No. 20-14418

In the

United States Court of Appeals

for the Eleventh Circuit

L. LIN WOOD, JR.,

Appellant,

v.

BRAD RAFFENSPERGER, *et al.*,

Appellees.

On Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.
No. 1:20-cv-04651-SDG — Steven D. Grimberg, *Judge*

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The undersigned counsel certifies that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

/s/ *Charlene S. McGowan*
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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary. As shown in the Appellees' response to the Court's Jurisdictional Questions, this Court lacks jurisdiction over the district court's denial of Appellant's motion for a temporary restraining order, and the case has been mooted by the certification of the slate of presidential electors by the Secretary of State and Governor. Even if this Court determines that it has jurisdiction over the appeal, the district court's order denying Appellant's motion for a temporary restraining order is grounded in well-established precedent of this Court and the Supreme Court. Appellant raises no novel or unsettled issues of law. The facts and legal arguments are adequately presented in the briefs, and the decisional process would not be significantly aided by oral argument.

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STATEMENT OF ISSUES

1. Whether Wood has Article III standing to challenge measures to implement signature verification for absentee ballots, or alleged deficiencies in poll watcher access to post-election audit procedures, where he alleged no cognizable injury in fact.

2. Whether this action seeking to prevent certification of Georgia's election is moot because the election has been certified.

3. Whether this action is barred by laches.

4. Whether the district court otherwise abused its discretion in denying Appellant's motion for a temporary restraining order because he was not likely to succeed on the merits of his Equal Protection, Due Process, and Elections Clause claims, and failed to satisfy the remaining TRO factors.

INTRODUCTION

This case involves a constitutional challenge to the Georgia presidential election by Appellant L. Lin Wood, Jr. ("Wood"). Wood seeks extraordinary relief: that this Court instruct the district court to enter an injunction "declaring that the election results are defective" and order the Secretary of State to "re-do" the election. (Appellant's Brief, at 19.)

Georgia's presidential electors were selected by popular vote, as provided by state law. The results of this election were certified by the Secretary of State and the Governor on November 20, 2020. Wood cites to no historical or legal precedent for a federal court to "de-certify" a state's slate of presidential electors selected in the manner established by that state's legislature. Even if the Court determines it has jurisdiction to consider this interlocutory appeal, it is impossible for the Court to grant Wood's requested relief, and the case should be dismissed as moot.

Wood's motion also fails on the merits. He argues that "Georgia's election tallies are suspect and tainted with impropriety" (Appellant's Brief, at 13), but he offered no evidence supporting this claim in the proceedings below. Wood does not allege that his vote or any vote was not properly counted. He presented no evidence of *any* ballots that were fraudulent, cast by

an illegal voter, or otherwise invalid. His motion is based entirely upon speculation and conjecture that invalid votes *may* have been counted, premised on a misunderstanding of Georgia's procedures for verifying absentee ballots. Contrary to Wood's assertion, the verification procedures do not conflict with state law, and there is no evidence that the procedures were applied in an arbitrary or disparate manner by county elections officials.

Presented with a similar record, the Third Circuit recently rejected a challenge seeking to overturn Pennsylvania's presidential election results based upon alleged irregularities in the processing of absentee ballots. *Donald J. Trump for President, Inc. v. Sec'y Pennsylvania*, No. 20-3371, 2020 U.S. App. LEXIS 37346 (3d Cir. Nov. 27, 2020). Noting the absence of evidence of fraud or unlawful votes, the Court concluded that "tossing 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. That remedy would be grossly disproportionate to the procedural challenges raised." *Id.* at *6.

The record here also does not support the drastic and unprecedented remedy of setting aside the certified presidential election results. Like every state, Georgia has a compelling interest in preserving the integrity of its election process.

"Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). For this reason, "[v]oters, not lawyers, choose the President. Ballots, not briefs, decide elections." *Donald J. Trump for President*, 2020 U.S. App. LEXIS 37346 at *30. Public confidence in the electoral process would certainly be undermined by a court invalidating the certified results of a presidential election in which nearly 5 million Georgians cast ballots. This Court should decline Wood's legally unsupportable efforts to overturn the expressed will of the voters and affirm the decision of the district court.

