No. 20-14418

In the United States Court of Appeals for the Eleventh Circuit

L. LIN WOOD, JR.,

Plaintiff-Appellant,

v.

BRAD RAFFENSPERGER, et al.,

and

DEMOCRATIC PARTY OF GEORGIA, DSCC, and DCCC,

Intervenors-Appellees.

INTERVENORS' STATEMENT ON JURISDICTIONAL QUESTIONS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA
NO. 1:20-CV-4651-SDG

Marc E. Elias Amanda R. Callais Alexi M. Velez Emily R. Brailey PERKINS COIE LLP 700 Thirteenth St., NW Suite 800 Washington, D.C. 20005 Telephone: (202) 654-6200 Facsimile: (202) 654-6211	Kevin J. Hamilton Amanda J. Beane PERKINS COIE LLP 1201 Third Avenue Suite 4900 Seattle, WA 98101 Telephone: (206) 359-8000 Facsimile: (206) 359-9000 Matthew J. Mertens* Georgia Bar No: 870320 PERKINS COIE LLP 1120 NW Couch Street, 10th Floor Portland, OR 97209 Telephone: (503) 727-2000 Facsimile: (503) 727-2222	Halsey G. Knapp, Jr. Joyce Gist Lewis Susan P. Coppedge Adam M. Sparks KREVOLIN AND HORST, LLC One Atlantic Center 1201 W. Peachtree St., NW Suite 3250 Atlanta, GA 30309 Telephone: (404) 888-9700 Facsimile: (404) 888-9577
Counsel for Intervenors-Appellees		

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, counsel for Intervenors hereby certify that the Certificate of Interested Persons contained in Plaintiff-Appellant's Initial Brief is complete.

/s/ Marc E. Elias
Counsel for Intervenors-Appellees

CORPORATE DISCLOSURE STATEMENT

Counsel for Intervenors certify that Intervenors are political party committees. Counsel for Intervenors further certify that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

/s/ Marc E. Elias
Counsel for Intervenors-Appellees

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

Pursuant to this Court's November 25, 2020 Order, Defendant-Intervenor-Appellees ("Intervenors") submit this statement on the jurisdictional questions raised by this Court regarding whether the denial of Plaintiff-Appellant's L. Lin Wood, Jr.'s "Emergency Motion for Temporary Restraining Order" ("TRO Motion") is immediately appealable and "whether, and to what extent, any challenge to the denial of [Wood's] requests for relief" are moot. Intervenors submit that this Court does not have jurisdiction because Wood's TRO Motion is not immediately appealable and, more importantly, it is moot.

The denial of the TRO Motion—which Wood originally sought to appeal under 28 U.S.C. § 1292(b), but then appears to have reconsidered in favor of a direct appeal under 28 U.S.C. § 1292(a)—does not meet the standards for immediate appeal under either approach. As a result, this Court lacks jurisdiction to review the district court's ruling. In addition, Wood's TRO Motion sought the extraordinary relief of enjoining certification of *five million* Georgians' votes or, alternatively, sought to enjoin certification of the votes of the more than *one million* Georgians who lawfully voted absentee by mail, but his appeal was brought at least four days after the 2020 general election was certified on November 20, 2020. As a result, Wood's requested relief is now moot. Accordingly, this Court should dismiss this appeal.

II. BACKGROUND

Intervenors provide this Court with an abbreviated background of the relevant procedural history of the underlying case and Wood's TRO Motion. A complete background of this case is laid out in Intervenors' merits' brief, which will be filed in accordance with the Court's scheduling order.

Wood filed his original complaint in the underlying case on November 13, 2020, and an Amended Complaint on November 16. ECF Nos. 1, 5.[1] In his Amended Complaint, he challenged the constitutionality of a Settlement Agreement that had been entered more than eight months earlier in a separate federal action which resulted in publicly noticed rulemaking and guidance to clarify procedures for verifying the signatures on absentee ballots, and also asserted that the now completed hand recount of every presidential vote in Georgia was unfair to the Republican Party. Based on these complaints and other conclusory and unsubstantiated allegations of fraud and conspiracy, Wood asserted claims under the Elections and Electors, Due Process, and Equal Protection Clauses.

