In the United States Court of Appeals for the Eleventh Circuit

L. LIN WOOD, JR.,

Plaintiff-Appellant,

v.

BRAD RAFFENSPERGER, et al.,

Defendants-Appellees.

and

DEMOCRATIC PARTY OF GEORGIA, DSCC, and DCCC,

Intervenors-Appellees

INTERVENORS' RESPONSE BRIEF

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

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CERTIFICATE OF INTERESTED PERSONS

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

/s/ Amanda R. Callais
Counsel for Intervenors

STATEMENT REGARDING ORAL ARGUMENT

Intervenors believe the Court should decide this matter based on the parties' concurrently-filed jurisdictional briefs. Should the Court consider Appellant's initial brief, Intervenors' response brief, and any reply thereto, Intervenors believe that oral argument is unnecessary and that proceeding on the papers is sufficient.

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/ Amanda R. Callais
Counsel for Intervenors

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I. INTRODUCTION

Plaintiff L. Lin Wood, Jr., a single Georgia voter unhappy with the outcome of the presidential election, seeks extraordinary, unprecedented, and wholly unjustifiable relief. Among other things, Wood asks that the federal courts interfere with the state's ordinary elections process and enjoin certification of the presidential election, negating the votes of *five million* other Georgia voters. In the alternative, Wood seeks a court order negating the votes of the more than *one million* Georgians who lawfully voted absentee by mail. The basis for Wood's remarkable request is his contention that a March 6, 2020, settlement agreement ("Settlement Agreement") in a separate federal litigation between the Secretary of State Brad Raffensperger (the "Secretary"), the State Election Board (the "Board"), and the Democratic Party of Georgia, DSCC, and DCCC (collectively, the "Intervenors") was somehow unconstitutional.

But Wood's challenge to the Settlement Agreement is both entirely meritless and comes far too late. The Settlement Agreement did not modify Georgia law as Wood contends. It simply articulated uniform, statewide procedures for matching signatures on absentee ballot envelopes and curing deficiencies on the same, all of which were well within the authority of the Secretary and the Board to do. In addition, the Settlement Agreement has been in effect for at least three elections.

ECF No. 54 at 21.[1] Its dictates were also the subject of an extended and public notice and comment process. Wood inexplicably waited over eight months after the Settlement Agreement was entered—and until *after* the general election—to even initiate this challenge and seek a temporary restraining order. The district court (Grinberg, J.) properly denied Wood's motion, in which he sought the "extraordinary" and "unprecedented" relief of preventing Georgia's certification of its election. *Id.* at 38.

The district court's 38-page opinion explaining its decision was well-reasoned, thoughtful, and should be affirmed on all points. First, as a threshold matter, the district court correctly found that Wood lacks standing to bring these claims, *id.* at 12-19, and that his decision to wait eight months and challenge the Settlement Agreement after the election legally bars his claims, *id.* at 19-23. The district court's consideration of the merits of Wood's motion for a temporary restraining order is equally correct, and properly found that if Wood failed to carry his burden of proving even one of the four requisite factors necessary to justify an injunction: (1) Wood is unlikely to succeed on the merits of his Elections and Electors Clause, Equal Protection Clause, and Due Process Clause claims, *id.* at 24-36; (2) Wood failed to show that he has suffered even a *legally cognizable* harm,

[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.

much less an irreparable one, *id.* at 37; and (3) the equities and public interest both weigh heavily against granting the relief requested, where the injury to state officials and the public at large if millions of duly cast ballots were not counted would be severe. *Id.* Under even the most exacting standard of review, affirmance would be appropriate. It is manifestly so under the "abuse of discretion" standard this Court must apply in this case.[2]

II. JURISDICTIONAL STATEMENT

Wood's appeal is not authorized by 28 U.S.C. § 1292(a)(1), and his requested relief is moot. The Court requested briefing on this issue, which Intervenors filed earlier today. In addition to the jurisdictional barriers discussed in that brief, this Court lacks authority to hear this matter for another reason: as the district court properly found, Wood lacks standing to pursue this matter under Article III. Thus, for the reasons stated in both this brief and Intervenors' jurisdictional statement, this appeal is not properly before this Court.

[2] As discussed herein, Wood only appeals the ruling on his equal protection claims and has therefore waived his appeal on his remaining claims. He affirmed this waiver in the jurisdictional brief filed with the Court this morning: "Appellant argued below that his rights to Equal Protection were violated by Georgia's absentee ballot processing scheme, as modified by the unlawful 'Settlement Agreement' because it fails to comply and conflicts with the election scheme adopted by the State Legislature." Pet's. Jurisdictional Brief at 3.

III. STATEMENT OF ISSUES

1. Did Wood waive his Electors, Elections, and Due Process Clause claims by failing to adequately appeal the district court's finding that he lacks standing to pursue these claims?

2. Did the district court abuse its discretion by denying Wood's motion for a temporary injunction?

IV. STATEMENT OF THE CASE

Wood, a registered voter in Fulton County, Georgia, contends that Defendants—the elected officials tasked with conducting elections in the state—performed their roles in an unconstitutional manner by entering into a Settlement Agreement with Intervenors in a separate federal litigation over eight months ago. Defendants separately ordered a hand recount of the 2020 general election presidential votes, and Wood contends Defendants violated the due process rights of Republican election monitors during this hand recount. Purportedly to right these wrongs, Wood filed suit on November 13, 2020, ten days after the conclusion of the general election, in which five million Georgians cast their ballots in accordance with Georgia law at the time of the election. ECF No. 1. Wood then waited another three days—until November 16—to file an amended complaint, ECF No. 5, and then another day to file a motion for temporary restraining order—on November 17. ECF No. 6.

Wood's amended complaint advances three claims against Defendants under (1) the First Amendment and the Equal Protection Clause of the Fourteenth Amendment (Count I); (2) the Electors and Elections Clauses of the Constitution (Count II); and (3) the Due Process Clause of the Fourteenth Amendment (Count III). ECF No. 5 at 24, 29, 32. His motion for temporary restraining order sought extraordinary and unprecedented relief: he asked the district court to issue an order prohibiting certification of the 2020 general election results in Georgia on a statewide basis, which would effectively nullify the nearly five million ballots cast by voters in that election. Alternatively, Wood sought to prohibit certification of any results that included absentee-by-mail votes (of which more than 1.3 million were cast in the election). Wood also sought to install Georgia Republican Party overseers for virtually every aspect of Georgia's signature-matching and ballot-counting election processes, both for this election and subsequent ones. ECF No. 6 at 24.

To "substantiate" his claims, Wood relied not only on a late and baseless challenge to the Settlement Agreement, but on several specious affidavits, including one redacted and unsigned affidavit from an unidentified individual in Venezuela, as well as another entirely speculative affidavit from an individual apparently intended as an expert report, and the hearing testimony of an individual who participated in the recount and did not identify a single instance of impropriety. The

district court properly denied Wood's motion, *see* ECF No. 54, and this appeal followed.