STATEMENT OF THE CASE

On November 13, 2020, ten days after Election Day, Wood filed a Complaint against the Secretary of State and the members of the State Election Board (collectively, "State Defendants"), asserting claims under the Equal Protection, Due Process, and Elections and Electors Clauses. Four days later, Wood filed an emergency motion for a temporary restraining order, asking the district court to enjoin the Secretary of State from certifying the results of the general election unless 1.3 million absentee ballots cast by Georgia voters were excluded from the tabulation. The district court promptly held a hearing on Wood's emergency

motion and issued an oral ruling denying the motion at the conclusion of the hearing, followed by a written order on November 20, 2020. The same day, the Secretary of State and Governor of Georgia certified Georgia's slate of presidential electors.

A. Relevant Background

1. Georgia's Absentee Ballot Procedures

Absentee ballots for the 2020 general election were processed by county election officials according to the procedures established by the Georgia legislature. These procedures were part of HB 316, bipartisan legislation passed in 2019 to reform the state's election code and implement a new electronic voting system. The reforms kept in place Georgia's policy of "no excuse" absentee voting, but modified the technical requirements for absentee ballots. HB 316 modified the language of the oath on the outer absentee ballot envelope to leave the signature requirement but remove the elector's address and date of birth. *See* O.C.G.A. § 21-2-384. Further, HB 316 added a "cure" provision, which requires election officials to give a voter until three days after the date of the election to cure an issue with the voter's signature before rejecting an absentee ballot for a missing or mismatched signature on the

outer envelope. *See* O.C.G.A. § 21-2-386(a)(1)(C). The"cure" provision was added to the statute's requirement that election officials "promptly notify" the voter of a rejected absentee ballot due to a missing or mismatched signature.

2. Prior Litigation Over the Notice and Cure Provisions for Absentee Ballots

On November 6, 2019, the Democratic Party of Georgia, DSCC, and DCCC (collectively, "Political Party Organizations") sued the State Defendants, alleging that the "promptly notify" language of O.C.G.A. § 21-2-386(a)(1)(C) was vague and ill-defined and left counties without standards for verifying signatures on absentee ballots. (App'x Vol. I at 144-49).

While that action was pending, the State Election Board ("SEB") approved a rule that established a uniform standard for counties to follow to "promptly notify" voters when their absentee ballot is rejected as required by O.C.G.A. § 21-2-386(a)(1)(C). The rule provides that when a timely submitted absentee ballot is rejected, the board of registrars or absentee ballot clerk must send the voter notice of the rejection and opportunity to cure within three business days, or by the next business day if within ten days of Election Day. Ga. Comp. R. & Regs. r. 183-1-14-.13 (the "Prompt Notification Rule").

The Prompt Notification Rule was adopted pursuant to the SEB's rule-making authority under O.C.G.A. § 21-2-31(2). It provides a uniform three-day standard for "prompt" notification required by O.C.G.A. § 21-2-386(a)(1)(C) when an absentee ballot is rejected, so that all counties give notice in a uniform manner. The Prompt Notification Rule was promulgated pursuant to the Georgia Administrative Procedure Act, published for public comment, and discussed at multiple public hearings before it became effective on March 22, 2020.

Because the Prompt Notification Rule resolved the issues in the pending lawsuit, the parties resolved the matter in a settlement agreement that included, among other terms, an agreement that (1) the State Election Board would promulgate and enforce the Prompt Notification Rule; and (2) the Secretary of State would issue guidance to county election officials regarding the signature matching process. (App'x Vol. I at 144-49).