Wood did not file his TRO Motion until November 17, in which he asked the district court to issue breathtaking and entirely unprecedented relief. Specifically, Wood sought "an emergency injunction": (1) "[p]rohibiting the certification of the

[1] Pursuant to Local Rule 28-5, Intervenors cite the document number of the district court's docket and corresponding page number when referencing filings below.

results of the 2020 general election in Georgia on a statewide basis, or (2) [a]lternatively prohibiting the certification of said results which include the tabulation of defective absentee ballots." ECF No. 6 at 24. Wood also sought an order from the federal court that would effectively impose upon Georgia elections officials several additional rights of observation and participation in the state's elections by the Republican Party that are not presently found in Georgia law. *See id.* at 24-25.[2]

The district court held a hearing on Wood's TRO Motion two days after it was filed, on November 19. ECF Nos. 21, 52. After carefully considering four hours of argument and evidence in which the district court asked probing questions of both sides, the court orally denied the TRO Motion on all grounds. ECF Nos. 52. The district court entered a 38-page written opinion detailing its reasoning the following day. ECF No. 54. In sum, the district court found that (1) Wood had failed to carry

[2] Specifically, Wood demanded that the district court order the following: (1) "[a]ny recount of the November 3, 2020 elections . . . must be performed in a manner consistent with" Georgia law, (2) Republican monitors must be given the right to observe all election activity in the 2020 general election as well as the January 5, 2021 run-off election, (3) Wood and the Republican Party must be given 24-hours' notice prior to any election activity, (4) all ballots must be read by two individuals and "said readings" be overseen by Republican Party monitors, (5) the Republican Party must receive certified copies of ballot envelopes and requests and be allowed to compare signatures on such in the January 5, 2021 run-off election, and (6) Republican monitors must be present at all signature verification processes for the January 5, 2021 run-off.

his burden of showing that he had standing to pursue any of his claims, (2) Wood's suit was barred by laches, (3) Wood was unlikely to succeed on the merits of his claims, and (4) the public interest and balance of the equities weighed strongly against granting his sweeping requests for relief. *Id.*

Georgia concluded a hand recount of the presidential election on November 18 and the Secretary of State certified the results of the 2020 general election on November 20.[3] The Governor issued a certificate of ascertainment that same day.[4] The following day, President Trump's reelection campaign requested a machine recount of the hand-recount.[5] That machine recount began on November 24 and is scheduled to conclude on December 2.[6]

Wood waited several days after the district court issued its ruling on his TRO Motion to seek appellate review. First, he moved the district court to certify its ruling for appeal under 28 U.S.C. § 1292(b) on November 23. ECF No. 63. Wood's motion for discretionary appeal under Section 1292(b) implicitly acknowledged that the TRO denial is "an order not otherwise appealable under [Section 1292(a)]." 28

---

[3] Kate Brumback, *Georgia Officials Certify Election Results Showing Biden Win*, Associated Press (Nov. 20, 2020), https://apnews.com/article/georgia-certify-election-joe-biden-ea8f867d740f3d7d42d0a55c1aef9e69.
[4] *Id.*
[5] Associated Press, *Presidential race official recount gets underway in Georgia* (Nov. 24, 2020), https://apnews.com/article/election-2020-joe-biden-donald-trump-georgia-elections-f83fb36b92f776e81b91bfa141512d31.
[6] *Id.*

U.S.C. § 1292(b). The next day, the district court requested responses from other parties on Wood's 1292(b) motion. Wood then reversed course and filed the instant appeal under 28 U.S.C. § 1292(a). ECF No. 65.

This Court issued a briefing schedule on November 25, and in accordance with that schedule Wood filed his opening brief that same day. In that brief, Wood purports to appeal the district court's denial of his TRO Motion on every count of his Complaint; however, as discussed in Intervenors' merits brief, Wood has in actuality waived his Elections, Electors, and Due Process Clause Claims in this appeal. *See* Intervenor's Br. at 20-21. Thus, the only claim remaining is his equal protection claim, pursuant to which Wood argues that allegedly unlawful votes diluted his lawful vote. Even if this Court did have jurisdiction over the denial of the TRO Motion (it does not), this claim is moot.

III. DISCUSSION

A. The district court's denial of Plaintiff's TRO Motion is not immediately appealable under 28 U.S.C. § 1292(a).

"It is well settled in this circuit that a TRO is not ordinarily appealable." *McDougald v. Jenson*, 786 F.2d 1465, 1472 (11th Cir. 1986); *see also* Wright & Miller, Fed. Prac. & Proc. § 3922.1 ("The general rule is that orders granting, refusing, modifying, or dissolving temporary restraining orders are not appealable under § 1292(a)(1)."). This is particularly true when an appellant seeks review of an order *denying* a TRO. *See, e.g.*, *Office of Pers. Mgmt. v. Am. Fed'n of Gov't Emps.*,

AFL-CIO, 473 U.S. 1301, 1305-06 (1985) (Burger, C.J., in chambers) (distinguishing order granting TRO from order denying TRO and finding "the Court of Appeals was without jurisdiction over the appeal from the District Court's order denying the temporary restraining order").

