UNITED STATES DISTRICT COURT OF APPEALS

ELEVENTH CIRCUIT

CASE NO. 20-14418

L. LIN WOOD, JR.,

Appellant,

vs.

BRAD RAFFENSPERGER, in his official capacity as Secretary of State of the State of Georgia, et al.,

Appellees.
_____/

CONSOLIDATED REPLY BRIEF OF APPELLANT[1]

On appeal from the United States District Court, Northern District of Georgia

Ray S. Smith, III
SMITH & LISS, LLC
Five Concourse Parkway
Suite 2600
Atlanta, Georgia 30328
(404) 760-6000
Attorney for Appellant
rsmith@smithliss.com

[1] Although this brief principally replies to Appellees' answer brief, it also addresses the arguments raised in the Intervenor's response brief and the *amicai curiae* brief. The latter two briefs make substantially the same and overlapping arguments as the Appellees.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellant, L. LIN WOOD, JR., pursuant to Fed.Ed. R. Civ. P. 26.1, and 11th Cir. R. 26.1-3, hereby submit this Certificate of Interested Persons and Corporate Disclosure Statement, as follows:

Beane, Amanda J. - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Blumenfeld, Jeremy P. - Counsel for Proposed Intervenors Woodhall, et al.

Brailey, Emily R. - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Callais, Amanda R. - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Carr, Christopher – Counsel for Appellee

Clarke, Kristen- Counsel for Proposed Intervenors Woodhall, et al.

Coppedge, Susan P. - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Elias, Marc E. - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Greenbaum, Jon M. - Counsel for Proposed Intervenors Woodhall, et al.

Grimberg, Steven D. – United States Northern District Court Judge

Hamilton, Kevin J. - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Houk, Julie M. - Counsel for Proposed Intervenors Woodhall, et al.

Hounfodji, Catherine North- Appellee

Knapp, Jr., Halsey G. - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Krevolin and Horst, LLC- Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Kuhlmann, Gillian C. - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Law Office of Bryan L. Sells, LLC - Counsel for Proposed Intervenors Woodhall, et al.

Lawyers' Committee for Civil Rights Under Law- Counsel for Proposed Intervenors Woodhall, et al.

Le, Anh - Appellee

Lewis, Joyce Gist- Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Manning, Susan Baker- Counsel for Proposed Intervenors Woodhall, et al.

Mashburn, Matthew- Appellee

McGowan, Charlene S. - Counsel for Appellee

Mertens, Matthew J. - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Morgan, Lewis & Bockius LLP - Counsel for Proposed Intervenors Woodhall, et al.

Office of Attorney General of Georgia- Counsel for Appellee

Perkins Coie LLP - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Powers, John- Counsel for Proposed Intervenors Woodhall, et al.

Raffensperger, Brad - Appellant

Rosenberg, Ezra D. - Counsel for Proposed Intervenors Woodhall, et al.

Sells, Bryan L. - Counsel for Proposed Intervenors Woodhall, et al.

Smith, III, Ray - Counsel for Appellant

Sparks , Adam M. - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Sullivan, Rebecca N. – Appellant

Velez, Alexi M. - Counsel for Intervenor-Defendants, Democratic Party of Georgia, et al.

Webb, Bryan K. - Counsel for Appellee

Willard, Russell D. - Counsel for Appellee

Wood, Jr., L. Lin. – Appellant

Worley, David J. – Appellee

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A. Appellant has standing to maintain his Constitutional challenge to Appellee's signature verification procedures because they violate his constitutional right to Equal Protection.