A. The Settlement Agreement

On November 6, 2019, Intervenors sued the Secretary and members of the Board, challenging Georgia's signature-matching laws under the First and Fourteenth Amendments to the U.S. Constitution. The Intervenors asserted that Georgia's arbitrary and unreliable procedures for comparing absentee ballot signatures and rejecting absentee ballots unconstitutionally deprived Georgians of their right to vote. *DPG v. Raffensperger*, No. 1:19-cv-5028 (N.D. Ga.). After weeks of arms-length negotiations, the parties entered into the Settlement Agreement on March 6, 2020, which was publicly filed with the court that day. ECF No. 1-1.

Throughout the negotiations, as memorialized in the Settlement Agreement, both the Secretary and Board maintained that Georgia's laws and processes were constitutional. *Id*. at 1-2. They did not agree to any modification of Georgia's elections statutes. Instead, they agreed to initiate rulemaking and issue guidance to help ensure uniform and fair treatment of voters *within* the existing statutory framework. *Id*. at 3-4. Thus, the Secretary agreed to issue official guidance intended to increase uniformity in processing absentee ballot signatures, and the Board agreed to promulgate and enforce a more robust voter notification and cure process. *Id*. The Office of the Georgia Attorney General and private counsel (who regularly

represents both the Georgia Republican Party and prominent Republican leaders) represented the Secretary and the other Board members during the negotiations and personally signed the Settlement Agreement. *Id*. at 6.

B. The Notice Rule

The Board implemented the Settlement Agreement by promulgating State Election Board Rule 183-1-14-.13 (the "Notice Rule"). *See* O.C.G.A. § 50-13-4. Under the Notice Rule, counties contact voters about rejected mail ballots within three business days after receipt of the absentee ballot and within one business day for ballots received within eleven days of election day. *Id.* Notably, under Georgia law, the Board could only implement and enforce this type of rule after an official rulemaking. O.C.G.A. § 21-2-31. And that is what occurred: over the course of several months, beginning in December 2019 (before the Settlement Agreement was finalized), and in accordance with the Georgia Administrative Procedures Act, the Board gave notice about the intended rulemaking, accepted comments from the public, and, only after that process was complete, implemented the new Notice Rule.[3] The rule that was finally adopted differed slightly from the rule in the Settlement Agreement, confirming that the rulemaking process was far from a

[3] *See* Georgia State Elections Board, *Notice of Intent to Post a Rule of the State Elections Board, Chapter 183-1-14 and Notice of Public Hearing* (Dec. 19, 2019) (scheduling public hearing for January 22, 2020).

rubberstamp of the Agreement. *See* Ga. Comp. R. & Regs. 183-1-14-.13 (amended March 22, 2020); Ga. Comp. R. & Regs. 183-1-14-.13 (May 21, 2020); Ga. Comp. R. & Regs. 183-1-14-.13 (Aug. 31, 2020).[4]

C. The OEB Procedures

On May 1, the Secretary in turn issued the procedures for review of allegedly-mismatched signatures by an Official Election Bulletin ("OEB").[5] Under the guidance contained in the May 1 OEB, if an election official determines that the voter's signature on a mail-in absentee ballot envelope does not match the voter's signature on file, the official must seek review from two other election officials. ECF No. 54 at 8; *see also* Chris Harvey, Official Election Bulletin (May 1, 2020). The mail-in absentee ballot may not be rejected unless two of the three election officials agree that the signature does not match. *Id*. All of these statewide changes—the Settlement Agreement, rulemaking, the Notice Rule, and process changes contained in the OEB—were widely publicized. *See supra* at nn.3-4. All were in place for the June 9 primary election, August 11 primary runoff election, and November 3 general election. ECF No. 54 at 21. Notably, they did not result in wholesale acceptance of

[4] The amended Notice Rule effective August 31, 2020, corrected a scrivener's error in the previously amended Notice Rule effective May 21, 2020, that altered the event triggering the obligation of the board of registrars or absentee ballot clerk to notify the elector whose timely-submitted absentee ballot was rejected.

[5] OEBs are election guidance documents that provide technical guidance to local election administrators regarding new rules, court orders, and other binding law to ensure consistency in the administration of elections statewide.

absentee ballots. In fact, in the 2020 general election Georgia rejected absentee ballots due to purported signature mismatches at the exact same rate as it had in the 2018 election. *Id*. at 28 (finding "the percentage of absentee ballots rejected for missing or mismatched information and signature" in both elections was .15%).

D. The General Election

On September 15, Georgia voters began casting absentee ballots for the general election. ECF No. 54 at 2. Election officials began reviewing signatures on absentee ballot envelopes as soon as the first ballots were returned, and that process concluded on November 6, when the deadline to cure absentee ballots passed. O.C.G.A. § 21-2-386(a)(1)(C). Where elections officials successfully matched signatures, they separated envelopes and ballots for counting as required by Georgia law to protect the secrecy of those ballots. *See* O.C.G.A. § 21-2-386(a)(2)–(3); *see also* S.E.B. Rule 183-1-14-0.9-15(4) (requiring absentee ballot envelopes to be processed "in a manner that ensures that the contents of the envelope cannot be matched back to the outer envelope"). This separation began on October 19 and continued throughout the initial counting period. *See* ECF No. 33-13; *see also* O.C.G.A. § 21-2-386(a)(2)-(3); Ga. Comp. R. & Regs. 183-1-14-0.9-.15(1), (4). Once a ballot is separated from its envelope, it is impossible to trace an absentee ballot to a specific voter, and any attempt to do so would violate state law. *See* S.E.B. Rule 183-1-14-0.9-15(4).

E. The Statewide Hand Recount

On November 11, the Secretary announced that a statewide hand recount of the presidential election would take place. *See* ECF No. 33-3; *see also* ECF Nos. 33-1, 33-2. On November 12, the Secretary distributed the rules governing the recount and held a statewide, public training on recount procedures for all election officials. *See* ECF No. 33-4; *see also* ECF No. 33-3. The recount began that same day. The rules the Secretary initially announced provided that "Political Parties are allowed to designate a minimum of two monitors per county at a ratio of one monitor per party for every ten audit boards in the county." ECF No. 33-3. After Republican Party complaints about access, however, the Secretary announced that counties could allow as many designated monitors from each party as their space could accommodate. ECF No. 33-15.