Though there are some rare circumstances where an order granting or denying a TRO may be appealed—either because emergency conditions pose a risk of serious, irreparable harm that requires immediate appeal, or because the order is a preliminary injunction disguised as a TRO—no such circumstance exists here and the well-settled rule stands. Simply put, the denial of Wood's TRO Motion is not immediately appealable and this Court lacks jurisdiction.

1. There are no emergency circumstances posing a threat of irreparable harm.

Wood appears to mistakenly rely on the "emergency circumstances" exception to justify his appeal of the district court's denial of his TRO Motion, *see* ECF No. 65 (titled "Plaintiff's Notice of Appeal (Emergency)"); *id.* at 1 (noting that "[t]he matter is an emergency"); *see also* Appellant's Br. at 12 (citing *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223 (11th Cir. 2005)). But this reliance is misplaced. Simply put, any "emergency" is one of Wood's own making. And the district court's denial of his TRO Motion will not cause him any cognizable, much less *irreparable*, harm.

A court "*may* exercise appellate jurisdiction" "when a grant or denial of a [TRO] might have a serious, perhaps irreparable, consequence, and can be effectually challenged only by immediate appeal . . . ." *Schiavo*, 403 F.3d at 1225 (emphasis added). Thus, a TRO may be considered an appealable emergency where irreparable harm will occur before other relief can reasonably be sought. The Eleventh Circuit permits emergency appellate review of TROs in only the most extreme circumstances, for example, when a death row inmate is set to be executed within 24 hours of a TRO denial, *see Ingram v. Ault*, 50 F.3d 898, 900 (11th Cir. 1995), or when a patient is taken off of life-sustaining medical treatment pursuant to a TRO, *see Schiavo*, 403 F.3d at 1225. The burden is on the appellant to "disprove the general presumption that no irreparable harm exists." *Ingram*, 50 F.3d at 899–900.

Here, Wood cannot show any irreparable harm stemming from the denial of his TRO Motion, much less the extreme circumstances needed for this Court to exercise its jurisdiction. In denying the TRO Motion, the district court expressly determined that Wood failed to show that "irreparable injury would result if no injunction were issued." ECF No. 54 at 37 (quoting *Siegel v. LePore*, 234 F.3d 1163, 1175–76 (11th Cir. 2000)). The court found that Wood "has not presented any evidence demonstrating how he will suffer any particularized harm as a voter or donor by the denial of this motion." *Id.*; *see also id.* ("The fact that [Wood]'s

preferred candidates did not prevail in the General Election . . . does not create a legally cognizable harm, much less an irreparable one."). Wood's mere declaration that "[t]he matter is an emergency because the electors in the United States and Georgia are seated on December 14, 2020," ECF No. 66 at 1, does not alleviate him of the burden of showing that absent immediate appellate review he will suffer "serious, perhaps irreparable, consequence." *Schiavo*, 403 F.3d at 1225. Simply put, Wood has failed to carry his burden.

Moreover, Wood finds himself in this quandary as a result of his own litigation strategy decisions. Wood waited more than eight months to file this case challenging a Settlement Agreement that was in place long before the election; indeed, he waited until all of the ballots were cast in the election before even bringing this case. As the district court properly found, Wood "could have, and should have, filed his constitutional challenge much sooner than he did." ECF No. 54 at 21. Wood may not seek to make an end run around the clear jurisdictional rules of the federal court by waiting months to delay in bringing suit and then declaring, when he files at the thirteenth hour, that he is entitled to immediate appellate review because it is an "emergency." Even at the late date that he filed, moreover, Wood could have filed a preliminary injunction motion, rather than a TRO, from which there might have been a right of direct appeal under 28 U.S.C § 1292(a). *See Cnty., Mun. Emps.'*

Supervisors' and Foremen's Union Local 1001 v. Laborers' Intern. Union of N. Am., 365 F.3d 576, 578 (7th Cir. 2004) (Easterbrook, J.)