On May 1, 2020, the Secretary of State distributed an Official Election Bulletin ("OEB"), advising county election officials of the Prompt Notification Rule and providing guidance for reviewing signatures on absentee-ballot envelopes. (App'x Vol. III at 157-64). The OEB instructed that after an election official makes an initial determination that the signature on the absentee ballot envelope

does not match the signature on file for the voter pursuant to O.C.G.A. § 21-2-386(a)(1)(B) and (C), two additional registrars, deputy registrars, or absentee ballot clerks should also review the signature, and the ballot should be rejected if at least two of the three officials agree that the signature does not match. (*Id.* at 162-63). The OEB expressly instructs county officials to comply with state law. (*Id.*)

Contrary to Plaintiff's claim that the Prompt Notification Rule and the OEB have significantly disrupted the signature verification process, these measures have had no detectable effect on the absentee ballot rejection rate since the last general election in 2018. (App'x Vol. III at 157-58). An analysis of the number of absentee-ballot rejections for signature issues for 2020 as compared to 2018 found that the rejection rate for absentee ballots with missing or non-matching signatures in the 2020 general election was 0.15%; the same rejection rate for signature issues as in 2018 before the new measures were implemented. (*Id.*)

3. The Post-Election Audit

Following the general election, the Secretary of State ordered a statewide risk-limiting audit pursuant to O.C.G.A. § 21-2-498 (the "Audit"). The Audit included a manual—by hand—tabulation of all ballots cast in the presidential election, which was conducted

at the county level. (App'x Vol. III at 158-59). Although O.C.G.A. § 21-2-498 does not explicitly call for poll watchers, the Secretary of State issued guidance to county election officials to ensure political parties the opportunity to have one designated monitor for every ten audit teams, with a minimum of two designated monitors in each county per party per room. (App'x Vol. III at 166-69). The manual tabulation for the Audit was conducted solely by county election officials, and the State Defendants had no control over the manner in which counties instructed, placed, or interacted with monitors. (App'x Vol. III at 158-59).

Following the Audit, on November 20, 2020, the Secretary of State and the Governor certified the final tabulation of votes, including the slate of presidential electors, as required by law. *See* O.C.G.A. § 21-2-499(b).

B. Proceedings Below

Wood filed this action on November 13, 2020. His Complaint, as amended, asserts three constitutional counts: (1) that the Litigation Settlement violates the Equal Protection Clause of the Fourteenth Amendment (Count I); (2) that the Litigation Settlement violates the Electors and Elections Clauses of Articles I and II (Count II); and (3) a Due Process claim based upon the allegation that the State Defendants denied Republican party

monitors meaningful access to observe and monitor the tabulation of votes or the statewide Audit (Count III). (App'x Vol. I at 79-91).

On November, 17, 2020, Wood filed an emergency motion for a temporary restraining order ("TRO"), asking the district court to enjoin the Secretary of State from certifying the results of the general election unless 1.3 million absentee ballots cast by Georgia voters were excluded from the tabulation. On November 19, 2020, the district court held an evidentiary hearing on Wood's emergency motion, and issued an oral ruling denying the motion at the conclusion of the hearing. On November 20, 2020, the district court issued a written order denying Wood's motion. The State Defendants moved to dismiss for lack of subject matter jurisdiction under FED. R. CIV. P. 12(b)(1). Before the district court could rule on the motion, however, Wood moved for interlocutory appellate review of the district court's order denying his motion for a TRO, followed a day later by a notice of appeal.

C. Standard of Review

This Court reviews a district court's denial of a motion for temporary restraining order or preliminary injunction "only for abuse of discretion." *Long v. Sec'y, Dep't of Corr.*, 924 F.3d 1171, 1175 (11th Cir. 2013).

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in denying Wood's emergency motion for a TRO, and the Court should affirm that decision and remand the case with instructions to dismiss the action for lack of subject matter jurisdiction and mootness.

Wood's TRO motion sought to enjoin the certification of the presidential election results based upon two factual allegations: (1) that State Defendants and the Democratic Party of Georgia entered into a March 2020 settlement agreement that altered the process by which counties verify voter signatures on absentee ballots in a way that allegedly violates the Georgia election code; and (2) that Republican poll watchers were not permitted to observe the vote tabulations or post-election Audit.[1] The district court correctly held that neither of these theories present a legally cognizable claim under the Equal Protection, Elections, and Due Process clauses.