Both the Democratic and Republican Parties of Georgia had numerous, and often equivalent numbers, of observers on-site at recount locations throughout the duration of the recount. *See, e.g.*, ECF No. 38-1 (Vailes Aff.) ¶¶ 5–6, 10–11; ECF No. 38-2 (Thomas Aff.) ¶¶ 7–8; ECF No. 38-3 (Brandon Aff.) ¶ 17; ECF No. 38-4 (Sumner Aff.) ¶ 5–6; ECF No. 38-5 (Lourie Aff.) ¶ 7; ECF No. 38-6 (Alston Aff.) ¶ 7; ECF No. 38-7 (Cason Aff.) ¶¶ 5–6, 12; ECF No. 38-8 (Young Aff.) ¶ 6; ECF No. 38-9 (Graham Aff.) ¶¶ 5, 13; ECF No. 38-10 (Short Aff.) ¶¶ 7–9, 11, 13, 15. Multiple recount locations also live-streamed the process, and several major state

and national new outlets observed and reported on the proceedings. *See, e.g.*, ECF No. 33-14.

As of November 18, all counties had finished the recount, which found that President-Elect Joseph Biden won the presidential election in Georgia by more than 12,000 votes. ECF No. 54 at 9-10 (citing ECF Nos. 33-1, 33-2, 33-3); *see also* Kate Brumback, *Georgia hand tally of votes is complete, affirms Biden lead*, AP News, https://apnews.com/article/election-2020-joe-biden-donald-trump-georgia-elections-1a2ea5e8df69614f4e09b47fea581a09 (last accessed Nov. 28, 2020). No major irregularities in the original counts or the recount have been reported.

F. The District Court Proceedings

On November 19, the district court held a nearly four-hour hearing on Wood's emergency motion for temporary restraining order. ECF Nos. 21, 52. The court entertained arguments from all parties and questioned each side on the issues, including about whether Wood had standing and whether there was merit to any of his claims. The court orally denied Wood's Motion at the hearing, finding that Wood lacked standing, unduly delayed bringing his claims to the prejudice of the Secretary of State and millions of Georgians who had already voted, and failed to state a claim on which relief could be granted and that granting Wood's requested relief would violate the *Purcell* principle. ECF No. 52 at 92:19-100:23.

The district court entered its written order the following day, in which it set forth detailed findings supporting its conclusion. As a threshold matter, the district court found that Wood had failed to establish that he had standing to pursue his claims. ECF No. 54 at 12. The district court also found that even if Wood could establish standing, he had inexcusably delayed in filing and therefore the doctrine of laches barred relief. *Id*. at 19. Finally, the district court considered whether, should these hurdles be surmounted, Wood's claims were cognizable or had merit, and concluded, for all claims, that they were neither. *Id*. at 23.

First, on the question of standing, the district court found that Wood failed to establish that he had suffered a particularized injury-in-fact that could invoke the jurisdiction of the federal courts. *Id*. at 14. Instead, the district court found that Wood's claims rested on purported injuries that, if they were in fact incurred, would be common across all voters, not particular and individual in some unique way to Woods. *Id*. at 18 (finding Wood failed to "sufficiently differentiate his alleged injury from that which *any* voter might have suffered--no matter the party affiliation"). The district court found that Wood's alleged injury was "a textbook generalized grievance" that could not support standing. *Id*. at 16-17.

Next, the district court considered the timing of Wood's suit, including the eight-month delay between the issuance of the Settlement Agreement and the initiation of this action, and concluded that Wood "could have, and should have,

filed his constitutional challenge much sooner[.]" *Id.* at 21. The court further noted that Wood "failed to submit any evidence explaining why he waited to bring these claims until the eleventh hour." *Id*. at 21.[6] That delay, moreover, threatened significant injury to millions of other voters who participated in the election under the rules that were in place at the time, by seeking to "disenfranchise a substantial portion of the electorate" post hoc, a result that would "erode the public's confidence in the electoral process." *Id.* at 22-23.

Finally, the district court also found that, on the merits, Wood was not entitled to a temporary restraining order. *Id*. at 25. With regard to the equal protection claim, the court found Wood failed to proffer any evidence of disparate treatment. *Id*. at 26. The court further found that Wood's theory of vote dilution was not cognizable in the present context, *id*. at 27, and that, even if it were cognizable, Wood had failed to proffer evidence supporting that claim. *Id*. at 28 ("This argument is belied by the record; the percentage of absentee ballots rejected for missing or mismatched information ad signature is the exact same for the 2018 election and the General Election."). As for Wood's Electors or Elections Clause claim, the district court found no violation because the Georgia General Assembly permits the Secretary to "formulate, adopt, and promulgate such rules and regulations, consistent with law,

[6] The district court noted both at oral argument and in its written order that "at least three elections" had occurred pursuant to the terms of the Settlement Agreement. Tr. at 16:14-17:18; ECF No. 54 at 21.

as will be conducive to the fair, legal, and orderly conduct of primaries and elections." *Id*. at 31 (citing O.C.G.A. § 21-2-31(2)). And, the court reiterated, the Settlement Agreement did "not override or rewrite state law" but "simply add[ed] an additional safeguard to ensure election security[.]" *Id*. If anything, the district court concluded, the Settlement Agreement "*furthers* [Wood's] stated goals of conducting '[f]ree, fair, and transparent public elections.'" *Id*. Finally, the court concluded that Wood's Due Process claim, too, lacked any merit, finding that Wood had no constitutional right to monitor an audit or vote recount. *Id*. at 33-34 (finding "federal courts have rejected the very interest Plaintiff claims has been violated, *i.e*., the right to observe the electoral process"). At its essence, the district court observed, this was a "garden variety" election dispute, insufficient to give rise to a substantive due process claim. *Id*. at 36 ("Plaintiff does not allege unfairness in counting the ballots; instead, he alleges that select non-party, partisan monitors were not permitted to observe the Audit in an ideal manner. Plaintiff presents no authority, and the Court finds none, providing for a right to unrestrained observation or monitoring of vote counting, recounting, or auditing.").

While acknowledging that no further analysis was necessary in light of Wood's lack of standing and lack of substantial likelihood of success on the merits, the district court proceeded to analyze the remaining temporary restraining order factors, finding that each also counseled against granting relief. First, the district

court found that Wood suffered no irreparable harm where his only injury was that his preferred candidate did not prevail. *Id*. at 37. Second, "[g]ranting injunctive relief here would breed confusion, undermine the public's trust in the election, and potentially disenfranchise of over one million Georgia voters." *Id*. at 38. Thus, no matter how the district court sliced it, Wood's motion for a temporary restraining order met none of the required factors.

Rather than immediately appealing the district court's order or seeking to amend his operative complaint, Wood sought to engage in discovery, including after the district court issued a minute order on November 24 staying discovery.

