel Nicole: Counsel for defendants Sherry T. Barnes, Marcia Brown, Terrence Dicks, Bob Finnegan, and Tim McFalls, members of the Richmond County Board of Elections, in the underlying case.
81. Mangano, John: Member of the Gwinnett County Board of Registration and Elections and defendant in the underlying case.
82. Mansinghani, Mithun: Counsel for amici curiae States of Oklahoma, Arizona, Arkansas, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska,

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83. Martin, Megan Nicole: Counsel for defendants Phil Johnson, Kelly Robinson, and Dustin Thompson, members of the Newton County Board of Elections and Registration, in the underlying case.
84. Martin, Talula: Former defendant in the underlying case. Terminated 6-30-2020.
85. Mashburn, Matthew: Member of the Georgia State Election Board and Appellant-Defendant.
86. McFalls, Tim: Member of the Richmond County Board of Elections and defendant in the underlying case.
87. McGowan, Charlene S.: Counsel for Appellants.
88. Mcrae, Colin: Member of the Chatham County Board of Registrars and defendant in the underlying case.
89. Michael Best & Friedrich LLP: Counsel for amici curiae The Republican National Committee and Georgia Republican Party, Inc.



90. Middleton, Pamela: Member of the Albany-Dougherty County Joint Board of Registration and Elections and defendant in the underlying case.
91. Miller, Carey Allen: Counsel for Appellants.
92. Momo, Shelley Driskell: Counsel for defendants Anthony Lewis, Susan Motter, Dele Lowman Smith, Samuel E. Tillman, and Baoky N. Vu, members of the DeKalb County Board of Registration and Elections, in the underlying case.
93. Morris-McBride, Donna: Member of the Henry County Board of Elections and Registration and defendant in the underlying case.
94. Motter, Susan: Member of the DeKalb County Board of Registration and Elections and defendant in the underlying case.
95. Natt, Joel: Member of the Forsyth County Board of Registrations and Elections and defendant in the underlying case.
96. Newkirk, Zachary J.: Counsel for Appellees-Plaintiffs The New Georgia Project, Reagan Jennings, Candace Woodall, and Beverly Pyne.
97. Noland Law Firm, LLC: Counsel for defendants Henry Ficklin, Mike Kaplan, Cassandra Powell, Herbert Spangler, and Rinda

Wilson, members of the Macon-Bibb County Board of Elections, in the underlying case.

98. Noland, William H.: Counsel for defendants Henry Ficklin, Mike Kaplan, Cassandra Powell, Herbert Spangler, and Rinda Wilson, members of the Macon-Bibb County Board of Elections, in the underlying case.
99. Norris, Cameron T.: Counsel for amici curiae The Republican National Committee and Georgia Republican Party, Inc.
100. Norse, William L.: Member of the Chatham County Board of Registrars and defendant in the underlying case.
101. Nuriddin, Vernetta: Member of the Fulton County Board of Registration and Elections and defendant in the underlying case.
102. Oklahoma Attorney General's Office: 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.
103. O'Lenick, Alice: Member of the Gwinnett County Board of Registration and Elections and defendant in the underlying case.

104. O'Neill, Michael J.: Counsel for Landmark Legal Foundation, amicus curiae in the underlying case.
105. Page Scrantom, Sprouse, Tucker & Ford, P.C.: Counsel for Uhland Roberts, Margaret Jenkins, Diane Scrimshire, and Eleanor White, members of the Columbus-Muscogee County Board of Elections in the underlying case.
106. Pannell, Jon: Member of the Chatham County Board of Registrars and defendant in the underlying case.
107. Paradise, Loree Anne: Counsel for defendants Beauty Baldwin, Stephen Day, John Mangano, Alice O'Lenick, and Ben Satterfield, members of the Gwinnett County Board of Registration and Elections, in the underlying case; and defendants Darry Hicks, Addison Lester, and Aaron Wright, members of the Fayette County Board of Elections and Voter Registration, in the underlying case.
108. Parker, Linda: Member of the Columbus-Muscogee County Board of Elections and defendant in the underlying case.
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110. Perkins Coie-CO: Counsel for Appellees-Plaintiffs, The New Georgia Project, Reagan Jennings, Candace Woodall, and Beverly Pyne.
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112. Perkins Coie LLP: Counsel for Appellees-Plaintiffs, The New Georgia Project, Reagan Jennings, Candace Woodall, and Beverly Pyne.
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116. Powell, Cassandra: Member of the Macon-Bibb County Board of Elections and defendant in the underlying case.
117. Proctor, Robert: Member of the Douglas County Board of Elections and Registration and defendant in the underlying case.

118. Public Interest Legal Foundation: Amicus Curiae in the underlying case.
119. Public Interest Legal Foundation-IN: Counsel for Public Interest Legal Foundation, amicus curiae in the underlying case.
120. Pullar, Patricia: Member of the Clayton County Board of Elections and Registration and defendant in the underlying case.
121. Pyne, Beverly: Appellee-Plaintiff.
122. Radzikinas, Carla: Member of the Forsyth County Board of Registrations and Elections and defendant in the underlying case.
123. Raffensperger, Brad: Georgia Secretary of State, Chair of the Georgia State Election Board, and Appellant-Defendant in the underlying case.
124. Richardson, Dan: Member of the Henry County Board of Elections and Registration and defendant in the underlying case.
125. Roberts, Uhland: Member of the Columbus-Muscogee County Board of Elections and defendant in the underlying case.
126. Robbins Ross Alloy Belinfante Littlefield LLC: Counsel for Appellants.

127. Robin, Kenneth Paul: Counsel for defendants Matthew Blender, Randy Ingram, Barbara Luth, Joel Natt, and Carla Radzikinas, members of the Forsyth County Board of Registrations and Elections in the underlying case; defendants Arch Brown, Andy Callaway, Donna Morris-McBride, Dan Richardson, Mildred Schmelz, Vivian Thomas, and Johnny Wilson, members of the Henry County Board of Elections and Registration, in the underlying case; defendants Phil Johnson, Kelly Robinson, and Dustin Thompson, members of the Newton County Board of Elections and Registration, in the underlying case; and defendants Benny G. Hand, Pamela Middleton, Dontravious Simmons, Annabelle T. Stubbs, and Frederick Williams, members of the Albany-Dougherty County Joint Board of Registration and Elections, in the underlying case.
128. Robinson, Kelly: Member of the Newton County Board of Elections and Registration and defendant in the underlying case.
129. Ross, Hon. Eleanor L.: United States District Judge for the Northern District of Georgia and judge in the underlying case.
130. Russo, Jr., Vincent Robert: Counsel for Appellants.