First, as a threshold matter, the district court lacks subject matter jurisdiction over the action because Wood cannot demonstrate Article III standing. Wood has not shown a concrete

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[1] On appeal, Wood does not argue his due process claim based upon the allegation that poll watchers were denied proper access to observe, and has therefore abandoned this claim. (*See* Appellant's Brief, at 12).

and particularized injury to his own individual right to vote. Instead, he asserts a generalized grievance about the operation and application of state law, which is insufficient to establish standing.

Second, Wood's claims are moot. Wood's TRO motion sought to prevent certification of the presidential election results, but the election has now been certified, thus mooting his requested relief.

Third, this suit is barred by laches. Wood inexcusably delayed in seeking relief until the eve of the State's certification, *after* the election and *months* after the State Defendants had promulgated rules and guidance regarding the processing of absentee ballots that Wood now challenges. More than 1.3 million absentee ballots were cast in the presidential election, and they have already been verified, tabulated, certified, audited, and included as part of the certified results. Wood's inexcusable delay is extremely prejudicial to the Secretary of State's ability to perform his statutory duties, as well as to Georgia voters who cast their ballots with the reasonable and legitimate expectation that their legally cast votes would be counted.

Fourth, Wood fails to clearly prove the required elements for a temporary restraining order. As the district court's well-reasoned order explained, he is not likely to succeed on the merits of his

constitutional claims, faces no irreparable harm, and the balance of the equities and public interest weigh strongly against an unprecedented injunction overturning the certified results of a presidential election.

ARGUMENT

I. The district court lacks subject-matter jurisdiction because Wood cannot establish Article III standing.

Federal courts have an independent obligation to ensure that subject-matter jurisdiction exists before reaching the merits of a dispute. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020). Article III of the Constitution limits the subject-matter jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. A party invoking federal jurisdiction bears the burden of establishing standing at the commencement of the lawsuit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). As an irreducible constitutional minimum, Wood must show he has (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. *Id.* at 561. As the party invoking federal jurisdiction, Wood bears the burden at the pleadings phase of "clearly alleg[ing] facts demonstrating each element." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Standing must be demonstrated "for each claim he seeks to press and for each form of relief that is sought." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017).

Injury in fact is "the first and foremost of standing's three elements." *Spokeo*, 136 S. Ct. at 1547-48. A plaintiff must show he suffered "an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* at 1548. Federal courts are not a "forum for generalized grievances" for claims that are "plainly undifferentiated and common to all members of the public." *Lance v. Coffman*, 549 U.S. 437, 439, 441 (2007). Therefore, a plaintiff must demonstrate "a personal stake in the outcome" that is "distinct from a generally available grievance about government." *Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018).

Wood's pleadings fail to clearly allege facts demonstrating an injury in fact. Wood alleges that he has standing "as a qualified elector and registered voter" and that he "made donations to various Republican candidates on the ballot for the November 3, 2020 general elections, and his interests are aligned with those of the Georgia Republican Party for the purposes of the instant lawsuit." (App'x Vol. I at 59). However, these factual allegations are no more than a generalized grievance, as Wood fails to point to

any injury that affects him "in a personal and individual way," rather than as part of the voting public. *Spokeo*, 136 S. Ct. at 1548.

A. Wood lacks standing to bring his equal protection claim.

Wood's equal protection claim is premised on a vote-dilution theory, namely, that the procedures for verifying signatures on absentee ballot envelopes subjected him to "arbitrary and disparate treatment" that diluted his vote. (Appellant's Brief at 24). The district court correctly concluded that this claim was a generalized grievance insufficient to establish standing because Wood "does not differentiate his alleged injury from any harm felt in precisely the same manner by every Georgia voter." (App'x Vol. IV at 48).