G. The Machine Recount

The State certified the presidential election results on November 20, after the statewide hand recount was completed.[7] The next day, President Trump's reelection campaign sought yet another statewide recount, this time a machine recount.[8] The

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[7] Georgia 2020 Certificate of Ascertainment, https://www.archives.gov/files/electoral-college/2020/ascertainment-georgia.pdf; *see* Michelle Ye Hee Lee, *Georgia certifies election results – the first to do so among states where Trump is mounting legal challenges*, The Washington Post, https://www.washingtonpost.com/politics/georgia-certifies-election-results--the-first-to-do-so-among-states-where-trump-is-mounting-legal-challenges/2020/11/20/66c77530-2b4b-11eb-9b14-ad872157ebc9_story.html (last accessed Nov. 29, 2020).

[8] Michelle Ye Hee Lee, *Trump campaign requests recount of hand-recounted results in Georgia, which is unlikely to change outcome*, The Washington Post, https://www.washingtonpost.com/politics/trump-campaign-requests-recount-of-hand-recounted-results-in-georgia-which-is-unlikely-to-change-

State granted the request and began recounting ballots—now the third time votes will have been counted—on November 24. This recount is ongoing and scheduled to conclude by December 2.[9] December 8 is the federal "safe harbor" date to resolve any controversy or contest concerning the appointment of presidential electors so that they can meet and cast their votes for president on December 14. *See* 3 U.S.C. §§ 5, 7.

H. Plaintiff's Appeal

Continuing his pattern of delay, Wood waited until the evening of November 24 to notice an appeal of the district court's denial of his motion for temporary restraining order. By this point, the State had already certified the results and the second recount was underway. Indeed, several counties have completed the machine recount as of the time of this filing and all counties are slated to finish by tomorrow.[10]

In his opening brief, Wood refuses to meaningfully engage with the district court's determinations regarding his lack of standing, inexcusable delay in filing the lawsuit, merits of the claims, or harm to the public the interest were his motion to

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outcome/2020/11/21/18ad955e-2c73-11eb-8fa2-06e7cbb145c0_story.html (last accessed Nov. 28, 2020).

[9] *Presidential race official recount gets underway in Georgia*, AP News, https://apnews.com/article/election-2020-joe-biden-donald-trump-georgia-elections-f83fb36b92f776e81b91bfa141512d31 (last accessed Nov. 28, 2020).

[10] David Wickert, *Recount resumes today in some metro Atlanta counties*, AJC, https://www.ajc.com/politics/election/recount-resumes-monday-in-some-metro-atlanta-counties/FKWDXQPSWJFB7BDPILE4EOR2LE/

succeed. With little deviation, Wood proceeds to simply rehash his motion for a temporary restraining order rather than explaining how the district court abused its discretion in denying it. But the district court's order was not an abuse of discretion, and this Court should affirm.

V. SUMMARY OF THE ARGUMENT

1. Wood waived several claims when he failed to address in his brief to this Court the district court's determination that he lacked standing to pursue his Electors, Elections, and Due Process Clause claims. *See Singh v. U.S. Att'y Gen.*, 561 F.3d 1275, 1278 (11th Cir. 2009); *see also Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 (11th Cir. 1989). The district court correctly determined that Wood failed to assert a particularized injury and therefore lacked standing to pursue his claims at all. *Lance v. Coffman*, 549 U.S. 437, 442 (2007); *Bognet v. Sec'y Commonwealth of Pa.*, No. 20-3214, 2020 WL 6686120, at *6 (3d Cir. Nov. 13, 2020). The district court's conclusion was entirely consistent with binding 11th Circuit precedent. *See Dillard v. Chilton Cty. Comm'n*, 495 F.3d 1324, 1333 (11th Cir. 2007) ("The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.").

2. The district court correctly determined that Wood inexcusably delayed in pursuing his lawsuit, *United States v. Barfield*, 396 F.3d 1144, 1150 (11th Cir. 2005), and thus that laches bars his claims. *E.g.*, *Sanders v. Dooly Cnty., Ga.*, 245 F.3d 1289, 1291 (11th Cir. 2001).

3. The district court correctly determined that Wood could not succeed on the merits of his equal protection claim. First, Wood failed to establish that he was likely to demonstrate that there was any disparate treatment between or among voters. *See, e.g.*, *Bognet*, 2020 WL 6686120, at *15-17; *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012). Second, his vote dilution theory is not cognizable in this context; if it were, it would transform every violation of state election law into a potential federal equal protection claim requiring scrutiny of the government's "interest" in failing to do more to stop the illegal activity. *Bognet*, 2020 WL 6686120, at *11.

4. The district court correctly determined that Wood could not succeed on the merits of his Electors and Election Clause claims. The Constitution delegates to States the authority to regulate elections and to determine the manner of selecting presidential electors. U.S. CONST. art. I, § 4, cl. 1; U.S. CONST. art. II, § 1, cl. 2. Using its authority, the Georgia General Assembly delegates to the Secretary the task of ensuring election security and uniformity across counties. O.C.G.A. § 21-2-50(a); O.C.G.A. § 21-2-31. The Secretary was well within that authority in entering

into the Settlement Agreement, issuing the OEB, and ensuring the signature-verification protocols were uniform across Georgia.

5. Wood does not appeal the district court's determination that he failed to demonstrate a substantial likelihood of success on his Due Process Clause claim. He has thus waived this claim. Nonetheless, the district court correctly determined that this claim has no merit. Wood has no constitutional interest in observing a recount. O.C.G.A. § 21-2-495(a); *see also Republican Party of Pa. v. Cortes*, 218 F. Supp. 3d 396, 408 (E.D. Pa. 2016); *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5997680, at *67 (W.D. Pa. Oct. 10, 2020); *see also Dailey v. Hands*, No. 14-423, 2015 WL 1293188, at *5 (S.D. Ala. Mar. 23, 2015) ("[P]oll watching is not a fundamental right.").

6. The district court correctly determined that Wood failed to establish that he would be irreparably harmed if his motion for a temporary restraining order were denied and that the public interest weighed against granting relief. Granting Wood's motion would disenfranchise between one and five million voters who dutifully cast their votes consistent with Georgia law at the time of the election after the election has passed without any avenue to remedy that harm. Such relief is unprecedented and unlawful. *See Donald J. Trump for President, Inc. v. Secretary Commonwealth of Pa.*, No. 20-3371, 2020 WL 7012522, at *1, 7 (3d Cir. Nov. 27, 2020) ("[T]ossing out millions of mail-in ballots would be drastic and

unprecedented, disenfranchising a huge swath of the electorate and upsetting all down-ballot races too."); *Short v. Brown*, No. 2:18-CV-00421 TLN-KJN, 2018 WL 1941762, at *8 (E.D. Cal. Apr. 25, 2018), *aff'd*, 893 F.3d 671 (9th Cir. 2018) (quoting *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (en banc)). And it is certainly not in the public interest. *See Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1327 (11th Cir. 2019) (stating relief that would disenfranchise many voters and undermine the perception of the election's integrity would not serve the public interest).