131. Ruiz, Christian Ramses: Counsel for Appellees-Plaintiffs The New Georgia Project, Reagan Jennings, Candace Woodall, and Beverly Pyne.
132. Ruth, Kathleen: Member of the Fulton County Board of Registration and Elections and defendant in the underlying case.
133. Sadler, Sr., Aldren: Member of the Rockdale County Board of Elections and Voter Registration and defendant in the underlying case.
134. Satterfield, Ben: Member of the Gwinnett County Board of Registration and Elections and defendant in the underlying case.
135. Schmelz, Mildred: Member of the Henry County Board of Elections and Registration and defendant in the underlying case.
136. Scrimshire, Diane: Member of the Columbus-Muscogee County Board of Elections and defendant in the underlying case.
137. Simmons, Dontravious M.: Member of the Albany-Dougherty County Joint Board of Registration and Elections and defendant in the underlying case.
138. Slay, Randolph: Member of the Chatham County Board of Registrars and defendant in the underlying case.

139. Smith, Dele Lowman: Member of the DeKalb County Board of Registration and Elections and defendant in the underlying case.
140. Smith, K'shaani: Former counsel for Appellees-Plaintiffs The New Georgia Project, Reagan Jennings, Candace Woodall, and Beverly Pyne, in the underlying case. Terminated 8-17-2020.
141. Snipes, Alan G.: Counsel for Uhland Roberts, Margaret Jenkins, Diane Scrimshire, and Eleanor White, members of the Columbus-Muscogee County Board of Elections in the underlying case.
142. Sowell, Gregory C.: Counsel for defendants Jesse Evans, Willa Fambrough, Charles Knapper, and Ann Till, members of the Athens-Clarke County Board of Elections and Voter Registration, in the underlying case.
143. Spangler, Herbert: Member of the Macon-Bibb County Board of Elections and defendant in the underlying case.
144. Sparks, Adam Martin: Counsel for Appellees-Plaintiffs The New Georgia Project, Reagan Jennings, Candace Woodall, and Beverly Pyne.



145. 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: Amici curiae.
146. Stubbs, Annabelle T.: Member of the Albany-Dougherty County Joint Board of Registration and Elections and defendant in the underlying case.
147. Sullivan, Rebecca N.: Member of the Georgia State Election Board and Appellant-Defendant.
148. Taylor English Duma LLP: Counsel for defendants Beauty Baldwin, Stephen Day, John Mangano, Alice O’Lenick, and Ben Satterfield, members of the Gwinnett County Board of Registration and Elections, in the underlying case; and defendants Darry Hicks, Addison Lester, and Aaron Wright, members of the Fayette County Board of Elections and Voter Registration, in the underlying case.
149. The New Georgia Project: Appellee-Plaintiff.
150. The Republican National Committee: Amicus curiae.

151. Thomas, Vivian: Member of the Henry County Board of Elections and Registration and defendant in the underlying case.
152. Thompson, Dustin: Member of the Newton County Board of Elections and Registration and defendant in the underlying case.
153. Till, Ann: Member of the Athens-Clarke County Board of Elections and Voter Registration and defendant in the underlying case.
154. Tillman, Samuel E: Member of the DeKalb County Board of Registration and Elections and defendant in the underlying case.
155. Timmermann, Lilian Margarita: Counsel for Appellees-Plaintiffs The New Georgia Project, Reagan Jennings, Candace Woodall, and Beverly Pyne.
156. Tyson, Bryan P.: Counsel for defendants Beauty Baldwin, Stephen Day, John Mangano, Alice O'Lenick, and Ben Satterfield, members of the Gwinnett County Board of Registration and Elections, in the underlying case; and defendants Darry Hicks, Addison Lester, and Aaron Wright, members of the Fayette County Board of Elections and Voter Registration, in the underlying case.

157. Vander Els, Irene B.: Counsel for defendants Anthony Lewis, Susan Motter, Dele Lowman Smith, Samuel E. Tillman, and Baoky N. Vu, members of the DeKalb County Board of Registration and Elections, in the underlying case.
158. Vu, Baoky N.: Member of the DeKalb County Board of Registration and Elections and defendant in the underlying case.
159. Webb, Bryan K.: Counsel for Appellants.
160. Wesley, Carol: Member of the Clayton County Board of Elections and Registration and defendant in the underlying case.
161. White, Daniel Walter: Counsel for defendants Fred Aiken, Neera Bahl, Jessica M. Brooks, Phil Daniell, and Darryl O. Wilson, members of the Cobb County Board of Registration, in the underlying case.
162. White, Eleanor: Member of the Columbus-Muscogee County Board of Elections and defendant in the underlying case.
163. Willard, Russell D.: Counsel for Appellants.
164. Williams, Frederick: Member of the Albany-Dougherty County Joint Board of Registration and Elections and defendant in the underlying case.

165. Wilson, Jr., Darryl O.: Member of the Cobb County Board of Registration and Elections and defendant in the underlying case.
166. Wilson, Johnny: Former defendant in the underlying case.  
Terminated 6-17-2020.
167. Wilson, Rinda: Member of the Macon-Bibb County Board of Elections and defendant in the underlying case.
168. Wingate, Mark: Member of the Fulton County Board of Registration and Elections and defendant in the underlying case.
169. Wood, June: Former defendant in the underlying case.  
Terminated 6-17-2020.
170. Woodall, Candace: Appellee-Plaintiff.
171. Worley, David J.: Member of the Georgia State Election Board and Appellant-Defendant.
172. Wright, Aaron: Member of the Fayette County Board of Elections and Voter Registration and defendant in the underlying case.
173. Zimmermann, Daniel: Member of the Douglas County Board of Elections and Registration and defendant in the underlying case.

**CORPORATE DISCLOSURE STATEMENT**

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

*/s/ Josh Belinfante*  
Josh Belinfante

## **STATEMENT REGARDING ORAL ARGUMENT**

Pursuant to Eleventh Circuit Rule 28-1(c), Appellants state that they do not request oral argument in this appeal. All matters regarding this case are fully set forth in the briefs filed by the parties and oral argument is unnecessary.