This Court squarely rejected Wood's generalized theory of vote dilution as a basis for standing in *Jacobson*. In that case, two individual voters argued that Florida's ballot-order statute diluted their votes by allowing Republican candidates to reap the alleged benefit of a "primacy" effect due to their top placement on the ballot. 974 F.3d at 1246. This Court first rejected the argument that all voters have standing to bring claims involving voting rights, stating, "the Supreme Court has made clear that 'a person's right to vote is individual and personal in nature,' so

'voters who allege facts showing disadvantage to themselves as individuals have standing to sue.'" *Id.* (quoting *Gill*, 138 S. Ct. at 1929). It then held that plaintiffs' dilution theory did not establish an injury in fact because plaintiffs offered no evidence "showing disadvantage to themselves as individuals." *Id.*

This Court similarly rejected the voters' party affiliation as a basis for standing, stating, "[a] candidate's electoral loss does not, by itself, injure those who voted for the candidate," as "[v]oters have no judicially enforceable interest in the outcome of the election." *Id.*

Like in *Jacobson*, Wood does not allege that he had "any difficulty in voting for [his] preferred candidate or otherwise participating in the political process." *Id.* He fails to make any particularized showing how his in-person vote was affected or treated differently by the state's procedures for processing absentee ballots. Rather, Wood speculates that invalid absentee ballots may have been counted, which allegedly dilutes his vote. (Appellant's Brief, at 23). Even assuming Wood had offered any evidence at all that invalid absentee ballots were counted, "such an alleged dilution is suffered equally by all voters and is not particularized for standing purposes." *Bognet v. Secretary*

Commonwealth of Pennsylvania, No. 20-3214, 2020 U.S. App. LEXIS 35639, at *12 (3d Cir. Nov. 13, 2020).

B. Wood lacks standing to bring his claim under the Elections Clause.

Wood's Elections Clause claim is that State Defendants instituted a procedure for processing absentee ballots that conflicts with state law and the Georgia legislature's authority to regulate elections under the Elections clauses. (Appellant's Brief at 26-28). However, the Supreme Court has been clear that allegations that state officials have not followed the law is "precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." *Lance*, 549 U.S. at 442.

Federal courts are not venues for parties to assert a bare right "to have the Government act in accordance with law." *Allen v. Wright*, 468 U.S. 737, 754 (1984). The Third Circuit recently rejected a similar claim in *Bognet*, holding that individual voters lacked standing to sue for alleged injuries attributable to a state government's alleged violations of the Elections Clause and Electors Clause. 2020 U.S. App. LEXIS 35639 at *19. That court stated, "[b]ecause Plaintiffs are not the General Assembly, nor do they bear any conceivable relationship to state lawmaking

processes, they lack standing to sue over the alleged usurpation of the General Assembly's rights under the Elections and Electors Clauses." *Id.* at *21; *see also Dillard v. Chilton Cty. Comm'n*, 495 F.3d 1324, 1332-33 (11th Cir. 2007) (holding that an allegation that the law has not been followed is "the kind of undifferentiated, generalized grievance about the conduct of government" that will not satisfy standing).

C. Wood lacks standing to bring his due process claim.

Wood's standing to assert his due process claim is even more tenuous because he attempts to assert claims on behalf of third-party Republican poll watchers, whom he alleges were denied "the opportunity to observe the [Audit] in any meaningful way" by county elections officials. (*See* App'x Vol. I at 134-35). Wood does not allege that he personally attempted to serve as a poll watcher or that the State Defendants participated in denying him or any other poll watchers the opportunity to observe the Audit. Not only is Wood's claim a generalized grievance rather than a particularized injury, none of the parties involved in the alleged conduct—the Republican poll watchers and the county election officials—are parties to this action.