> ([T]he only reason [the denial of a TRO] might have such an effect would be [the appellants'] own strategy; rather than asking for a preliminary injunction, [they] immediately appealed. That maneuver cannot be allowed to work. . . . Only when resort to the regular processes of litigation is unavailing, and the judge is unwilling to make a prompt decision even though delay erodes or obliterates the rights in question, does inaction have the 'effect' of denying injunctive relief.).

Tellingly, Wood cites no applicable authority that would authorize this Court to exercise jurisdiction under these or even remotely analogous circumstances. He relies primarily on *Schaivo*, the now-infamous case involving a familial dispute over the medical care of a patient on life support, but nothing about this case's circumstances are remotely similar. The only other case that Wood cites in support of his argument that this Court should assert jurisdiction under Section 1292(a)(1) is a recent Third Circuit decision, *Bognet v. Secretary Commonwealth of Pennsylvania*, 2020 WL 6686120 (3d Cir. Nov. 13, 2020), but it, too, is in apposite. Wood claims that in *Bognet*, the court "recogniz[ed] the immediate appealability of voter and candidates [sic] motion for temporary restraining order and preliminary injunction." Initial Br. of Appellant at 12. But Wood ignores that *Bognet* involved a *combined* motion for a TRO *and* a preliminary injunction. Preliminary injunctions are appealable under Section 1292(a). When a "preliminary injunction is part of [an] appeal, the question of the appealability of the temporary restraining orders is

essentially moot as they are subsumed in the district court's preliminary injunction." *Evergreen Presbyterian Ministries Inc. v. Hood*, 235 F.3d 908, 917 n.10 (5th Cir. 2000), *abrogation on other grounds recognized by Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697, 704 (5th Cir. 2007). In contrast, Wood opted not to seek a preliminary injunction, nor is there any order on a preliminary injunction to appeal.

2. The TRO Motion denial does not otherwise resemble a denial of a preliminary injunction.

Though Wood does not appear to rely on it as a basis for direct appeal of the district court's order in this case, it is true that in limited instances the denial of a TRO can be appealed under 28 U.S.C. § 1292(a)(1) when several factors indicate that "the relief sought was a preliminary injunction," rather than a TRO. *AT&T Broadband v. Tech Commc'ns, Inc.*, 381 F.3d 1309, 1314 (11th Cir. 2004). Out of an abundance of caution, Intervenors briefly address those factors here, none of which Wood can satisfy.

Specifically,

> [a]n order granting a TRO may be appealable as an order granting a preliminary injunction when three conditions are satisfied: (1) the duration of the relief sought or granted exceeds that allowed by a TRO ([14] days), (2) the notice and hearing sought or afforded suggest that the relief sought was a preliminary injunction, and (3) the requested relief seeks to change the status quo.

Id.

As a preliminary point, Wood does not allege—in either his notice of appeal or his opening brief with the Court—that the requested TRO is appealable because

it is effectively a preliminary injunction. In fact, Wood's actions suggest he believes otherwise. Immediately after the district court's order, Wood filed a motion to certify the order denying the TRO for interlocutory appeal under Section 1292(b). *See* ECF No. 63. By filing a motion for discretionary appeal under Section 1292(b), Wood implicitly acknowledged that the TRO denial is "an order not otherwise appealable under [Section 1292(a)]", which he now seeks to invoke. 28 U.S.C. § 1292(b). Wood noticed an appeal pursuant to Section 1292(a) only *after* the district court requested responses from other parties on his initial 1292(b) motion. Wood's contradictory motion for review under Section 1292(b) remains pending before the district court.

Turning to the second prong described in *AT&T Broadband*, though a hearing was held, it was conducted under the premise that the relief sought was a TRO. Under the Federal Rules, notice and hearing are strongly encouraged before granting a TRO. *See, e.g.*, Advisory Committee Note to 1966 Amendment of Rule 65(b) ("[I]n view of the possibly drastic consequences of a temporary restraining order, the opposition should be heard, if feasible, before the order is granted . . . ."). The mere fact that the district court conducted a hearing that is favored for *all* TROs cannot convert a TRO denial into an appealable preliminary injunction order.