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## **STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION**

The district court had subject-matter jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1343 because this is an action arising from claims asserted under the Constitution and laws of the United States.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1), governing appeals from interlocutory orders, because Defendants-Appellants (hereinafter, “Appellants” or “State Defendants”) appeal from the district court’s order entered August 31, 2020, granting in part Plaintiffs-Appellees’ (hereinafter “Appellees” or “Plaintiffs”) motion for preliminary injunction. Doc. 134. Appellants timely filed the Notice of Appeal from the district court’s order on September 4, 2020. Doc. 136.

## STATEMENT OF THE ISSUES

1. Whether Plaintiffs' claims for preliminary injunctive relief and the district court's August 31, 2020 preliminary injunction order, which expired at 7:00 pm on November 6, 2020, are now moot.

2. In the alternative, whether the district court's order erred when it concluded that (a) a Georgia statute, which requires all absentee ballots to be returned by 7:00 pm on Election Day, imposes a severe burden on the right to vote under the First and Fourteenth Amendments to the United States Constitution and in the light of the ongoing COVID-19 pandemic; and (b) its remedy of extending the deadline by three business days satisfies the Constitution. See O.C.G.A. § 21-2-386(a)(1)(F).

3. In the alternative, whether the district court's order erred when it concluded that (a) a Georgia statute, which requires all absentee ballots to be returned by 7:00 pm on Election Day, violates rights to procedural due process in the light of the ongoing COVID-19 pandemic; and (b) its remedy of extending the deadline by three business days satisfies the Constitution. See O.C.G.A. § 21-2-386(a)(1)(F).

## STATEMENT OF THE CASE

This is an appeal of the district court’s order granting, in part, Plaintiffs’ motion for preliminary injunction. Citing the First and Fourteenth Amendments to the United States Constitution, the district court’s order enjoined State Defendants and 17 county election officials (“County Defendants”) from enforcing the requirement that all absentee ballots be returned to county election offices by 7:00 pm on Election Day (the “Election Day Deadline”). The order required, instead, that county election offices accept any otherwise complete absentee ballot that arrived to county election offices by 7:00 pm on November 6, 2020, so long as it was postmarked on or before November 3, 2020 (Election Day). The district court’s order was never effective, because this Court stayed its implementation on October 2, 2020.

### **I. Nature of the Case, Course of Proceedings, and Disposition Below.**

Plaintiffs, a voting advocacy group and individual voters, filed an initial complaint against State Defendants and County Defendants on May 8, 2020. Doc. 1. Almost a month later, on June 3, 2020, Plaintiffs filed an Amended Complaint with sweeping challenges to several Georgia election laws and procedures, including: (1) the statute

governing incomplete absentee-ballot-request forms; (2) the statute allowing elderly, disabled, military, and overseas voters to request absentee ballots for an entire election cycle; (3) whether the State should provide pre-paid postage with absentee ballots; (4) the statutory prohibition on third-party ballot harvesting; and (5) the Election Day Deadline (the “Challenged Policies”). Doc. 33, ¶¶ 130-38. On June 26, 2020, State Defendants and the County Defendants filed separate motions to dismiss Plaintiffs’ Amended Complaint. Docs. 82, 83. Those motions remain pending.

On June 10, 2020, Plaintiffs moved for a preliminary and mandatory injunction on each of the Challenged Policies. Doc. 57. On July 8, 2020, State Defendants and the County Defendants responded to Plaintiffs’ motion. Docs. 90, 91. On July 16, 2020, Plaintiffs filed a reply in support of their motion, attaching several exhibits. Docs. 105-107. On July 21, 2020, State Defendants filed a motion to strike Plaintiffs’ reply and the attached exhibits. Doc. 109. The Court denied State Defendants’ motion to strike but did afford State Defendants an opportunity to file a sur-reply in response to Plaintiffs’ reply. Doc. 121. State Defendants filed their sur-reply on August 12, 2020. Doc. 126.



The district court held a hearing on Plaintiffs’ motion for preliminary injunction on August 19, 2020. Doc. 150. Thereafter, on August 31, 2020, the district court granted Plaintiffs’ motion in part and denied it in part. Doc. 134. The district court’s order denied the motion with respect to each of the Challenged Policies *except* the Election Day Deadline. Despite finding 1.1 million absentee ballots were counted in the June 2020 Primary and 7,281 ballots were rejected as late, the district court decided that the Election Day Deadline imposed a “severe” burden on Georgia voters. Doc. 134 at 57-58, 60. While acknowledging Georgia’s “strong” and “important” interests in conducting an efficient election, maintaining order, quickly certifying election results, and preventing voter fraud, the district court’s order nevertheless concluded that such interests were not so compelling as to justify continued enforcement of the Election Day Deadline. Doc. 134 at 61.

The district court’s order declined, however, to order the specific relief requested by Plaintiffs: extension of the absentee ballot receipt deadline by at least five business days. Instead, the order required that State Defendants and the County Defendants must “accept as otherwise

valid, absentee ballots from qualified voters that are postmarked by Election Day and arrive at their respective county's office within three (3) business days after Election Day.” Doc. 134 at 68. The order did not address any other deadline, policy, or practice of Georgia's elections or absentee voting process that may be affected by the order.

On September 4, 2020, State Defendants appealed and moved the district court to stay its order pending appeal. Docs. 136, 137. On September 16, 2020, the district court denied State Defendants' motion to stay. Doc. 145. On September 18, 2020, State Defendants moved this Court to stay the district court's order pending appeal. That motion was granted on October 2, 2020.

## **II. Statement of Facts.**

In its August 31, 2020 order, the district court made several factual findings in evaluating Plaintiffs' motion for preliminary injunction.<sup>1</sup> In the interests of efficiency and clarity, only those facts

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<sup>1</sup> For purposes of this appeal only, State Defendants do not contest the district court's factual findings. State Defendants contest only the application of law to those facts. State Defendants do not waive their right to contest the district court's factual findings, which were made at the preliminary injunction stage, in the proceedings below and reserve all rights and arguments regarding same.

relevant to the district court’s ruling on the Election Day Deadline—which is the only issue on appeal—are addressed here.