The Supreme Court of the United States recognized in *Baker v. Carr*, 82 S. Ct. 691, 703-704 (1962) that a group of qualified voters had standing to challenge the constitutionality of a redistricting statute. The voter plaintiffs alleged it deprived them of Equal Protection. The Supreme Court recognized that a citizen's right to vote, free of arbitrary impairment by state action is a right secured under the Federal Constitution if such impairment results from, among other things, vote dilution by false tally. *Id*. Similarly, in *Gray v. Sanders*, 83 S. Ct. 801 (1963), the Supreme Court observed that any person whose right to vote was impaired by election procedures had standing to sue on the ground the system used in counting votes violated the Equal Protection Clause. Indeed, every voter's vote is entitled to be correctly counted once and reported, and to be protected from the diluting effect of illegal ballots. *Id.* at 380. See also, *McLain v. Mier*, 851 F. 2d 1045, 1048 (8th Cir. 1988)(voter had standing to challenge constitutionality of North Dakota ballot access laws); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1333 (N.D. Ga. 2018)(individual voters whose absentee ballots were rejected on the basis of signature mismatch had standing to assert constitutional challenge to absentee voting statute).

This Court in *Roe v. Alabama*, 43 F. 3d 574, 580, 581 (11th Cir. 1995) held that a voter sufficiently alleged the violation of a right secured by the constitution to support a section 1983 claim based on the counting of improperly completed absentee ballots. In *Roe*, the voter and two candidates for office sought injunctive relief preventing enforcement of an Alabama circuit court order requiring that improperly completed absentee ballots be counted. This Court stated that failing to exclude these defective absentee ballots constituted a departure from previous practice in Alabama and that counting them would dilute the votes of other voters. *Id.* 581. Recognizing that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise, "this court modified affirmed the preliminary injunction issued by the district court in that case and enjoined the inclusion in the vote count of the defective absentee ballots.

Further, in *Common Cause/Georgia v. Billups*, 554 F. 3d 1340, 1351 (11th Cir. 2009) this Court held that voters had standing to challenge the requirement of presenting government issued photo identification as a condition of being allowed to vote. The plaintiff voters in that case did not have photo identification, and consequently, would be required to make a special trip to the county registrar's office that was not required of voters who had identification. *Id.* 1351. There was no

impediment to the plaintiff's ability to obtain a free voter identification card. Although the burden on the plaintiff voters was slight in having to obtain identification, this Court found that a small injury, even "an identifiable trifle" was sufficient to confer them standing to challenge the election procedure. *Id*.

In *George v. Haslam*, 112 F. Supp. 3d 700, 709 (M.D. Tenn. 2015), registered voters were found to have standing to sue the state governor and others based on the allegation that the method by which votes cast in the election were counted violated their rights to Equal Protection. That court observed that citizens have a constitutionally protected right to participate in elections on an equal basis with other citizens, and the equal protection clause prohibited the state from valuing one person's vote over that of another. *Id*. *Accord*. *Nielsen v. DeSantis*, 2020 WL 5552873 at *2 (N.D. Fla. June 30, 2020)(voters had standing to challenge state voting procedures including the requirement to pay postage on their mail-in ballots, the election date deadline for the supervisor of elections to receive a mailed ballot, and a restriction on delivery of remote ballots cast by others.)

In *New Ga. Project v. Raffensperger*, 2020 WL 5200930 (N.D. Ga. August 31, 2020), registered voters had standing to sue the Georgia Secretary of State and the State Election Board challenging policies governing Georgia's absentee voting process in light of dangers presented by Covid-19.

The district court in *Middleton v. Andino*, 2020 WL 5591590 at *12 (D.S.C. September 22, 2020) ruled that a voter had standing to challenge an absentee ballot signature requirement and a requirement that absentee ballots be received on election day to be counted. The court observed that the fact that an injury may be suffered by a large number of people does not by itself make that injury a non-justiciable generalized grievance as long as each individual suffers particularized harm, and voters who allege facts showing disadvantage to them have standing to sue. *Id*.

Similarly, in the present case, the Appellant has shown below that as a voter and as a financial supporter of the Republican Party, he has legal standing to maintain the challenge to the Appellees' unconstitutional signature verification requirements implemented and used in the 2020 election. *Accord*. *Citizens for Legislative Choice v. Miller*, 993 F. Supp. 1041, 1044-1045 (E.D. Mich. 1998)(voters who wished to vote for specific candidates in an election had standing to challenge constitutionality of a state constitutional amendment establishing term limits for state legislators).