VI. ARGUMENT

A. The district court's denial of the motion for a temporary restraining order is subject to the highly deferential abuse of discretion standard of review.

A district court's decision to deny a temporary restraining order is reviewed for abuse of discretion. *Majd-Pour v. Georgiana Cmty. Hosp., Inc.*, 724 F.2d 901, 902 (11th Cir. 1984). Such review is extremely narrow in scope. *Carillon Importers, Ltd. v. Frank Pesce Int'l Grp. Ltd.*, 112 F.3d 1125, 1126 (11th Cir. 1997). In general, it will lead to reversal only if the district court applied an incorrect legal standard, applied improper procedures, relied on clearly erroneous factfinding, or if it reached a conclusion that is clearly unreasonable or incorrect. *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005). Short of that, there is a range of

choice within which the appellate court will not reverse the district court even if the former might have reached a different decision. *Id.*

B. Wood lacks standing to assert his claims.

The district court correctly held that Wood's allegations "fall far short of demonstrating that [he] has standing to assert these claims." ECF No. 54 at 14. "The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance. This inquiry involves 'both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.'" *Kowalski v. Tesmer*, 543 U.S. 125, 128-29 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). For a party to have standing, they must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Muransky v. Godiva Chocolatier, Inc.*, No. 16-16486 & 16-16783, 2020 WL 6305084, at *4 (11th Cir. Oct. 28, 2020). Prudential considerations require "that a party '[]must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski*, 543 U.S. at 129 (quoting *Warth*, 422 U.S. at 499).

1. Wood has waived his standing arguments regarding his Elections, Electors, and Due Process Clause claims.

The district court correctly ruled that Wood lacks standing to proceed on any of his claims, because the basis for each constitutes nothing more than a generalized grievance, insufficient to support standing under Article III. ECF No. 54 at 12-19;

see also Dillard, 495 F.3d at 1333. In his brief, however, Wood limits his standing discussion to his equal protection claim. *See* Appellant's Br. at 20-26. And just this morning, Wood reaffirmed that he is only relying on his equal protection claim in this appeal. *See* Pet's. Jurisdictional Brief at 3 ("Appellant argued below that his rights to Equal Protection were violated by Georgia's absentee ballot processing scheme, as modified by the unlawful "Settlement Agreement" because it fails to comply and conflicts with the election scheme adopted by the State Legislature.").

Accordingly, as a threshold matter, Wood has waived any argument that the court erred in finding he lacks standing to pursue those claims. It is true that he asserts as a conclusory matter that he has standing on those claims, but his argument goes on to address standing only with respect to his equal protection claim. *See id*. at 21. It is well-settled that "simply stating that an issue exists, without further argument or discussion, constitutes waiver of that issue and precludes our considering the issue on appeal." *Singh v. U.S. Att'y Gen.,* 561 F.3d 1275, 1278 (11th Cir. 2009) (explaining "an appellant's brief must include an argument containing appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"); *see also Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 (11th Cir. 1989) (issue is deemed waived when appellant fails to elaborate an argument on the merits regarding that issue).

If the district court was correct that Wood lacked standing as to any claim, of course, then its conclusion that Wood failed to show he was likely to succeed on the merits of those claims could not have been an abuse of discretion. Thus, this Court need not even consider Wood's arguments as to the merits of any of his claims except his equal protection claim. For reasons discussed further below, the district court was correct in concluding that Wood lacked standing as to that, as well as each of his other, claims.

2. The district court correctly concluded that Wood failed to show he has standing.

The district court correctly found that Wood lacked standing to pursue his equal protection claim because he failed to show that he has or will suffer an injury in fact adequate to satisfy Article III's requirements to invoke federal jurisdiction. ECF No. 54 at 15-16. To establish injury in fact, "[a] plaintiff needs to plead (and later support) an injury that is concrete, particularized, and actual or imminent, rather than conjectural or hypothetical." *Muransky,* 2020 WL 6305084 at *5. When the injury alleged "is that the law . . . has not been followed[,]" plaintiffs assert nothing more than an "undifferentiated, generalized grievance about the conduct of government" that is not a sufficient injury for standing purposes. *Dillard*, 495 F.3d at 1332-33.

As the district court properly found, this is precisely the case here. ECF No. 54 at 15-16. Wood asserts that "[a]s a qualified elector and registered voter, [he] has

Article III standing to bring this action." *See* ECF No. 5 at 4 (relying on *Meek v. Metro. Dade Cty. Fla.*, 985 F.2d 1471, 1480 (11th Cir. 1993)). But he proffered no allegations demonstrating how he is harmed in those roles. Rather, his recurring grievance is that Defendants allegedly did not follow Georgia law regarding absentee ballot signature verification protocols. *See, e.g.*, *id.* at 4, 15. "This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that [courts] have refused to countenance in the past." *Lance*, 549 U.S. at 442.

During oral argument before the district court, Wood baselessly asserted for the first time that his standing under the Equal Protection Clause derives from a theory of vote dilution that he continues to press here. Specifically, Wood argues that because Defendants allegedly did not follow the correct processes, invalid absentee votes may have been cast and tabulated, thereby diluting Wood's in-person vote. *See* Appellant's Br. at 22-25. But the district court also correctly rejected this argument. ECF No. 54 at 15-16. Vote dilution is a viable basis for federal claims only in specific contexts—typically in equal protection challenges to state schemes crafted to structurally and significantly devalue one group of people's votes over another's, thus giving rise to standing by the disadvantaged community. *See Bognet*, 2020 WL 6686120, at *13 ("The key inquiry for standing is whether the alleged violation of the right to vote arises from an invidious classification—including those

based on race, sex, economic status, or place of residence within a State[.]") (quotations and citations omitted). Outside of that limited context, courts have uniformly rejected this kind of vote dilution theory as a textbook generalized grievance.

Indeed, the Third Circuit rejected an almost identical argument mere weeks ago in *Bognet*. There, the plaintiffs argued that the Pennsylvania Supreme Court's extension of the ballot receipt deadline and presumption of timeliness for ballots with missing or illegible postmarks received before the extended deadline were unlawful. The *Bognet* plaintiffs asserted a claim under the Equal Protection Clause, arguing that "unlawfully" counting ballots received after Election Day diluted their votes. *Id.* at *10. The Third Circuit held that the plaintiffs lacked standing to bring a dilution claim because they could not show a particularized injury. According to the *Bognet* court, even if the deadline extension and presumption regarding timeliness were unlawful, counting votes submitted after Election Day "'dilute[s]' the influence of all voters in Pennsylvania equally and in an 'undifferentiated' manner and do not dilute a certain group of voters particularly." *Id.* at *12. Accordingly, the injury alleged was not particularized to the plaintiffs and could not support standing. *Id.* ("Voter Plaintiffs' dilution claim is a paradigmatic generalized grievance that cannot support standing . . . such an alleged dilution is suffered equally by all voters and is not particularized for standing purposes[,]" and collecting cases). *See also Moore v.*

Circosta, No. 1:20-cv-911, 2020 WL 6063332, at *14 (M.D.N.C. Oct. 14, 2020) ("[T]he notion that a single person's vote will be less valuable as a result of unlawful or invalid ballots being cast is not a concrete and particularized injury in fact necessary for Article III standing."); *Donald J. Trump for President, Inc. v. Cegavske*, No. 220CV1445JCMVCF, 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) (rejecting plaintiffs' claims of vote dilution that "amount to general grievances that cannot support a finding of particularized injury as to [p]laintiffs"); *Martel v. Condos*, No. 5:20-CV-131, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020) ("If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury."); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F.Supp.3d 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution[is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact.").