First, as to the Election Day Deadline, the district court found as follows:

The State of Georgia does not count mail ballots received after the closing of polls at 7:00 p.m. on Election Day. See O.C.G.A. § 21-2-386(a)(1)(F). This is true even if a ballot arrives late for reasons outside the voter’s control, and even if the ballot was postmarked before or on Election Day. Id. Thus, as it now stands, for a mail-in ballot to be accepted and deemed valid for this year’s November election, the respective county registrar must receive it no later than Tuesday, November 3, 2020, at 7:00 p.m. Id.

Doc. 134 at 7-8.

The district court’s order made another factual finding that was critical to its holdings: the COVID-19 Pandemic necessitated relief:

As all are no doubt aware, the ongoing global pandemic caused by COVID-19 has triggered mass social disruption. [...]

Defendant Secretary of State Brad Raffensperger—in accordance with his duty to oversee Georgia’s elections—has taken several measures to adjust the voting process due to the circumstances caused by COVID-19. Am. Compl. at 8, 43; [Docs. 59-31, 59-32]. Such measures included the postponement of the Georgia primary to June 9, 2020, encouraging voting by mail, and sending absentee ballot

applications to approximately 6.9 million active voters. [Docs. 58 at 3; 59-31; 59-32; 59-33].

Due to the circumstances presented by the COVID-19 pandemic and the State's responsive measures, Georgia voters have utilized absentee voting in record numbers during recent elections. [Doc. 59-34].

Doc. 134 at 8-10.

Plaintiffs did not allege, and the district court did not hold, that any Plaintiff was unable to vote because of the Election Day Deadline. The district court did conclude, however, that the COVID-19 pandemic had resulted in approximately 7,000 absentee ballots arriving late during that election. Doc. 134 at 60. This represents less than 1% of the approximately 1.1 million absentee ballots cast during the June 2020 primary. Doc. 134 at 57. On October 2, 2020, this Court stayed the district court's order. New Georgia Project v. Raffensperger, 976 F.3d 1278 (11th Cir. 2020). In reviewing the district court's factual findings, this Court acknowledged that the "percentage of absentee ballots rejected [in the June 2020 primary] as late was smaller than usual." Id. at 1281. The motions panel further held that, on full appeal, the State would likely succeed on the merits because:

- The district court’s order misapplied the Anderson-Burdick analysis, because Georgia’s absentee ballot return deadline “does not implicate the right to vote at all.” Id. at 1281.
- To the extent there is any burden on the right to vote it is outweighed by the State’s important “and likely compelling” interests. Id.
- Finally, the Plaintiffs’ “novel” procedural due process claim is subsumed into the Anderson-Burdick analysis and not evaluated separately. Id. at 1282 (citing Jacobson v. Florida Sec’y of State, 974 F.3d 1236 (11th Cir. Sept. 3, 2020)).

In addition to these substantive issues, the motions panel also concluded that staying the district court’s preliminary injunction order would be in the public’s interest, and that the State would suffer irreparable harm if the injunction were permitted to impact the 2020 general election. Id. at 1283-84.

The preliminary injunction issued by the district court expired on or around November 7, 2020.

## STANDARD AND SCOPE OF REVIEW

As to the underlying merits of this appeal, a district court's grant of a preliminary injunction is generally reviewed for abuse of discretion, deferring to the lower court's findings of fact, but conclusions of law as to those facts are given no deference. E. Remy Martin & Co., S.A. v. Shaw-Ross Int'l Imports, Inc., 756 F.2d 1525, 1529 (11th Cir. 1985); N. Am. Med. Corp. v. Axiom Worldwide, Inc., 522 F.3d 1211, 1216 (11th Cir. 2008).

When considering the issue of mootness, the Court must determine whether the issue(s) presented on appeal present "a live controversy with respect to which the court can give meaningful relief." Friends of Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1216 (11th Cir. 2009) (quotation omitted); see also Christian Coal. of Fla., Inc. v. United States, 662 F.3d 1182, 1189 (11th Cir. 2011) ("[T]he Supreme Court has made clear that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" (quotation omitted)).

## SUMMARY OF ARGUMENT

This is an appeal of a preliminary injunction that, by its very terms, has expired.<sup>2</sup> Before this Court even reaches the merits of the district court's order, it should declare that the order, and Plaintiffs' claims for preliminary injunction, are no longer applicable and are moot. The very text of the order indicates the district court "emphasize[d] that the equitable relief it provides is limited to the November 2020 election during these extraordinary times." New Georgia Project v. Raffensperger, 1:20-CV-01986-ELR, 2020 WL 5200930, at \*27 (N.D. Ga. Aug. 31, 2020). That election has come and gone, and the district court's injunction has expired. This ends the inquiry before it even leaves the gate.

To the extent this Court considers the merits of the district court's order, it should be reversed for reasons already articulated by this Court: under the Anderson-Burdick analysis, having voters return absentee ballots to county election offices by the close of the polls on

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<sup>2</sup> In recognition of this, the State Defendants reached out to the Plaintiffs to determine whether briefing needed to proceed. The parties were unable to come to an agreement on the weight of the motions panel hearing, and consequently, the State Defendants were compelled to file this brief.

Election Day does not implicate the right to vote. Even if it did, the burden is slight, particularly in the light of the numerous options that Georgians have to exercise the franchise. And, that incidental burden is outweighed by the State’s important and compelling interests in “conducting an efficient election, maintaining order, quickly certifying results, and preventing voter fraud.” New Georgia Project, 976 F.3d at 1284. Given this, Plaintiffs should not have been deemed likely to succeed on the merits.

Similarly, as two judges on the motions panel decided, procedural due process claims in the context of elections are really Anderson-Burdick claims arising under the First and Fourteenth Amendments to the Constitution of the United States. Id. But even if this Court went the other way, there is no likelihood of success on the merits for a procedural due process claim when the right to vote itself is not harmed by the Georgia’s Election Day Deadline policy. After all, no matter what deadline the legislature (or a court through judicial fiat) imposes, there will always be Georgians who miss it. But deadlines are not inherently unconstitutional, and Georgia’s Election Day Deadline is not either.



## ARGUMENT AND CITATION OF AUTHORITY

### I. Plaintiff's Claims For Preliminary Injunctive Relief Are Moot.

Plaintiffs moved for preliminary injunctive relief specifically as to the November 3, 2020 general election. Doc. 58 at 10. Likewise, the district court's order expressly limited itself only to the November 3, 2020 general election and only because of COVID-19: "The Court emphasizes that the equitable relief it provides is limited to the November 2020 election during these extraordinary times." Doc. 134 at 69. That election has passed, which means the preliminary injunction expired before it ever became effective. Consequently, Plaintiffs' claims are now moot.