Accordingly, Appellant Wood has standing. As discussed below, the Appellees' procedure for verifying signatures and rejecting absentee ballots was unconstitutional. It valued absentee votes more than in person votes, and

impermissibly diluted the Appellant's in person vote. Accordingly, the trial court erred in concluding the Appellant lacked standing.

B. The Appellees' change to the procedures for rejecting absentee ballots conflicts with the state's legislative framework for the presidential election was beyond their legal authority and is otherwise invalid, and therefore its unconstitutional.

The initial brief contains detailed discussion of the terms of the Appellee's and political party committee Intervenors' settlement agreement. (Initial Brief at p. 16-18, 27-28) including the reasons why the procedures it created for mail-in absentee ballot signature verification are unconstitutional. The Appellant's brief at p. 6, as well as the political party committee intervenors' motion to intervene below (DE 8 at p. 4-8) also discuss the litigation and settlement in detail.

The settlement agreement should be deemed invalid for the additional reason that on its face it was not signed by the parties themselves. See DE 6-1 at p. 6. By its very terms, the agreement was to take effect "when each and every party has signed it, as of the date of the last signature." *Id*. at p.1. However, the signature page fails to contain any party's signature; instead, only the electronic signatures of counsel for the parties appear.

Additionally, the new procedures created through the settlement agreement were illegally implemented by Appellee because, as conceded by the Appellee and

Intervenors, the rules were not promulgated pursuant to official rule making procedures. Accordingly, the settlement parties, and Appellees in particular, took it upon themselves to bypass the customary requirement for public notice and comment that is attendant to official rulemaking. Rather, this new and different procedure, which changed the clear legislative framework for elections, was disseminated under the guise of an "official election bulletin." However, such bulletins are not a substitute for formal rulemaking. Therefore, the settlement agreement and the new rules for signature verification it generated are unconstitutional for these additional reasons. Thus, the lower court erred in refusing to grant Appellant relief.

C. The Appellees' change of the procedures for rejecting absentee ballots impermissibly diluted the Appellant's vote and resulted in mail-in absentee ballots being valued more than in person ballots in violation of his Equal Protection rights.

As shown on their face, the procedures applicable to voter identification verification in connection with the actual voting process treat in-person voters like Appellant, different from mail-in absentee voters. Pursuant to O.C.G.A. § 21-2-417(a), an in-person voter must "present proper identification to **a** poll worker" before their vote may be cast. (emphasis added). Similarly, the voter identification procedure provided by OCGA § 21-2-386 provides that absentee ballots would be

received and reviewed by "**a** registrar or clerk." (emphasis added). *See* O.C.G.A. § 21-2-386(a)(1)(B). If the signature does not appear to be valid or does not conform with the signature on file, "the registrar or clerk shall write across the face of the envelope "Rejected" giving the reason therefore." See O.C.G.A § 21-2-386(a)(1)(C). As such, before the Appellees and political party committee Intervenors entered into the unconstitutional settlement agreement, one poll worker was charged with verifying the voter's identity before their ballot was cast regardless of whether the vote was in person or by mail-in absentee ballot.

As set forth more fully in the initial brief, the Appellees and political party committee intervenors changed the clear statutory procedure for confirming voter identity at the time of voting, so that rather than one poll worker reviewing signatures, a committee of three poll workers was charged with confirming that absentee ballot signatures were defective before rejecting a ballot.

This new procedure treated in-person voter identification verification different from mail-in absentee voter identification verification at the time of casting the vote. By designating a committee of three to check mail-in absentee voter identification but having a single poll worker check in person voter identification, the challenged procedure favors the absentee ballots, treats the absentee voters differently from in-person voters and values absentee votes more than the ballots of

in-person voters. Indeed, when a question of voter identity arises, one poll worker resolves it for an in-person voter, but any questions regarding mail-in absentee voter identification is resolved by 3 poll workers. Thus, the challenged procedure violates the Appellant's rights to equal protection and cannot be allowed to stand.