Wood cannot satisfy the criteria to assert standing on behalf of third-party poll watchers. To do so, he must (1) "have suffered

an 'injury-in-fact' that gives [him] a 'sufficiently concrete interest' in the dispute"; (2) "have a close relationship to the third party"; and (3) "there must be a hindrance to the third party's ability to protect its own interests." *Aaron v. Private Clinic Mgmt. LLC v. Berry*, 912 F.3d 1330, 1339 (11th Cir. 2019) (citation omitted); *see also Bognet*, 2020 U.S. App. LEXIS 35639, *21. Wood makes no such allegations here.

Moreover, the alleged injury to the third-party poll watchers is not traceable to any action by the State Defendants. Wood's grievance is with county election officials whom he alleges excluded poll watchers from observing the Audit. Wood does not allege that any of the State Defendants controlled or even participated in this conduct. As this Court has held, "[t]o satisfy the causation requirement of standing, a plaintiff's injury must be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Jacobson*, 974 F.3d at 1253 (citation omitted); *see also Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1265 (11th Cir. 2011) (holding that an injury sufficient to establish standing cannot "result [from] the independent action of some third party not before the court.").

II. Wood's claims are moot.

Even if Wood could establish Article III standing, his claims have been mooted by the State's certification of the presidential electors. Because the case "no longer presents a live controversy with respect to which the court can give meaningful relief," it is moot. *Troiano v. Supervisor of Elections in Palm Beach Cty., Fla.*, 382 F.3d 1276, 1282 (11th Cir. 2004). Mootness is jurisdictional—because a federal court may only adjudicate cases and controversies, a ruling that cannot provide meaningful relief is an impermissible advisory opinion. *Id.*; *see also Christian Coal. of Fla., Inc. v. United States*, 662 F.3d 1182, 1189 (11th Cir. 2011) (noting that because jurisdiction is limited to "cases" and "controversies," a case is moot when it no longer presents a live controversy as to which a court can give meaningful relief); *Brooks v. Ga. State Bd. of Elections*, 59 F.3d 1114, 1118 (11th Cir. 1995) (explaining that an appeal is moot where it is "impossible for the court to grant any effectual relief whatever to a prevailing party").

III. Wood's claims are barred by laches.

The district court also correctly held that Wood's claims are barred by laches. Laches bars a request for equitable relief when (1) the plaintiff delays in asserting the claim; (2) the delay is not excusable; and (3) the delay causes the non-moving party undue

prejudice. *United States v. Barfield*, 396 F.3d 1144, 1150 (11th Cir. 2005). In the context of elections, "any claim against a state electoral procedure must be expressed expeditiously." *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990) (*citing Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968)). As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made. *Id.*

Wood offers no reasonable excuse or evidence explaining his failure to bring his challenge to the Litigation Settlement prior to the election, before election officials began—and completed—validating signatures on absentee ballot envelopes for the general election. And there is no question in this context that delay has substantially prejudiced the State Defendants, as well as the members of the public who have cast legal ballots.

Where, as here, an election has already been conducted, any harm that might arise from an alleged constitutional violation must be weighed against "such countervailing equitable factors as the extremely disruptive effect of election invalidation and the havoc it wreaks upon local political continuity." *Soules v. Kauaians for Nukolii Campaign Committee*, 849 F.2d 1176, 1177 (9th Cir. 1988). For this reason, "if aggrieved parties, without adequate explanation, do not come forward before the election, they will be

barred from the equitable relief of overturning the results of the election." *Id.* at 1180-81 (citing *Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 182-83 (4th Cir. 1983)). To hold otherwise "permit[s], if not encourage[s], parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action." *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973).

IV. Wood fails to satisfy the requirements for a TRO.

Even if Wood could overcome the jurisdictional defects that are fatal to his claims, the district court correctly held that he still failed to satisfy the requirements for a TRO.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008). To prevail on his motion, Wood is required to show: (1) a substantial likelihood of prevailing on the merits; (2) that the plaintiff will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damages the proposed injunction may cause the opposing party; and (4) the injunction would not be adverse to the public interest. *Duke v. Cleland*, 954 F.2d 1526, 1529 (11th Cir. 1992). The Court "should pay particular regard for the public consequences in

employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24.