Pursuant to Article III of the Constitution of the United States, courts may entertain only those cases that present a live controversy. Dow Jones & Co. v. Kaye, 256 F.3d 1251, 1254 (11th Cir. 2001) (citing U.S. Const. art. III, § 2). Jurisdiction here is granted by 28 U.S.C. § 1292(a)(1), which empowers the Court to "entertain an appeal from orders 'granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.' This limited grant of jurisdiction carves out an exception to the ordinary rule that

[courts] review a case only after the district court has entered its final judgment.” Leedom Mgmt. Grp., Inc. v. Perlmutter, 532 Fed. Appx. 893, 895 (11th Cir. 2013).

A matter is rendered moot when the jurisdictional grant that gave rise to the interim decision no longer applies. See, e.g., Tropicana Products Sales, Inc. v. Phillips Brokerage Co., 874 F.2d 1581, 1583 (11th Cir. 1989); Brooks v. Georgia State Bd. of Elections, 59 F.3d 1114, 1118 (11th Cir. 1995); Dow Jones & Co., Inc. v. Kaye, 256 F.3d 1251, 1254 (11th Cir. 2001). This principle is perhaps most exemplified in Kaye, where a judicially-imposed gag order had expired by operation of law, which left this Court with no live controversy to decide. 256 F.3d at 1255; see also cf. Jews for Jesus, Inc. v. Hillsborough County Aviation Auth., 162 F.3d 627, 629 (11th Cir. 1998) (“A case is moot when events subsequent to the commencement of a lawsuit create a situation in which the court can no longer give the plaintiff meaningful relief.”).

This case is no different. The district court’s order applied only to a now-past election and absentee ballots that were postmarked on or before November 3 and arrived at county election offices by 7:00 pm on November 6, 2020. New Georgia Project v. Raffensperger, 1:20-CV-

01986-ELR, 2020 WL 5200930, at \*27 (N.D. Ga. Aug. 31, 2020). This ends the inquiry. The case should be remanded with instruction to vacate the preliminary injunction order and Plaintiff's claims for injunctive relief as having expired, with instruction to consider the remainder of the issues in the light of this Court's decision on the State Defendants' motion to stay. See United States v. Munsingwear, Inc., 340 U.S. 36, 41 (1950) (“[I]n dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.”)

## **II. The District Court's Order Contains Reversible Error.**

Even if this Court were to conclude that the appeal is somehow not moot, the motions panel correctly identified several bases of reversible error. First, the district court's order creates the precise problems of traceability and political questions that this Court identified in Jacobson. Second, the district court's order misapplied the Anderson-Burdick analysis, which controls the Plaintiffs' claim arising under the First and Fourteenth Amendments. Finally, the district

court's order erred when it decided that the Plaintiffs had articulated a likelihood of success on the merits of their procedural due process claim.

**A. Jacobson, Standing, and the Political Question Doctrine.**

The district court's order appears to require all county election officials—regardless of whether they are a party or not—to ignore state statutory law and count absentee ballots that arrive after the polls close on Election Day. Alternatively, it creates a situation where some voters have three more days to return their absentee ballots than other voters. Neither situation is tenable, nor can they be reconciled with this Court's binding precedent.

On September 3, 2020, this Court issued the merits panel decision in Jacobson. 974 F.3d 1236. The decision, which was addressed in the motions panel opinion in this case, addressed a preliminary injunction impacting Florida elections. The Jacobson plaintiffs sued the Florida Secretary of State to invalidate and prevent the enforcement of a state statute addressing the order of candidates' placement on the ballot. The Florida district court imposed a preliminary injunction granting relief, but this Court reversed. Relevant to this appeal was the conclusion that suing the Florida Secretary of State did not provide the Jacobson

plaintiffs with standing, because their purported injuries were not traceable to the state (as opposed to local election officials). Jacobson, 974 F.3d at 1253.

As in Florida, Georgia counties perform the bulk of election administration. And most importantly to this case, Georgia counties are responsible for tabulating votes, not the Secretary. O.C.G.A. § 21-2-492. County election officials will determine which ballots are timely, and which are not. Id. Thus, Jacobson's holding applies with equal weight to this appeal, as the Georgia non-party counties are not “obliged ... in any binding sense ... to honor an incidental legal determination [this] suit produce[s].” Jacobson, 974 F.3d at 1254 (quoting Lewis v. Governor of Alabama, 944 F.3d 1287, 1302 (11th Cir. 2019)).

Indeed, the likely result of the district court's order is worse than the one in Jacobson. While no counties were subject to the district Court's order in Jacobson—making it at least uniform in its impropriety—here only those counties that are party to the litigation are subject to the district court's order and voters in other Georgia counties would have their ballots treated differently. This type of disparate treatment is flawed and impermissible. Cf. Bush v. Gore, 531

U.S. 98, 104-05 (2000) (deciding votes cannot be counted differently or given different weight).

As the Jacobson decision makes plain, that Georgia's Secretary of State is a statewide elected official is immaterial for purposes of demonstrating standing. The district court's order decided that the Secretary's status as Georgia's "chief election official" established traceability. See New Georgia Project v. Raffensperger, 1:20-CV-01986-ELR, 2020 WL 5200930, at \*8 n.14 (N.D. Ga. Aug. 31, 2020) (citing O.C.G.A. § 21-2-50(b)). But Florida statutes use the same language, and the district court's order does not explain how Florida law differs from Georgia law on this point or how those differences, if any, are material. Fla. Stat. § 97.012(14). The Jacobson court, on the other hand, concluded that the title proved insufficient to confer standing, and applied here, the same result necessarily follows: "In the absence of any evidence that the Secretary controls [when absentee ballots are counted], the [Plaintiffs] likewise cannot rely on the Secretary's general election authority to establish traceability." Jacobson, 974 F.3d at 1254. Courts are now applying this reasoning to Georgia election disputes as well. See, e.g., Ga. Republican Party, Inc. v. Sec'y of State for Georgia,

20-14741-RR, 2020 WL 7488181, at \*2 (11th Cir. Dec. 21, 2020) (unpublished); Anderson v. Raffensperger, 1:20-CV-03263, 2020 WL 6048048, at \*23 (N.D. Ga. Oct. 13, 2020). Thus, as in Jacobson, the district court’s order erred by concluding that the Plaintiffs’ purported injuries were traceable to State Defendants and only 17 of Georgia’s 159 counties.