It is well established that a state may not arbitrarily value one person's vote over that of another. *Obama For America v. Husted*, 697 F. 3d 423 428 (6th Cir. 2012). The Equal Protection Clause prohibits a state from treating voters in disparate ways. *Id.* 428. *See also Bush v. Gore*, 121 S. Ct. 525 (2000)(having granted the right to vote on equal terms, the state may not later arbitrarily value one person's vote over another, such disparate treatment is a violation and a dilution of a citizen's vote). Before the settlement agreement one poll worker resolved questions of voter identification regardless of whether the vote was in-person or by mail-in absentee ballot. The settlement agreement resulted in a later arbitrary change that improperly treated the in person votes differently than the mail-in absentee ballots.

D. Laches does not bar Appellant's claims and in any event is inapplicable to cases seeking to redress ongoing constitutional violations.

The Appellee's legal action accrued after he suffered harm following the presidential election. A federal court's jurisdiction can be invoked only when the plaintiff himself has suffered some threatened or actual injury. *Warth v. Seldin*, 95.

S. Ct. 2197, 2205 (1975). A litigant has standing to challenge the constitutionality of a law only if the law has an adverse impact on the litigant's own rights. *Feminist Women's Health Center v. Burgess*, 282 Ga. 433 (Ga. 2007). It was not until the election occurred that Appellant's vote was diluted, which gave rise to his cause of action. Very shortly thereafter, he instituted the district court action. Under these circumstances, courts including in the Eleventh Circuit, have recognized laches does not bar a constitutional challenge. *Democratic Executive Committee of Florida v. Lee*, 915 F. 3d 1312, 1326 (11th Cir. 2019)(laches did not bar claims challenging Florida's vote by mail ballot rejection rules where action was initiated about one year after the state's rule was adopted); *Democratic Party of Georgia v. Crittenden*, 347 F. Supp. 3d 1324 1338-1339 (N.D. Ga. 2018)(organization's constitutional claims challenging rejection of absentee ballots in pending general election and statutory framework for curing and counting provisional ballots were not barred by doctrine of laches as many issues regarding voter's experiences did not arise until after election day); *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821, 827 (N.D. Ga. 1993)(claims by plaintiff voters who voted for senatorial candidate who received plurality vote but lost runoff election were not barred by laches, despite being brought four weeks after runoff election because they were not ripe prior to the runoff.) Accordingly, Appellant's claims and request for injunctive relief were not

ripe until the election and are not barred by laches. The lower court erred in ruling that they were. As such, the district court should be reversed.

Indeed, the Appellees' violations of the Appellant's constitutional right to Equal Protection is an ongoing violation. Since same procedures challenged herein are to be employed in the January Senatorial runoff election, the constitutional violation can only be characterized as ongoing. Federal courts have recognized that laches is inapplicable to cases where the injury is continuing. *League of Women Voters of Michigan v. Benson*, 373 F. Supp 3d 867, 908-909 (E.D. Mich. 2019) (recognizing laches does not apply to ongoing or recurring harms), vacated on other grounds, *Chatfield v. League of Women Voters of Michigan*, 140 S. Ct. 2019; *Smith v. Clinton*, 687 F. Supp. 1310, 1312-1313 (E.D. Ark. 1988)(laches did not bar challenge by black registered voters in dual member state legislative district despite being filed 7 years after the apportionment plan because constitutional injury was a continuing injury).

Had the Appellant filed suit when the settlement agreement was publicly filed, the Appellee no doubt would have then argued Wood lacked standing because any injury he could have claimed at that time was merely hypothetical and/or not ripe. As such, Appellants claims are not barred by laches.

E. Appellant's claims are not Moot

The Appellees and intervenors' argument that Appellant's claims and request for injunctive relief are moot should be rejected. First, this Court in *Siegel v. Lepore*, 234 1172-1173 F. 2d 1139 (11th Cir. 2000), held that a suit challenging the vote tabulation procedure in a presidential election was not rendered moot when the manual recounts were completed and the vote tabulations certified. In that case, as in the present controversy, the presidential candidate and others were contesting the election results in various lawsuits in numerous courts. *Id.* at 1173. Based on the complex and ever shifting circumstances in *Siegel*, this Court found laches did not apply. The reasoning in *Siegel* squarely applies in this case. As such, the lower court erred in finding laches barred Appellant's requested relief.