Wood's reliance on *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691 (1962), is wholly misplaced. Appellant's Br. 22-24. *Baker* is a reapportionment case in which the court conferred standing upon a group of plaintiffs within a particular voting pool whose votes, as a result of a dated legislative apportionment scheme, carried less weight than other members of the same voting pool. 369 U.S. at 208. But Wood's claims have nothing to do with reapportionment. And he has failed to demonstrate that he, as an individual citizen of Georgia, has suffered an injury *not* suffered by

other members of the voting population at large. *Accord Bognet*, 2020 WL 6686120, at *13 (noting for vote dilution purposes, "a disadvantage to the plaintiff exists only when the plaintiff is part of a group of voters whose votes will be weighed differently compared to another group," and rejecting the plaintiffs' reliance on *Baker* because no voter's vote counted for less than that of any other voter as a result of the challenged state action).

Wood cites *Roe v. State of Alabama by & through Evans*, 43 F.3d 574 (11th Cir. 1995), but that case does not support his standing argument either. The two plaintiffs in *Roe* were candidates for a political office decided in the challenged election. *Id.* at 579. Wood is a private citizen, by contrast, not a candidate for any elected office. Additionally, the *Roe* court found particularized harm in the post-election inclusion of absentee ballots that had been deemed invalid. *Id.* at 580. Wood seeks to do the opposite—remove validly cast absentee ballots after completion of the election. And, critically, *Roe* was not an Equal Protection case. Rather, it evaluated a *Due Process Clause* claim that arose from the "fundamental unfairness" of changing the absentee ballot rules *after* the election had been completed.[11] *Id.* at 581. Thus, *Roe* does nothing to advance Wood's "vote dilution" standing argument.

[11] Wood's reliance on *Roe* is thus particularly ironic, given that he seeks the precise remedy—ex post facto changes to the absentee ballot vote-counting process—that the *Roe* court found "fundamentally unfair" to the point of constituting a Due Process Clause violation.

Wood's baseless contention that Defendants subjected him to "arbitrary and disparate treatment" that violates the Equal Protection Clause fares no better. *See* Appellant's Br. at 23-24. Wood complains about the implementation of a Settlement Agreement that Defendants applied in a wholly equal manner across the entire state. And he concedes as much in the Amended Complaint. *See* ECF No. 5 at 11-12 (alleging the Settlement Agreement "set[ ] forth different standards to be followed by the clerks and registrars in processing absentee ballots *in the State of Georgia*") (emphasis added). In other words, no voter—including Wood—was treated any differently than any other voter. *See* ECF No. 54 at 26. This is not a cognizable injury that gives standing for an Equal Protection claim.[12]

Finally, as discussed *supra* at Section VI.B.1., Wood has waived any argument that the district court erred in finding he failed to establish he had standing to pursue his Elections and Electors Clause or Due Process Clause claims. Nevertheless, the district court's conclusions on these fronts was also correct. To support each of these claims, Wood relied upon his argument that the Settlement Agreement usurped the Legislature's authority and its signature matching provision

[12] Wood confusingly discusses an ostensible requirement that a voter must produce a photo I.D. to vote in person, while an absentee voter does not, which "is sufficient to demonstrate disparate treatment and thus, an injury sufficient for standing." Appellant's Br. 25. But Wood does not challenge Georgia's voter I.D. law, and Georgia's voter I.D. requirement is wholly irrelevant to this dispute. The Settlement Agreement had nothing to do with photo I.D. requirements.

conflicts with Georgia law. The district court correctly found that this argument was based on nothing more than "[a] generalized grievance regarding a state government's failure to properly follow the Elections Clause of the Constitution," which "does not confer standing on a private citizen." ECF No. 54 at 14-15. Courts are uniform on this point. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (explaining a complaint that the Elections Clause has not been followed "is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past"); *Dillard*, 495 F.3d at 1333 (citing *Lance*); *Bognet*, 2020 WL 6686120, at *6 ("[P]rivate plaintiffs lack standing to sue for alleged injuries attributable to a state government's violations of the Elections Clause.").[13] The Elections and Electors Clauses confer powers on the legislatures of each state; because Wood is not the Georgia legislature, he has no standing to sue for any alleged violations of the General Assembly's rights under the Elections or Electors Clauses. *Bognet*, 2020 WL 6686120, at *7 (holding individual voters and a candidate for federal office lacked standing to assert claims under the Elections and

[13] Given the functionally identical roles that the Elections and Electors Clauses serve, with the former setting the terms for congressional elections and the latter implicating presidential elections, *see Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839 (2015) (Roberts, C.J., dissenting) (noting Electors Clause is "a constitutional provision with considerable similarity to the Elections Clause"), this same logic applies equally to the Electors Clause.

Electors clauses "[b]ecause [they] are not the General Assembly, nor do they bear any conceivable relationship to state lawmaking processes").

The district court also correctly determined that Wood lacked standing for his due process claim, which rested on the fairness of the hand recount, for several additional reasons. ECF No. 54 at 17-18. Most notably, Wood did not attempt to participate as a designated monitor in the hand recount, so he cannot assert a particularized injury arising from alleged problems with monitor access. *See Warth*, 422 U.S. at 502 (stating standing requires plaintiffs to "allege and show that they *personally* have been injured, not that injury has been suffered by other, unidentified members of the class . . . which they purport to represent"). And, once again, Wood's broad objection is that Defendants failed to conduct the hand recount consistently under Georgia law. This is a generalized grievance. *See Lance*, 549 U.S. at 440–41.

C. The district court did not abuse its discretion in determining that Wood inexcusably delayed in bringing his lawsuit.

Even if Wood had standing, the district court did not abuse its discretion in determining that his extraordinary delay in filing suit was inexcusable and bars his claims. ECF No. 54 at 19-20. Laches bars a claim when "(1) there was a delay in asserting a right or a claim, (2) the delay was not excusable, and (3) the delay caused [the defendants] undue prejudice." *United States v. Barfield*, 396 F.3d 1144, 1150 (11th Cir. 2005); *see also Sanders v. Dooly Cnty., Ga.*, 245 F.3d 1289, 1291 (11th

Cir. 2001) (concluding "that the district court did not abuse its discretion in deeming the claims seeking injunctive relief to be laches-barred" in elections context).