Beyond the lack of traceability, Plaintiffs’ requested relief raises a political question—when absentee ballots must arrive at county election offices—that this Court should not decide. See Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019) (citation omitted). Again, Jacobson is instructive. Foundationally, the Elections Clause commits the administration of elections to coordinate political departments—Congress and state legislatures. U.S. Const. Art. I, § 4, cl. 1. This delegation includes matters concerning “notices, registration, supervision of voting, protection of voters, prevention of fraud ... counting votes, duties of [local officials] and making and publication of election returns.” Smiley v. Holm, 285 U.S. 355, 366 (1932).

Rather than upholding the Georgia General Assembly’s exercise of its constitutionally delegated authority to manner of the general

election, the district court’s order substituted its judgment that an additional three days was necessary to satisfy the United States Constitution. In doing so, the district court’s order waded into a political question with no judicially manageable standards. See Coalition for Good Governance v. Raffensperger, 2020 WL 2509092 at \*1, \*3 (N.D. Ga. May 14, 2020) (citing Rucho and Jacobson v. Fla. Sec’y of State, 957 F.3d 1193, 1217 (11th Cir. 2020) (William Pryor, J., concurring)).<sup>3</sup> Such decisions require an initial policy determination of the kind reserved for legislative and executive branch officials—determining *when* the deadline should be in light of COVID-19 and purported delays within the United States Postal Service. “It would be inappropriate for a district court to undertake this responsibility in the unlikely event that it possessed the requisite technical competence to do so.” Aktepe v. United States of America, 105 F.3d 1400, 1404 (11th Cir. 1997) (concerning comparative judgments of military personnel).

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<sup>3</sup> The portion of the Jacobson decision cited in the Coalition for Good Governance case became part of the merits panel’s opinion. 974 F.3d at 1258-69.



Similar to this Court’s recent decision in Jacobson, “no judicially discernable and manageable standards exist” to determine what constitutes a “fair” return deadline for absentee ballots during the COVID-19 pandemic, and “picking among the competing visions of fairness ‘poses basic questions that are political, not legal.’” Jacobson, 974 F.3d at 1263 (quoting Rucho, 139 S. Ct. at 2500). Even if a standard for fairness could be determined, “no objective measures exist to determine violations of that standard” during a pandemic. Id. As the record below suggests, the rate at which absentee ballots were rejected as late in the June 2020 Primary was lower than the rejection rate in the pre-COVID-19 era—a rejection rate of 0.6% in 2020 (7,281 late ballots of over 1.1 million absentee ballots cast) compared to 0.7% in 2014, 1.2% in 2016, and 1.6% in 2018. See Doc.59-1 at 4-5. The deadline for voters to vote is a policy choice, and the district court’s order overrides that policy choice. This is another reason that Plaintiffs should have been declared unlikely to succeed on the merits.

**B. The Anderson-Burdick Claim.**

As the motions panel already concluded, the district court’s order misapplied the controlling standards applicable to the First and

Fourteenth Amendments to the United States Constitution. Burdick v. Takushi, 504 U.S. 428, 433 (1992); Anderson v. Celebrezze, 460 U.S. 780, 788 (1983). The applicable Anderson-Burdick analysis requires courts to:

weigh the “character and magnitude of the burden the State’s rule imposes” on the right to vote “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, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (internal quotation marks omitted).

If a State’s rule imposes a “severe burden” on the right to vote, then the rule may survive only if it is “narrowly tailored” and only if the State advances a “compelling interest.” Id. But if the rule imposes only “reasonable, nondiscriminatory restrictions,” then “a State’s important regulatory interests will usually be enough” to justify it. Id. (internal quotation marks omitted).

As the Supreme Court explained in Anderson and then in Burdick, election laws “invariably impose some burden upon individual voters.” Burdick, 504 U.S. at 433, 112 S.Ct. 2059. That means strict scrutiny is not required for every voting regulation; to say otherwise would “tie the hands of States” as they seek “order, rather than chaos” in their elections. Id. (internal quotation marks omitted).

New Georgia Project, 976 F.3d at 1280–81.

1. Deadlines Do Not Impose A Severe Burden On The Right To Vote.

The district court's order held that the burden imposed by the Election Day Deadline is "severe." New Georgia Project v. Raffensperger, 1:20-CV-01986-ELR, 2020 WL 5200930, at \*24 (N.D. Ga. Aug. 31, 2020). Importantly, the holding focused on the purported burden on **voters** in the light of the COVID-19 pandemic and not the burden on the **voting process** itself: "the burden on many voters will be severe." Id.

This approach contains critical errors, as recognized by the motions panel. Georgia's requirement to timely return absentee ballots does not burden a voter's actual right to vote. New Georgia Project, 976 F.3d at 1281. At most, the requirement imposed some burden on voters to vote in a particular manner. But, the Anderson-Burdick analysis does not focus on "the peculiar circumstances of individual voters" who chose to vote absentee, by mail, and late into the election season. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 206 (2008) (Scalia, J., concurring).

In addition to wrongly focusing on voters instead of the voting process, the district court's order made a qualitative error: the

Constitution does not preclude mere inconveniences to voting. See Storer v. Brown, 415 U.S. 724, 728–729 (1974). A constitutional violation does not arise from voting laws that are “[o]rdinary and widespread ... such as those requiring ‘nominal effort.’” Id. (citations omitted). Here, as recognized by the motions panel, there is evidence that “the percentage of absentee ballots rejected as late was smaller [in the June 2020 primary] than usual” despite the increased use of absentee ballots. New Georgia Project, 976 F.3d at 1281. Thus, there is no burden on the voting process, and alternatively, any imposition is merely incidental and not actionable.