And in these proceedings the district court and the parties, including Wood himself, have consistently referred to Wood's motion as one for a TRO and not a preliminary injunction. *See, e.g.*, ECF No. 54 at 1 ("This matter is before the Court

on a motion for temporary restraining order filed by Plaintiff L. Lin Wood, Jr."); ECF No. 65 at 1 ("The reason [for appeal] being the Court erred in not granting the temporary restraining order"). Though "the label placed upon the order is not necessarily dispositive of its appealability," *AT&T Broadband*, 381 F.3d at 1314, when the plaintiff *and* the court are in agreement that the motion sought a TRO, this Court should defer. *Cf. Wheeler v. Talbot*, 770 F.3d 550, 552 (7th Cir. 2014) ("We think it best, however, to take the district court at its word. The court certainly knew the difference between a TRO and a preliminary injunction, and its order specified that it was denying Wheeler's motion for a 'preliminary injunction . . . .'"); *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 572 (6th Cir. 2002) (relying on fact that "both parties have treated the motion, and the district court's ruling thereon, as a motion for a preliminary injunction" in determining that order was appealable). The hearing does not "suggest that the relief sought was a preliminary injunction." *AT&T Broadband*, 381 F.3d at 1314.

To the first and third prongs, if any portion of Wood's requested relief *did* "exceed[] [the duration] allowed by a TRO" or "seek[] to change the status quo," that relief has either been abandoned by Wood on appeal or is new relief that he has improperly raised on appeal for the first time before this Court. *Id.* Wood actively framed his TRO Motion as an effort to temporarily preserve what he contended was

the status quo by "bar[ing] the certification of [the election] results until Plaintiff's substantive claims can be heard . . . ." ECF No. 6. at 2.

While his request for a declaration that the hand recount should be re-performed under absurd new conditions may qualify as affirmative relief, it is irrelevant for two reasons. *First*, that relief was based solely on his Due Process Clause claims which he has entirely abandoned in this appeal. *See* Appellant's Br. (failing to mention Due Process Clause); Appellee's Br. at 20-21; *AT&T Broadband*, 381 F.3d at 1320 n.14 ("Issues not raised on appeal are considered abandoned."). *Second*, that request was for *declaratory* relief which cannot serve as the basis for an appeal taken under § 1292(a). *See Kaimowitz v. Orlando*, 122 F.3d 41, 43 (11th Cir. 1997) (explaining that the scope of the Court's jurisdiction over appeals under 28 U.S.C. § 1292(a) are "limited to matters directly related to the denial of injunctive relief"). Additionally, though some relief requested in Wood's brief before this Court—*i.e.*, seeking an order "that the election must be re-done"—would change the status quo and would extend beyond fourteen days, *see* Appellant's Br. at 39; this is new relief is requested for the first time on appeal and is thus improper. *See Kaimowitz*, 122 F.3d at 43 (explaining that scope of Court's jurisdiction under 28 U.S.C. § 1292(a) is "limited to matters directly related to the denial of injunctive relief").

Wood does not believe that his TRO Motion was functionally a request for a preliminary injunction, and for the reasons stated above, Intervenors agree. Nor does Wood face serious, irreparable harm that can only be remedied through immediate appeal. As a result, this Court does not have jurisdiction to hear this appeal.

B. Wood's challenge to the district court's denial of his motion for a temporary restraining order is moot.

1. Certification of Georgia's election results deprives the instant motion of an active controversy.

The Secretary has already certified Georgia's election rendering Wood's requested relief in this TRO Motion—preventing Georgia's certification of the election—moot.

"If events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give the plaintiff or appellant meaningful relief, then the case is moot and must be dismissed." *Hand v. Desantis*, 946 F.3d 1272, 1275 (11th Cir. 2020) (quoting *World Wide Supply OU v. Quail Cruises Ship Mgmt.*, 802 F.3d 1255, 1259 (11th Cir. 2015)); *Hall v. Sec'y, Ala.*, 902 F.3d 1294, 1297 (11th Cir. 2018), *cert. denied sub nom. Hall v. Merrill*, 140 S. Ct. 117 (2019); *Brooks v. Ga. State Bd. of Elections*, 59 F.3d 1114, 1118–19 (11th Cir. 1995) ("An appellate court simply does not have jurisdiction under Article III 'to decide questions which have become moot.'"). As this "Court has consistently held[,] an appeal from the denial of a motion for preliminary injunction is mooted when the requested effective end-

date for the preliminary injunction has passed." *Tropicana Prod. Sales, Inc. v. Phillips Brokerage Co.*, 874 F.2d 1581, 1582 (11th Cir. 1989).