A. Wood is not substantially likely to succeed on the merits.

1. Wood's equal protection claim fails.

Wood fails to articulate a legally cognizable claim under the Equal Protection clause. Typically, when deciding a constitutional challenge to state election laws, federal courts apply the *Anderson-Burdick* framework that balances the burden on the voter with the state's interest in the voting regulation. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008); *Democratic Exec. Comm. of Fla. v. Lee,* 915 F.3d 1312, 1318-19 (11th Cir. 2019).

But Wood's equal protection claim does not even implicate *Anderson-Burdick*, because he fails to articulate how the Litigation Settlement burdens his right to vote in the first place. Both the Prompt Notification Rule and the OEB guidance are facially neutral, and Wood does not explain how either values one person's vote over another or treats voters arbitrarily or disparately.

The Supreme Court's decision in *Bush v. Gore* does not support Wood's claim. There, the Supreme Court found a violation

of equal protection where certain counties were utilizing "arbitrary and disparate" standards for what constituted a legal vote in the 2000 Florida recount. *Bush v. Gore,* 531 U.S. 98, 105 (2000). Here, the Prompt Notification Rule and OEB guidance do the exact opposite: they provide uniform and consistent standards in complete harmony with the statutory framework for each county to employ when verifying signatures on absentee ballot envelopes, in order to avoid the kind of ad hoc standards that varied from county to county that the Supreme Court found unconstitutional in *Bush v. Gore*.

Wood also asserts a vote dilution theory in support of his equal protection claim, but that fails as well. This theory is based upon his speculation that county elections officials may not have properly verified the signatures on all absentee ballots, purportedly allowing some invalid absentee ballots to be counted, which in turn dilutes his vote. Wood offers no evidence that this actually happened, but nevertheless, it is not a recognized theory of vote dilution.

Vote dilution under the equal protection clause is "concerned with votes being weighed differently." *Bognet*, 2020 WL 6686120, at *31. But Wood cannot analogize his equal protection claim to gerrymandering cases in which votes were weighted differently, as

in *Baker v. Carr*, 369 U.S. 369 U.S. 186 (1962), which Wood cites but is inapposite here. Wood's argument is based "solely upon state officials' alleged violation of state law that does not cause unequal treatment." *Bognet*, 2020 WL 6686120, at *31. However, "if dilution of lawfully cast ballots by the 'unlawful' counting of invalidly cast ballots were a true equal-protection problem, then it would transform every violation of state election law…into a potential federal equal-protection claim." *Id.* at *32; *see also Jacobson*, 974 F.3d at 1247 (rejecting partisan vote dilution claim).

2. Wood's claim under the Elections Clause fails.

The Elections Clause provides that "[t]he Times, Places, and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1. Wood contends that the State Defendants have usurped the power of the legislature by "imposing a different procedure for handling defective absentee ballots" than the one specified by statute. Yet he concedes that the State Defendants have the authority, delegated by the legislature, "[t]o formulate, adopt, and promulgate such rules and regulations … as will be conducive to the fair, legal, and orderly conduct of primaries and elections" so long as those rules are "consistent with law." O.C.G.A. § 21-2-31(2). Thus, Wood's claim depends on the

assumption that the rules and guidance resulting from the Litigation Settlement are inconsistent with Georgia's election code.

They are not.

When an absentee ballot is defective because of a signature mismatch, the statute provides that "[t]he board of registrars or absentee ballot clerk shall promptly notify the elector of such rejection, [and] a copy of [that] notification shall be retained in the files of the board of registrars or absentee ballot clerk." O.C.G.A. § 21-2-386(a)(1)(C). Once notified, the elector has the opportunity to "cure" any defects so the ballot may be counted. *See id.* The Litigation Settlement (and subsequent OEB guidance to county officials) merely clarifies the specifics of that procedure. If the clerk determines that a signature does not match, the clerk "must seek review from two other … absentee ballot clerks," and a ballot will only be rejected if a majority of the consulted clerks agree that the signatures do not match. Nothing about these procedures supplants or contradicts the text of the statute.