It also matters that Georgia makes it very easy for individuals to cast and return ballots in multiple ways. These efforts “mitigate chances that voters will be unable to cast their ballots.” New Georgia Project, 976 F.3d at 1281 (citing O.C.G.A. §§ 21-2-381(a)(1)(A), 21-2-384(a)(2) (early requests of absentee ballots); 21-2-385 (early returns of absentee ballots in person or by mail); Ga. Comp. R. & Regs. 183-1-14-0.8-.14 (use of drop boxes)). Even voters who have requested an absentee ballot but are concerned that their ballot will not be delivered and/or returned on time can vote early in-person or on Election Day

itself. O.C.G.A. §§ 21-2-385; 21-2-388. Finally, “though delays in the postal service *may* (not *will*) delay when some voters receive their absentee ballots, all of these avenues remain open to any and all voters.” New Georgia Project v. Raffensperger, 976 F.3d 1278, 1281 (11th Cir. 2020) (emphasis in original). The district court should have considered these alternatives before amending a state statute. Id. at 1286 (Lagoa, J., concurring) (citing Greater Birmingham Ministries v. Sec’y of State for Alabama, 966 F.3d 1202, 1223 (11th Cir. 2020)).

Under these circumstances, the district court’s order erred when it concluded that the burden imposed by the Election Day Deadline is severe.

2. The State’s Interests Outweigh The Purported Burden.

Even if there were some burden imposed by the Election Day Deadline, the requirement that ballots be returned by the close of the polls is “reasonable and non-discriminatory.” New Georgia Project, 976 F.3d at 1281. Consequently, precedent mandates that Georgia’s law be upheld so long as the interest it serves is “important.” Burdick, 504 U.S. at 433 (1992) (citing Anderson, 460 U.S. at 788). The interests identified by the State below included conducting an efficient election,

maintaining order, quickly certifying election results, and preventing voter fraud. Doc. 91 at 20-21; 29-32. The district court's order did not challenge these interests and, in fact, described them as "strong" and "important." New Ga. Project, 2020 WL 5200930, at \*25. So did the motions panel when it stayed the district court's preliminary injunction. New Georgia Project, 976 F.3d at 1284.

Supreme Court precedent indicates that the motions panel (and the district court) were correct. Crawford, 553 U.S. at 196; Purcell v. Gonzalez, 549 U.S. 1, 4 (2006); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 364 (1997). In Purcell, the Court ruled that preserving the integrity of an election is a compelling interest, which far exceeds the required standard on this appeal. 549 U.S. at 4. Similarly, Timmons held that conducting efficient elections is important. 520 U.S. at 364; see also Utah Republican Party v. Cox, 892 F.3d 1066, 1084 (10th Cir. 2018). Finally, in Crawford, the Court's plurality opinion concluded that the prevention of voter fraud is an important interest. 553 U.S. at 196. This Court has also stated that "maintaining fairness, honesty, and order" are **compelling** state interests. Green v. Mortham,

155 F.3d 1332, 1335 (11th Cir. 1998).<sup>4</sup> Thus, when the alleged burden is correctly classified as something less than severe (as the motions panel concluded), the State’s important interests clearly carry the day. But even if this Court were now to conclude that the purported burden imposed by the Election Day deadline is “severe,” applying the holding in Green warrants upholding Georgia’s election law given the state’s compelling interests. Id.

3. The Order’s Relief Still Imposes A Deadline.

Although the district court did not grant Plaintiffs’ requested relief of a five-day extension with no postmark requirement, it still imposed a deadline that suffers from the same criticisms as Georgia’s law. There is no reason that the Election Day Deadline chosen by Georgia legislators is any more or less constitutional than the three-day extended deadline imposed by the district court’s order. Any deadline “will invariably burden some voters ... for whom the earlier time is inconvenient,” but these burdens are assessed in light of “a state’s legitimate interest in providing order, stability, and legitimacy to the

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<sup>4</sup> The wisdom of these cases has been proven and demonstrated by the events following the 2020 General Election.

electoral process.” Cox, 892 F.3d at 1077. As the Sixth Circuit observed, a “generally applicable deadline that applied to all would-be absentee voters would likely survive the Anderson-Burdick analysis, even if it resulted in disenfranchisement for certain ... individuals.” Mays v. LaRose, 951 F.3d 775, 792 (6th Cir. 2020).

Put simply, whether Georgians are subject to the decision of their legislature or that of the district court, there will still be a deadline and some voters will doubtlessly miss it. This type of line-drawing is best left to elected state legislatures, as the Constitution provides. See U.S. Const. art. 1, § 4, cl. 1.

#### 4. The Procedural Due Process Claim.

Plaintiffs cannot demonstrate a likelihood to prevail on the merits of their procedural due process claim for at least two reasons, both of which were identified in the motions panel decisions. First, the Anderson-Burdick analysis is now the controlling framework in the Eleventh Circuit. New Georgia Project v. Raffensperger, 976 F.3d at 1282 (citing Jacobson, 974 F.3d at 1261). Second, as discussed in Judge Lagoa’s concurrence to the motions panel, procedural due process requires a recognized right, and there is no constitutionally cognizable



right to vote by absentee. New Georgia Project, 976 F.3d at 1288 (citing McDonald v. Bd. of Election Comm’rs of Chicago, 394 U.S. 802, 807-08 (1969)).

As to the first point, Jacobson unequivocally held that courts “must evaluate laws that burden voting rights using the approach of Anderson and Burdick.” 974 F.3d at 1261; see also New Georgia Project v. Raffensperger, 976 F.3d at 1282. The Fifth and Ninth Circuits recently issued an opinion concluding the same. Richardson v. Texas Sec’y of State, 978 F.3d 220, 235 (5th Cir. 2020) (addressing signature verification); Arizona Democratic Party v. Hobbs, 976 F.3d 1081, 1086 (9th Cir. 2020) (citing this Court’s opinion favorably).<sup>5</sup>

Second, Judge Lagoa’s concurrence highlights that this case is not about the right **to vote**; rather, it is the means of voting and time of voting that are at issue in this appeal. See New Georgia Project v. Raffensperger, 976 F.3d at 1288 (“Plaintiffs claim a constitutionally protected interest in voting absentee”). But, “the right to vote in any

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<sup>5</sup> The Sixth Circuit considered but passed on the issue. Memphis A. Philip Randolph Inst. v. Hargett, 978 F.3d 378, 391 (6th Cir. 2020) (raising but passing on the issue).

manner ... [is not] absolute.” Burdick 504 U.S. at 433. Indeed, the Supreme Court has already held that there is no constitutional right to vote absentee. McDonald, 394 U.S. at 807-08.