In Wood's own words, "[t]his action and the instant Motion pertain to the certification of Georgia's results from the November 3, 2020 general election." ECF No. 6 at 1 n. 1. The November 20th certification date not only supplied the basis for the "emergency" motion, but also was the *only injunctive* relief that Wood sought below. *Id*. at 24 (requesting enjoinment of "certification of the results of the 2020 general election in Georgia on a statewide basis; or [a]lternatively . . . certification of said results which include the tabulation of defective absentee ballots"). On November 20th, by Wood's own admission, the Secretary certified the 2020 general election results. Appellant's Br. at 1 & 38; *see* O.C.G.A. § 21-2-499(b).[7] This was "more than a mere rubber stamp. It require[d] that Secretary of State to engage in the same tabulation, computation, and canvassing process undertaken by the counties as set forth in O.C.G.A. § 21-2-493 prior to final certification." *Common Cause Ga. v. Kemp*, 347 F. Supp. 3d 1270, 1291 (N.D. Ga. 2018). And it is recognized by law as a "final" certification "deadline." *See id*. at 1300.[8]

[7] Brumback, *supra* note 3.

[8] This Court's jurisdiction to hear this appeal is not affected by the statewide statutory recount requested by the Trump Campaign. The Recount does not affect the finality of the existing certification; indeed, the Recount statute does not call for re-certification of the results at the end of the process *unless* there was an error in the original count. O.C.G.A. § 21-2-495(c)(1) ("If, upon such recount, it is

Thus, when certification took place on November 20th, Wood's requested relief was mooted. *See Tropicana Prod. Sales*, 874 F.2d at 1583 ("The express limitation [plaintiff's] motion set for itself has divested this Court of jurisdiction over the appeal."); *McDonald v. Cook Cnty. Officers Electoral Bd.*, 758 F. App'x 527, 529–30 (7th Cir. 2019) (Barrett, J.) (finding case is moot because the relief that the plaintiff "specifically sought in the district court in her motion for interlocutory relief . . . would not affect the results of an election that has already happened").[9]

To be sure, Wood did ask for other forward-looking *declaratory* relief in his TRO Motion. That cannot serve as the basis for an appeal taken under § 1292(a),

---

determined that the original count was incorrect, the returns and all papers prepared by the superintendent, the superintendents, or the Secretary of State shall be corrected accordingly and the results recertified."). Even if re-certification takes place after the Recount, this act has no legal significance for Appellant because it would not change the status quo (the results have already been certified). In any event, re-certification is a different act under state law that Appellant did not seek to enjoin below. *See Kaimowitz*, 122 F.3d at 43 (scope of the Court's jurisdiction over appeals under 28 U.S.C. § 1292(a) are "limited to matters directly related to the denial of injunctive relief.").

[9] *See also, e.g.*, *Bogaert v. Land*, 543 F.3d 862, 871 (6th Cir. 2008) ("This Court and other Circuits repeatedly have held that an appeal from a preliminary injunction ordering an issue or candidate to be placed on or stricken from a ballot becomes moot when the election is completed and the results final."); *Padilla v. Lever*, 463 F.3d 1046, 1049 (9th Cir.2006) ("The plaintiffs['] . . . claim for injunctive relief [enjoining the election] has become moot. The recall election has occurred, and the term of office filled by that election has expired."); *Operation King's Dream v. Connerly*, 501 F.3d 584, 591 (6th Cir. 2007) ("The Plaintiffs' request for injunctive relief has become moot . . . . Simply put, the opportunity to keep Proposal 2 off the November 2006 general election ballot has long since passed.").

however, because such appeals only apply to *injunctive* relief and, as such, is not at issue here. *See Kaimowitz*, 122 F.3d at 43 (explaining that the scope of the Court's jurisdiction over appeals under 28 U.S.C. § 1292(a) are "limited to matters directly related to the denial of injunctive relief."). As such, there is no aspect of Wood's requested relief that is properly situated for review.[10]

Perhaps recognizing this, Wood has conspicuously altered the nature of the relief that he is seeking in his opening brief before this Court. For the first time, Wood asserts that he *not only* seeks to halt certification, *but also* is demanding a court order that would require the state of Georgia to conduct an entirely new presidential election. *See* Appellant's Br. at 39 ("[T]his Court should direct or reverse with instructions that the trial court direct that the election must be re-done in a constitutionally permissible manner"). But the fact that the injunction he sought is no longer available does not now justify modification, much less expansion, of the requested relief on appeal; quite the opposite. *Cf. Donald J. Trump for President v. Sec'y of Commw.*, No. 20-3372, slip op. at 11 (3d. Cir. Nov. 27, 2020) ("Having repeatedly stressed the certification deadline, the [Appellant] cannot now pivot and object that the District Court abused its discretion by holding the Campaign to that