3. Wood's due process claim fails.

Wood's due process claim is premised on the allegation that Republican and Trump campaign poll watchers were denied full access to the tabulation of votes and subsequent Audit. While

Wood raised this claim below in support of his motion for a TRO, he does not raise it on appeal, and appears to have abandoned it. Nevertheless, the district court correctly held that Wood failed to articulate a discernable due process claim, under either procedural or substantive due process.

As the district court noted, there is no constitutional right to serve as a poll watcher; rather, the right is conferred by statute. *See, e.g., Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5997680, at *67 (W.D. Pa. Oct. 10, 2020) *Republican Party of Penn. v. Cortes*, 218 F. Supp. 3d 396, 408 (E.D. Pa. 2016).

Wood fails to cite any statutory process he claims poll watchers were denied. He also does not allege that State Defendants are the ones who denied access to poll watchers to observe a process that was taking place at the county level. While the Secretary issued OEB guidance instructing counties to allow party monitors to observe the Audit, if any county failed to comply with this guidance, any legal claim should have been brought by the monitors or the affected political party against the county at the time of the alleged violation.

With respect to substantive due process, Wood's claim is nothing more than a "garden variety" election dispute that this

Court has held does not rise to the level of a constitutional deprivation. *Curry v. Baker*, 802 F.2d 1302, 1314 (11th Cir. 1986). "Although federal courts closely scrutinize state laws whose very design infringes on the rights of voters, federal courts will not intervene to examine the validity of individual ballots or supervise the administrative details of a local election." *Id.* It is only where the election process "reaches the point of patent and fundamental unfairness" that a violation of due process may be indicated. *Id.* at 15; *see also Duncan v. Poythress*, 657 F.2d 691, 700 (5th Cir. 1981) (holding that due process only prohibits action by state officials which "seriously undermine[s] the fundamental fairness of the electoral process.").

B. Wood faces no irreparable harm.

Wood fails to articulate any specific harm that he faces if his requested relief is not granted, other than the vague claim that an infringement on the right to vote constitutes irreparable harm. However, as discussed above, Wood does not even allege that his right to vote was denied or infringed in any way—only that his preferred candidate lost. This is not a valid claim of harm or a justifiable basis for excluding legally-cast ballots. *Jacobson*, 974 F.3d at 1246 ("Voters have no judicially enforceable interest in the outcome of an election.").

C. The balance of equities weighs against a TRO.

"Confidence in the integrity of our electoral process is essential to the functioning of our participatory democracy," and court orders affecting elections "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U. S. at 4-5. For this reason, the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205, 1207 (April 6, 2020) (per curiam); *see also New Ga. Project*, 976 F.3d 1278, 1283 (11th Cir. 2020) ("[W]e are not on the eve of the election—we are in the middle of it, with absentee ballots already printed and mailed. An injunction here would thus violate *Purcell*'s well-known caution against federal courts mandating new election rules—especially at the last minute.")

Here, the election *has already been conducted*, and the slate of presidential electors has been certified. Granting Wood's requested relief would only serve to "disenfranchise [] voters or sidestep the expressed will of the people." *Donald J. Trump for President,* 2020 U.S. App. LEXIS 37346 at *28. It was not an abuse of discretion for the district court to recognize the

extraordinary harm to the public and the integrity of Georgia's election system that would result from Wood's requested relief.

CONCLUSION

For the reasons set out above, the district court did not abuse its discretion in denying Wood's motion for a TRO, and this Court should affirm that order. Moreover, because Wood failed to establish standing and this case is moot, the Court should remand the case to the district court with instructions to dismiss the action for lack of subject matter jurisdiction.

Respectfully submitted, this 1st day of December, 2020.

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,010 words as counted by the word-processing system used to prepare the document. This brief also complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2020, I served this brief by electronically filing it with this Court's ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

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