First, there is no question that Wood delayed considerably in asserting his claims. The Settlement Agreement was finalized and publicized more than eight months ago. ECF No. 54 at 7. Wood could have, and should have, filed his constitutional challenge to the Settlement Agreement much sooner than he did, to be resolved *before* absentee voting began. *Id.* at 20-21.

Second, as the district court found, Wood did not provide any credible excuse for his delay, failing to submit any evidence explaining why he waited to bring these claims. *Id.* at 21 ("Nor has Wood articulated any reasonable excuse for his prolonged delay. Wood failed to submit any evidence explaining why he waited to bring these claims until the eleventh hour."). Wood's claims, even assuming his standing for bringing them could be established, were ripe the moment the parties executed the Settlement Agreement. *Id*. Wood protests that laches should not bar his claim because until he "cast his vote and all votes were purported in, [he] had not suffered an injury." Appellant's Br. 39. But this is simply untrue. A plaintiff need not have *actually* suffered the injury to bring suit. *See, e.g*., *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013) (standing requires a plaintiff to assert an actual injury *or* a future injury with a "substantial risk" of occurring). Of course, Wood's claimed injury regarding the Settlement Agreement is not cognizable, but even accepting his

theory, standing jurisprudence does not require him to wait until he "cast his vote" to raise his claims.

Finally, Defendants, the Intervenors, and the public at large would be significantly injured if Wood's undue delay were excused. ECF No. 54 at 21-22. Beyond causing widespread and detrimental confusion, Wood's requested relief would disenfranchise a substantial portion of the electorate and erode the public's confidence in the electoral process. *See Sw. Voter Registration Educ. Project*, 344 F.3d at 919 ("Interference with impending elections is extraordinary, and interference with an election after voting has begun is unprecedented.") (citation omitted). Thus, the district court was correct in finding that laches and Wood's inexcusable delay in bringing this case independently barred his claims.

D. The district court did not abuse its discretion in ruling that Wood is unlikely to succeed on the merits.

1. Wood is not likely to succeed on his equal protection claim.

The district court also correctly found that Wood is unlikely to succeed on the merits of his equal protection claim because he fails to demonstrate any burden on his or anyone else's right to vote or any disparate treatment of voters. Wood's conclusory assertion that there has been "disparate treatment" of voters does not call this finding into question. *See* Appellant's Br. 34-36.

To sustain a such an equal protection claim, a plaintiff must demonstrate that similarly situated voters are treated differently. *See, e.g., Obama for Am.*, 697 F.3d

at 428 (finding Equal Protection Clause applies when state classifies voters in disparate ways). But, as the district court found, Defendants applied the Settlement Agreement in a wholly uniform manner across the state. *See, e.g.*, ECF No. 5 at 11-12. In other words, no voter—including Wood—was treated any differently than any other because of the Settlement Agreement. This is not an equal protection violation.

Wood fares no better with his vote dilution argument, as the district court properly found: "Wood cannot transmute allegations that state officials violated state law into a claim that his vote was somehow weighted differently than others. This theory has been squarely rejected." ECF No. 54 at 27 (citing *Bognet*, 2020 WL 6686120, at *11). Dilution of lawfully cast ballots by the "unlawful" counting of "invalidly" cast ballots is not a true equal protection problem; if it were, it would transform every violation of state election law into a potential federal equal protection claim requiring scrutiny of the government's "interest" in failing to do more to stop the illegal activity. *Bognet*, 2020 WL 6686120, at *11; *see also* discussion *supra* at 24-26. As the Third Circuit recently found in a markedly similar case, "[t]his is not how the Equal Protection Clause works." *Id*. Thus, Wood is unlikely to succeed on his Equal Protection Clause claim.

2. Wood is not likely to succeed on his Election and Electors Clause claims.

Wood waived his Election and Electors Clause claims when he failed to address the district court's determination that he lacks standing to bring them. *Supra*

at Section VI.B.1. But even if they were properly before this Court, the district court properly disposed of them.

The Elections and Electors Clause vest authority in "the Legislature" of each state to regulate "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives," U.S. CONST. art. I, § 4, cl. 1, and to determine the manner of the selecting presidential electors, U.S. CONST. art. II, § 1, cl. 2, respectively. As noted above, Wood is not the Legislature and thus has no basis for raising this claim. *See supra* at 29. But even if that were not the case, his claim would still fail. Innumerable courts to examine this issue have held that the use of the term "Legislature" does not preclude the delegation of such legislative authority. *See, e.g.*, *Ariz. State Legislature*, 576 U.S. at 807 (noting that Elections Clause does not preclude "the State's choice to include" state officials in lawmaking functions so long as such involvement is "in accordance with the method which the State has prescribed for legislative enactments") (quotations omitted).

Accordingly, the actions of the Secretary could only constitute plausible violations of the Elections and Electors Clauses if such actions exceeded the authority granted to him by the Georgia General Assembly. As the district court correctly found, they did not. Pursuant to Georgia law, the Secretary is the chief election official for the State, O.C.G.A. § 21-2-50(a), and the General Assembly has granted him the power and authority to manage Georgia's election system, including

the absentee voting system. *See Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251 (N.D. Ga. 2019); Ga. Op. Att'y Gen. No. 2005-3 (Apr. 15, 2005) (recognizing Secretary's authority to manage Georgia's election system). Additionally, the Secretary is the Chair of the Board, which is the governmental body responsible for uniform election practice in Georgia. O.C.G.A. § 21-2-31; *see also Curling v. Raffensperger*, 403 F. Supp. 3d 1311, 1345 (N.D. Ga. 2019) ("[T]he [] Board is charged with enforcing Georgia's election code under state law."). The Secretary was well within that authority in entering into the Settlement Agreement, issuing the OEB, and ensuring the signature verification protocols were uniform across Georgia.

Wood's Elections and Electors Clause claims are entirely premised on the notion that issuance of the OEB "constitute[s] a usurpation of the legislator's [sic] plenary authority." Appellant's Br. 29-30. This is false. The Settlement Agreement and resulting procedures are in no way inconsistent with the Georgia Election Code. The Secretary's signature-review guidance explicitly seeks to promote uniform application of the signature-verification processes required by Georgia law. As the district court succinctly and correctly determined in rejecting Wood's Elections and Electors Clause arguments:

> The Settlement Agreement is a manifestation of Secretary Raffensperger's statutorily granted authority. It does not override or rewrite state law. It simply adds an additional safeguard to ensure election security by having more than one individual review an

> absentee ballot's information and signature for accuracy before the ballot is rejected. Plaintiff does not articulate how the Settlement Agreement is not "consistent with law" other than it not being a verbatim recitation of the statutory code. Taking Plaintiff's argument at face value renders O.C.G.A. § 21-2-31(2) superfluous. A state official—such as Secretary Raffensperger—could never wield his or her authority to make rules for conducting elections that had not otherwise already been adopted by the Georgia General Assembly.