Separately, Appellant brought this action before the Appellee certified the state election results. Appellee nonetheless certified the election, with full awareness that this litigation was ongoing. By insisting on certifying the election results in the face of an ongoing constitutional challenge, on which appellate remedies had not been exhausted, Appellee did so at their peril. Appellee cannot thereby cure the constitutional violations at issue in this case.

Finally, there is a runoff election scheduled in January 2021 for two U.S. senatorial seats in Georgia, and if the challenged procedures are employed, it will

further aggravate the Appellant's continuing constitutional injury. Accordingly, this controversy is not moot.

F. The trial court's finding that the rejection rate of absentee ballots was the same in 2018 and 2020 was clearly erroneous.

At the hearing on the Appellant's motion for injunctive relief, evidence was presented by way of affidavit concerning the rejection rates for absentee ballots. Appellant submitted an attorney declaration (DE 30-1), which based on data publicly available from Georgia Secretary of State's website, established that the rejection rate of absentee ballots was 3.06% in the 2016 general election and 3.58% in the 2018 general election, but reduced dramatically to 0.32% in the 2020 general election. The 2020 rejection rate represents approximately a 90% decrease in the rate of mail-in ballot rejections compared to the prior two general elections evidencing that defective ballots were not detected. (DE 30-1 at p. 3).

Had the historical mail-in ballot rejection rate of 2016 and 2018 been applied to the 2020 mail-in ballot numbers, it would have been anticipated that over 40,000 ballots would have been rejected. Given the margin of votes separating the presidential candidates is under 14,000 votes, these ballots potentially made the difference in the outcome. *Id.* at p. 4.

Notably, the Appellant's attorney affidavit states that the total number of rejected ballots was used to formulate the rate of rejection calculation because the Secretary of State does not provide data publicly that tabulates the number of mail-in absentee ballot rejections based solely on a missing or mismatched signature. *Id.* at p. 5. The Appellants' calculations are explained in detail in the attorney affidavit, and their factual basis and the methodology for the calculations is included in the affidavit.

In opposition, the Appellee filed the affidavit of Chris Harvey (DE 34-1). At p. 5 of the Harvey affidavit, paragraph 7 makes the claim that the rejection rates in 2018 and 2020 of absentee ballots for missing or non-matching signatures was identical, 0.15%. However, the statement is made in a conclusory manner and entirely lacks any foundation. Indeed, Harvey affidavit is devoid of any reference to the source of the data used for this calculation and it conflicts with the information that is publicly available on the Secretary of State's website. The Harvey affidavit lacks any tables, detailed calculations, or specificity regarding the raw data utilized. Nonetheless, the district court found that the absentee ballot rejection rate in 2018 and 2020 was identical (DE 54 at p. 28), apparently adopting the figures in the Harvey affidavit. Since the Harvey calculations lacked any foundation, however, the

court's decision in this regard was clearly erroneous and not based on substantial, competent evidence. As such, the trial court should be reversed.

G. The State should be required to cure the constitutional deficiencies in the 2020 Presidential election.

Appellant's action below sought an injunction, not just preventing certification, but also declaring the election results defective and requiring Appellees to cure the violations. *See* (DE 5 Verified Amended Complaint at p. 28-29); (DE 6 Plaintiff's Emergency Motion for Injunctive Relief at p. 24-25). Now, on appeal, the remedy sought would be for the Appellee to be required to de-certify the election results and cure the constitutional violations, including doing the election over. Only legal votes may be counted, and with all voters given the opportunity to vote anew, none would be disenfranchised. There is, at present, still time to accomplish this. The constitution demands nothing less. Although Appellees and Intervenors would be satisfied just to get this election done, Appellant and the constitution demand that they get it done correctly. Appellant satisfied the legal criteria for entry of the requested injunction.