The Fifth Circuit reached a similar conclusion in Texas Democratic Party v. Abbott, 978 F.3d 168, 189 (5th Cir. 2020). Relying on McDonald and the timing of the ratification of the Twenty-Sixth Amendment, the Abbott court concluded that in 1971, there was no recognized “right to vote by mail.” 978 F.3d at 188. Nothing suggests that changed by 2020.

Indeed, as pointed out in Judge Lagoa’s concurrence, the right to vote is not even a protected liberty interest. New Georgia Project v. Raffensperger, 976 F.3d at 1288 (citing League of Women Voters of Ohio v. Brunner, 548 F.3d 463, 479 (6th Cir. 2008)). This is because, in part, the procedural due process guarantees that a recognized property or liberty interest may not be **taken away** without due process. Here, the Election Day Deadline deprives no one of anything, as the right to vote remains and may be exercised through numerous other means. Cf. Greater Birmingham Ministries, 966 F.3d at 1223 (considering options to obtain a photo identification without cost).

Further, as the concurrence notes, in the context of procedural due process claims, “*legislative* action [differs from] *adjudicative* action.” New Georgia Project v. Raffensperger, 976 F.3d at 1288-89 (Lagoa, J., concurring) (emphasis in original). Legislative action impacts “more than a few people.” Id. (citing Jones v. Governor of Florida, 975 F.3d 1016, 1048 (11th Cir. 2020)). By contrast, a deprivation caused by an adjudicative action impacts “only a ‘relatively small number of persons’ ... [who] may be entitled to additional process above and beyond that provided by the legislative process.” Id. (citing Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445-46 (1915)); see also Jones, 975 F.3d at 1048 (deprivation of felons’ right to vote was adjudicative action); 75 Acres, LLC v. Miami-Dade Cty, 338 F.3d 1288, 1290 (11th Cir. 2003) (addressing local moratorium as legislative action). The Election Day Deadline “affects all Georgians equally. It was passed by Georgia’s legislature performing a legislative function ... Procedural due process, then, has nothing to do with this case.” New Georgia Project v. Raffensperger, 976 F.3d at 1289 (Lagoa, J., concurring).

But, even if this Court applied the traditional procedural due process analysis, the district court’s order contains reversible error. To

support a procedural due process claim, Plaintiffs must show that their deprivation was committed under color of state law. Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59 (1999); Grayden v. Rhodes, 345 F.3d 1225, 1232 (11th Cir. 2003). If so, courts next apply the Mathews balancing test and consider three factors: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of such interest along with the value, if any, of additional safeguards; and (3) the government’s interest, including the burden of additional safeguards. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Plaintiffs assert they possess a private liberty interest in “voting and having one’s ballot counted,” which is at risk of deprivation by the deadline because of the pandemic’s effect on the postal service. Doc. 58 at 2-5, 10-11, 22-25. The district court expressed concern about “massive delays and exigent circumstances *caused* by COVID-19.” Doc. 134 at 62 (emphasis added). This theory excludes the requisite *state* action. See Doe v. Fla. Bar, 630 F.3d 1336, 1342 (11th Cir. 2011); see also Mathews, 424 U.S. at 335. Postal delays and a virus are not state acts. See Georgia Shift v. Gwinnett Cnty., 2020 WL 864938 at \*5 (N.D.

Ga. Feb. 12, 2020); see also Coalition for Good Governance, 2020 WL 2509092, at \*3 (distinguishing between COVID-19 and State acts).

Further, as addressed above, a deadline to vote does not deprive anyone of the right to vote, and the order's three-day extension does not solve any of the issues inherent in the application of any deadline.

Safeguards apply too: voters are reminded of the Election Day Deadline in the instructions that accompany every absentee ballot. Doc. 91-3 at ¶ 5. Voters' knowledge of this, [Doc. 107-10 at ¶ 9], alleviates the risk of an erroneous deprivation.

Regarding the third Mathews factor, the district court "acknowledge[d] that [State] Defendants have a strong interest in certifying election results and maintaining the integrity of elections." Doc. 134 at 63. Extending the deadline for county elections officials to receive absentee ballots is not an additional procedural safeguard. It is a different deadline and different policy not made by the elected representatives in Georgia. Some voters will doubtlessly miss the extended deadline, but the burden imposed on the State's interests remains heavy. Timely certification of election results promotes certainty in elections, itself an important state interest. Broughton v.

Douglas Cty. Bd. of Elections, 286 Ga. 528, 528–29 (2010). So too is maintaining the integrity of elections. Eu v. San Francisco Cty. Democratic Cent. Comm., 489 U.S. 214, 231(1989). This is compounded by the fact that the district court’s order applies to only 17 counties and contradicts the pre-printed instructions on absentee ballots.

### **III. The Remining Injunction Factors Warrant Reversal.**

“Because the State is the appealing party, its interest and harm merge with that of the public.” Veasey v. Abbott, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam). Adding new, ad hoc processes to the mix risks ongoing uncertainty, confusion, and the inconsistent application of law. See Purcell, 549 U.S. at 4 (“Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.”). Reversing the district court’s order will assure the public that both the judiciary and the State will “ensur[e] proper consultation and careful deliberation” before disrupting the election process. Hand v. Scott, 888 F.3d 1206, 1215 (11th Cir. 2018).

## **CONCLUSION**

The preliminary injunction issued by the district court was stayed and has now expired. It never changed the legal relationship between

the parties and should be vacated. This Court's order on the State Defendants' motion to stay, however, should not be ignored by the district court. For these and all of the foregoing reasons, therefore, the State Defendants respectfully request that an order be issued by this Court vacating the district court's order and remanding the case to the district court with instruction to proceed in the light of the motions panel's decision.

Respectfully submitted this 7th day of January, 2021.

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## NOTICE REGARDING PAPER FILING

Pursuant to General Order No. 46 of the United States Court of Appeals for the Eleventh Circuit, Counsel for Defendants-Appellants hereby provides notice that he has filed the foregoing brief through the CM/ECF system, but is unable to comply with the requirement to file paper copies with the Court at this time and will do so at a future date to be established by the Court.

/s/ Josh Belinfante  
Josh Belinfante

Dated: January 7, 2021.



## CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,522 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(i) and 11th Cir. R. 32-4.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

/s/ Josh Belinfante  
Josh Belinfante

Dated: January 7, 2021.

## CERTIFICATE OF SERVICE

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

/s/ Josh Belinfante  
Josh Belinfante

Dated: January 7, 2021.