ECF No. 54 at 31.

For all these reasons, Wood's Elections and Electors Clause claims necessarily fail.

3. Wood is not likely to succeed on his Due Process claim.

As discussed *supra* at Section VI.B.1, Wood has waived his due process claim on appeal. Regardless, this claim—which is premised on the purported denial of Republican observers' right to observe the hand recount and asserts both procedural and substantive due process violations—also fails.

As a threshold matter, to succeed on a procedural due process claim, a plaintiff must demonstrate that he has a "private interest that will be affected by the official action." *Mathews v. Eldridge*, 424 U.S. 319, 334–47 (1976). Neither Georgia law nor the U.S. Constitution provides a private individual with an enforceable "private interest" in observing a recount. Rather, Georgia law provides that *candidates* and *political parties* may send "two representatives to be present" at a recount. *See* O.C.G.A. § 21-2-495(a). Thus, neither Wood—who does not even allege, much less present evidence, that he even attempted to observe the recount—nor the individual

monitors who submitted supporting affidavits are due any process here. *See, e.g.*, *Republican Party of Pa. v. Cortes*, 218 F. Supp. 3d 396, 408 (E.D. Pa. 2016) ("[T]here is no individual constitutional right to serve as a poll watcher . . . but rather the right is conferred by statute."); *Boockvar*, 2020 WL 5997680, at *67 (same); *Dailey v. Hands*, No. 14-423, 2015 WL 1293188, at *5 (S.D. Ala. Mar. 23, 2015) ("[P]oll watching is not a fundamental right."). Without such an interest, Wood cannot establish a substantial likelihood of success on the merits as to this claim.

Wood's substantive due process claim fares no better, and the district court was correct in finding that it was unlikely to succeed. ECF No. 54 at 34-36. It is well-settled that "[f]ederal courts should not 'involve themselves in garden variety election disputes.'" *Serpentfoot v. Rome City Comm'n*, No. 4:09-CV-0187-HLM, 2010 WL 11507239, at *16 (N.D. Ga. Mar. 3, 2010) (quoting *Curry v. Baker*, 802 F.2d 1302, 1315 (11th Cir. 1986) (noting "[o]nly in extraordinary circumstances will a challenge to a state election rise to the level of a constitutional deprivation"). For the substantive Due Process Clause to be implicated, the situation "must go well beyond the ordinary dispute over the counting and marking of ballots." *Curry*, 802 F.2d at 1315. To the extent that they set forth any dispute, Wood's allegations describe at most only an "ordinary dispute over the counting and marking of ballots" that does not demonstrate any fundamental unfairness in the election as a whole or

the recount process specifically. *Id*. The district court did not abuse its discretion in so determining.

E. Wood will not suffer irreparable harm absent a temporary restraining order.

Finally, the district court correctly found that Wood would not suffer irreparable harm in the absence of a temporary restraining order. ECF No. 54 at 37. Wood brings, at most, generalized grievances or third-party claims. As such, he cannot demonstrate that he will suffer any harm at all. And his contention that "an infringement on the fundamental right to vote amount in an irreparable injury," Appellant's Br. 37, is wholly irrelevant for that reason. The Settlement Agreement does not infringe (or even affect) Wood's right to vote, which he exercised without impediment on November 3. In contrast, the relief Wood seeks *would* infringe upon the fundamental right to vote of between one and five million Georgians who voted in the 2020 general election, warranting against any grant of injunctive relief and further demonstrating the soundness of the district court's finding on this point.

F. The balance of equities and the public interest weigh against issuance of a temporary restraining order.

The district court correctly found "that the threatened injury to Defendants as state officials and the public at large far outweigh any minimal burden on Plaintiff." ECF No. 54 at 38. Wood does not even engage with the district court's findings and

conclusions on these two factors, much less attempt to explain how the district court abused its discretion in rejecting his arguments.

There is no question that the balance of the equities and the public interest weigh against Wood's requested relief. Wood asks this Court to disenfranchise between one and five million voters who dutifully cast their votes after the election is over. Such relief is unprecedented. *See Short v. Brown*, No. 2:18-CV-00421 TLN-KJN, 2018 WL 1941762, at *8 (E.D. Cal. Apr. 25, 2018), *aff'd*, 893 F.3d 671 (9th Cir. 2018) (quoting *Sw. Voter Registration Educ. Project*, 344 F.3d at 919 ("[I]nterference with an election after voting has begun is unprecedented."). And it is certainly not in the public interest. *See Arkansas United v. Thurston*, No. 5:20-CV-5193, 2020 WL 6472651, at *5 (W.D. Ark. Nov. 3, 2020) (rejecting requested injunctive relief because it would interfere with ongoing county election processes on Election Day, which was not in the public interest).

Indeed, instead of *remedying* a constitutional violation, granting Wood's requested relief would *violate* millions of Georgians' constitutional rights. *See Donald J. Trump for President, Inc.*, 2020 WL 7012522, at *8; *Stein v. Cortés*¸ 223 F. Supp. 3d 423, 442 (E.D. Pa 2016) (granting relief that "could well ensure that no Pennsylvania vote counts . . . would be both outrageous and completely unnecessary"). Just days ago, the Third Circuit rejected a very similar argument, finding that the public equities counseled against granting the plaintiffs' requested

relief because doing so would "harm millions of" voters by disenfranchising them and "sidestep[ping] the expressed will of the people." *Donald J. Trump for President, Inc.*, 2020 WL 7012522, at *8. Moreover, the harm would not stop there. In addition to disenfranchising voters, "knowledge that otherwise-eligible voters were not counted would be harmful to the public's perception of the election's legitimacy," and therefore weighs even further against the public interest. *Jones v. Governor of Fla.*, 950 F.3d 795, 830 (11th Cir. 2020) (internal quotation marks omitted).

The widely publicized, well-accepted procedures of the Settlement Agreement were used to conduct the general election in accordance with Georgia law. The results of that election have been announced, and a full hand recount of all ballots cast in the presidential race, which both political parties were able to observe, produced the same result. The district court did not abuse its discretion in declining to grant a temporary restraining order that would upend the status quo and wreak havoc on the state's election apparatus.

VII. CONCLUSION

For the above-stated reasons, Intervenors respectfully urge this Court to affirm the district court's judgment.

Dated: December 1, 2020 */s/ Amanda R. Callais*

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 9725 words as counted by the word-processing system used to prepare the document.

Respectfully submitted this 1st day of December, 2020.

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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.

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