[10] Even if it could be at issue, this requested relief is primarily based in Wood's Due Process Clause claims which, as discussed in Intervenors' merits brief, Wood has waived on appeal. *See* Intervenor's Br. at 20-21.

very deadline."). Thus, there is no aspect of Wood's requested relief that can be granted and this appeal is moot. *Hand*, 946 F.3d at 1275; *Hall*, 902 at 1297; *Brooks*, 59 F.3d 1114 at 1119.[11]

2. Wood's requested relief does not fall into any recognized exceptions to the mootness doctrine.

While mootness deprives the Court of jurisdiction, this Court has acknowledged three exceptions that permit courts to hear otherwise moot claims in three narrow circumstances, none of which apply here. Specifically, this Court may nevertheless consider a case that otherwise is moot: (1) where the issues are capable of repetition, yet evading review; (2) where an appellant has taken all steps necessary to perfect the appeal and to preserve the status quo before the dispute becomes moot; and (3) where the trial court's order will have dangerous collateral legal consequences. *Nat'l Broad. Co. v. Commc'ns Workers of Am., AFL-CIO*, 860 F.2d 1022, 1023 (11th Cir. 1988) (citing *B & B Chem. Co. v. United States E.P.A.*, 806 F.2d 987, 990 (11th Cir. 1986)).

First, this dispute is not "capable of repetition, yet evading review." *Id.* This exception is limited to situations where "there is a 'reasonable expectation' or a

[11] Such relief, in fact, would likely be in conflict with the federal statute setting the date of the election. *See Craig v. Simon*, No. 20-3126, 2020 WL 6811358, at *2 (8th Cir. Nov. 20, 2020) (holding that federal statute setting date of congressional election conflicts with state law prohibiting certification and requiring new election after death of candidate); *see also* 3 U.S.C. § 1.

'demonstrated probability' that the same controversy will recur involving the same complaining party," and (2) the 'challenged action was in its duration too short to be fully litigated prior to its cessation or expiration.'" *Brooks*, 59 F.3d at 1120 (quoting *The News–Journal Corp. v. Foxman*, 939 F.2d 1499, 1507 (11th Cir.1991) (quoting *Murphy v. Hunt*, 455 U.S. 478 (1982) (per curiam)). Wood's requested injunctive relief is limited to the 2020 general election, which will never occur again. This limitation is not outside of Wood's control. The "issues in this appeal evade review only because of date-specific provisions set voluntarily by the part[y and] while it is true that this particular appeal was mooted before the issues raised could be addressed, it does not follow 'that similar future cases will evade review.'" *Brooks*, 59 F.3d at 1121 (quoting *Neighborhood Transp. Network, Inc. v. Pena*, 42 F.3d 1169, 1173 (8th Cir.1994)).

Even if a similar dispute were to occur in the future, there is nothing inherent that would necessarily prevent it from being fully ligated prior to the certification of an election. This election cycle alone numerous cases have been brought on these grounds and were fully litigated prior to election day, much less the certification deadline. *See, e.g., Curling v. Raffensperger*, No. 1:17-CV-2989-AT, 2020 WL 5994029 (N.D. Ga. Oct. 11, 2020). In fact, as the district court found, even this specific case could have been brought substantially earlier, had Wood only not unduly and inexplicably delayed. ECF No. 54 at 19-23. Thus, the fact that this matter

had to be litigated on a compressed timeframe was the result of Wood's actions, including specifically his significant and unjustifiable delay in waiting to bring this case until eight months after the Settlement Agreement was signed, after the general election, and mere days before the certification deadline. *Wood v. Raffensperger*, No. 1:20-cv-04651-SDG, 2020 WL 6817513, at *7 (N.D. Ga. Nov. 20, 2020) ("Wood could have, and should have, filed his constitutional challenge much sooner than he did, and certainly not two weeks *after* the General Election."). This is not a circumstance in which it would be appropriate to apply the "capable of repetition, yet evading review" exception. *Nat'l Broad. Co.*, 860 F.2d at 1023.

Moreover, this exception rarely applies to appeals of orders denying preliminary injunctive relief. This is because "if there exists some alternative vehicle through which a particular policy may effectively be subject to a complete round of judicial review, then courts will not generally employ this exception to the mootness doctrine." *Bourgeois v. Peters*, 387 F.3d 1303, 1308 (11th Cir. 2004) (citing *Sierra Club v. EPA*, 315 F.3d 1295, 1303 n.11 (11th Cir. 2002)). Here, that alternative vehicle—the underlying litigation—remains and Wood can continue to fully litigate that. Thus, this exception to the mootness doctrine does not apply.