CONCLUSION

For the reasons stated above, as well as in Appellant's initial brief, the District Court's order should be reversed and this Court should grant or instruct the lower court to grant the Appellant an injunction determining that the results of the 2020 general election in Georgia are defective as a result of the above described constitutional violations and requiring the Appellees de-certify the results and to cure said deficiencies in a manner consistent with Federal and Georgia law, and not in accordance with the improper procedures established in the litigation settlement. Further, this Court should enjoin, or instruct the lower court to enjoin the Defendants from employing the constitutionally defective in the upcoming Senatorial runoff election. This relief will ensure that the election process is conducted in a manner consistent with the United States Constitution. Further, it would promote public confidence in the results of the election.

Respectfully submitted this 3rd day of December, 2020.

SMITH & LISS, LLC

/s/ Ray S. Smith, III
Ray S. Smith, III
Georgia Bar No. 662555
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the within and foregoing submission does not exceed the word count limit imposed by Rule 24 complies with the requirements of FRAP 32(g).

SMITH & LISS, LLC

/s/ Ray S. Smith, III
Ray S. Smith, III
Georgia Bar No. 662555
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been electronically filed with this Court via CM/ECF and was furnished to all counsel on the attached service list by e-mail on December 3, 2020.

SMITH & LISS, LLC

/s/ Ray S. Smith, III
Ray S. Smith, III
Georgia Bar No. 662555
Counsel for Appellant

Five Concourse Parkway
Suite 2600
Atlanta, Georgia 30328
(404) 760-6000
rsmith@smithliss.com

SERVICE LIST

Wood v. Raffensperger, et al.
Case No. 1:20-cv-04651-SDG

CHRISTOPHER M. CARR
Deputy Attorney General
BRYAN K. WEBB
Deputy Attorney General
Russell D. Willard
Senior Assistant Attorney General
Charlene S. McGowan
Assistant Attorney General
40 Capitol Square SW
Atlanta, GA 30334
cmcgowan@law.ga.gov
404-458-3658 (tel)
Attorneys for State Defendants

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

Marc E. Elias*
Amanda R. Callais*
Alexi M. Velez*
Emily R. Brailey*
PERKINS COIE LLP
700 Thirteenth Street NW, Suite 800
Washington, DC 20005
Telephone: (202) 654-6200
melias@perkinscoie.com
acallais@perkinscoie.com
avelez@perkinscoie.com
ebrailey@perkinscoie.com

Kevin J. Hamilton*
Amanda J. Beane*
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101
Telephone: (206) 359-8000
khamilton@perkinscoie.com
abeane@perkinscoie.com

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

Matthew J. Mertens*
Georgia Bar No: 870320
PERKINS COIE LLP
1120 NW Couch Street, 10th Floor
Portland, Oregon 97209
Telephone: (503) 727-2000

**Pro Hac Vice Application Pending*

Counsel for Intervenor-Defendants, Democratic Party of Georgia ("DPG"), DSCC, and DCCC ("Political Party Committees")

Bryan L. Sells
Law Office of Bryan L. Sells, LLC
P.O. Box 5493
Atlanta, GA 31107-0493
(404) 480-4212 (voice/fax)
bryan@bryansellslaw.com

John Powers*
jpowers@lawyerscommittee.org
Kristen Clarke
kclarke@lawyerscommittee.org
Jon M. Greenbaum*
jgreenbaum@lawyerscommittee.org
Ezra D. Rosenberg*
erosenberg@lawyerscommittee.org
Julie M. Houk*
jhouk@lawyerscommittee.org
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street NW, Suite 900
Washington, DC 20005
Telephone: (202) 662-8300

Susan Baker Manning^
Jeremy P. Blumenfeld^
Catherine North Hounfodji^
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: +1.202.739.3000
Facsimile: +1.202.739.3001
susan.manning@morganlewis.com
jeremy.blumenfeld@morganlewis.com
catherine.hounfodji@morganlewis.com

william.childress@moreganlewis.com
chris.miller@morganlewis.com
benjamin.hand@morganlewis.com

** admitted pro hac vice*

^ Pro hac vice admission pending

Counsel for Proposed Intervenors James Woodhall, Helen Butler, Melvin Ivey, Members of the Proposed Intervenors the Georgia State Conference of the NAACP, and the Georgia Coalition for the People's Agenda