Second, the other exceptions to the mootness doctrine are equally inapplicable. For example, "an appellant [who] has taken all necessary steps to perfect the appeal and to preserve the status quo before the dispute becomes moot,"

may be excepted from the mootness doctrine. *B & B Chem. Co.*, 806 F.2d at 990. But Wood, who has been dilatory at every step, has done nothing to perfect the appeal here. This exception, too, has been extremely narrowly applied, limited primarily to criminal defendants who seek to challenge their convictions notwithstanding that they have been released from custody. Indeed, even though this Court "has referred to the 'all necessary steps' exception in cases that did not involve confinement of an individual, in none of those cases did [it] find the exception applicable." *Ethredge v. Hail*, 996 F.2d 1173, 1177 n. 8 (11th Cir. 1993) (collecting cases) (citing 13A Wright, Miller & Cooper, Federal Practice & Procedure § 3533.4, at 302 (2d ed. 1984) ("[T]he fundamental argument for review [in such cases] is that the stigma of conviction of itself justifies review.")).

Likewise, there is no risk that dangerous collateral consequences are likely to occur as a result of the district court order. *See B & B Chem. Co.*, 806 F.2d at 990. The district court's interlocutory order is limited to Wood's emergency request and such requests are not generally found to cause collateral harm. *See Brooks*, 59 F.3d at 1121; *see also Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm.*, 950 F.3d 790, 795 (11th Cir. 2020) (declining to vacate preliminary injunction opinion after appeal was rendered moot because interlocutory orders usually do not cause collateral harm). And any assertion that the district court's order might have negative persuasive value for Wood going forward is insufficient to

satisfy the collateral-consequences mootness exception because such assertions are simply "too speculative." *B & B Chem.*, 806 F.2d at 991; *see also, e.g.*, *Ethredge*, 996 F.2d at 1177. Thus, no exceptions to the mootness doctrine apply here, and Wood's appeal is moot.

IV. CONCLUSION

As demonstrated above, Wood's request is procedurally improper and fails to present a live case and controversy for this Court to decide. While these alone are sufficient grounds for dismissal, Intervenors also respectfully request that this Court dismiss the appeal because it sets a dangerous precedent for American elections. As the Third Circuit explained just last week, "[v]oters, not lawyers, choose the President. Ballots, not briefs, decide elections." *Donald J. Trump for President v. Sec'y of Commw.*, No. 20-3372, slip op. at 11 (3d. Cir. Nov. 27, 2020). Georgia's voters have decided this election and the Secretary has soundly certified those results. This Court should dismiss this appeal.

Dated: December 1, 2020 */s/ Marc E. Elias*

Halsey G. Knapp, Jr.
Joyce Gist Lewis
Adam M. Sparks
Susan P. Coppedge
KREVOLIN AND HORST, LLC
One Atlantic Center
1201 W. Peachtree Street, NW,
Ste. 3250
Atlanta, GA 30309
Telephone: (404) 888-9700
Facsimile: (404) 888-9577
hknapp@khlawfirm.com
jlewis@khlawfirm.com
sparks@khlawfirm.com

Marc E. Elias
Amanda R. Callais
Alexi M. Velez
Emily R. Brailey
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
MElias@perkinscoie.com
ACallais@perkinscoie.com
AVelez@perkinscoie.com

Kevin J. Hamilton
Amanda J. Beane
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: (206) 359-8000
Facsimile: (206) 359-9000
KHamilton@perkinscoie.com
ABeane@perkinscoie.com

Gillian C. Kuhlmann
PERKINS COIE LLP
1888 Century Park East, Suite 1700
Los Angeles, CA 90067
Telephone: (310) 788-3900
Facsimile: (310) 788-3399
GKuhlmann@perkinscoie.com

Matthew J. Mertens
Georgia Bar No: 870320
PERKINS COIE LLP
1120 NW Couch Street, 10th Floor
Portland, OR 97209
Telephone: (503) 727-2000
Facsimile: (503) 727-2222
MMertens@perkinscoie.com

Counsel for Intervenors-Appellees

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 5,603 words as counted by the word-processing system used to prepare the document.

Respectfully submitted this 1st day of December, 2020.

/s/ Marc E. Elias
Counsel for Intervenors-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 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 1st day of December, 2020.

/s/ Marc E. Elias
Counsel for Intervenors-Appellees