NO. 20-14418-RR

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

L. LIN WOOD, JR.,

Plaintiff/Appellant,

v.

BRAD RAFFENSPERGER, in his official capacity as Secretary of State of the State of Georgia, **REBECCA N. SULLIVAN**, in her official capacity as Vice Chair of the Georgia State Election Board, **DAVID J. WORLEY**, in his official capacity as a Member of the Georgia State Election Board, **MATTHEW MASHBURN**, in his official capacity as a Member of the Georgia State Election Board, and **ANH LE**, in her official capacity as a Member of the Georgia State Election Board,

Defendants/Appellees.

On Appeal from the United States District Court
For the Northern District of Georgia
L.T. No.: 1:20-cv-04651-SDG

APPELLANT'S EMERGENCY MOTION FOR EXPEDITED REVIEW

RAY S. SMITH III, ESQ.
SMITH & LISS, LLC
Five Concourse Parkway, Suite 2600
Atlanta, Georgia 30328
Telephone: 404.760.6006
Facsimile: 404.760.0225

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

EMERGENCY MOTION FOR EXPEDITED REVIEW

COMES NOW the Appellant, L. LIN WOOD, by and through undersigned counsel, pursuant to 11th Cir. R. 27-3 and moves for expedited review of this appeal, and in support of this request states the following:

1. On November 13, 2020, Appellant filed an action in the District Court for the Northern District of Georgia, asserting three claims against Appellees/Defendants, in their official capacities, based on numerous constitutional violations.

2. On November 16, 2020, Appellant filed an Amended Complaint, and on November 17, 2020, Appellant filed an emergency motion for a temporary restraining order ("TRO").

3. On November 19, 2020, Appellees and Intervenors filed separate responses in opposition to Appellant's motion for a TRO, and the District Court held oral argument on Appellant's motion the same day.

4. At the conclusion of oral argument, the District Court denied Appellant's request for a TRO.

5. Appellant requests that this Court grant expedited briefing on its appeal from the District Court's decision denying the Emergency Motion for a Temporary Restraining Order.

6. Appellant's underlying action relates to the integrity of election procedures in the 2020 Presidential General Election in the State of Georgia, particularly as those procedures were fundamentally and irredeemably flawed, from this Constitutional deviation.

7. Appellant further submits that the procedures enacted by the Secretary of State and the State Board of Elections relate to the enormous quantity of mail-in-ballots cast in Georgia pursuant to the unlawful "Consent Decree," which precludes ascertainment of these ballots' compliance with the detailed requirements for demonstrating the authenticity of such votes and the eligibility of those purportedly casting such ballots to vote in Georgia. Appellant's vote was made more difficult that the votes of others who were not required to present identification or were struggling with signature verification.

8. This issue is critical because the State Board of Elections is proposing to use the same procedures in the upcoming Senatorial run-off election, and if they are invalid, then the outcome of that election could likewise be in doubt. The integrity of the election system in Georgia should not be subject to ridicule or doubt.

9. This action also concerns a Due Process and Equal Protection claim that Georgia's mail ballot scheme, as modified by the unlawful "Consent Decree," is unconstitutional, and fails to comply with the election scheme adopted by the State Legislature. Additionally, the scheme lacks any safeguards, given that there is clearly

confusion and opportunity for mischief created by the lack of signature verification wrought by the "Consent Decree/Settlement Agreement."

10. This action is of nationwide importance because of the consequences of flawed election processes on the election for the President of the United States in the State of Georgia could turn the election in favor of either candidate.

11. It is critically important for Appellant's claims to be heard before the December 14, 2020 "safe harbor" date under GA Code § 21-2-499 (2019) of Georgia certifying its Presidential electors, which is only 21 days away.

12. The Amended Complaint asserts claims under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment; the Electors and Elections Clause of the Constitution; and the Due Process Clause of the Fourteenth Amendment because Defendants, Georgia's Secretary of State, Brad Raffensperger, and four Georgia Election Board members, engaged in an intentional scheme to circumvent Georgia's legislative enactments by entering into an unconstitutional Consent Decree, in an effort allow the counting of defective mail ballots.

13. Appellant seeks to exclude the defective mail ballots which may turn the result of the Election, and further seeks to prevent the use of the same constitutionally flawed procedures in the upcoming Senatorial run-off election. Appellant does not seek to exclude any legally cast votes.

14. Appellant further submits that good cause exists for expedited review, as irreparable may occur or the appeal may become moot unless a ruling is obtained within seven days.

15. Appellant contacted counsel for the Defendants and Intervenors to seek agreement to Appellant's proposed briefing schedule, namely, that Appellant's opening brief shall be due by **November 25, 2020 by 5:00 p.m.;** and that Appellees' briefs shall be due by **November 26, 2020 by 5:00 p.m.,** with oral argument to be held on November 27, 2020 if desired by the Court.

16. At the time of filing, the Appellees have not consented to the proposed briefing schedule.

WHEREFORE, Appellant respectfully request that the Court establish an expedited schedule for the disposition of the instant appeal according to the above deadlines.

Respectfully submitted,

/s/ Ray S. Smith III
RAY S. SMITH III, ESQ.
SMITH & LISS, LLC
Five Concourse Parkway, Suite 2600
Atlanta, Georgia 30328
Telephone: 404.760.6006
Facsimile: 404.760.0225
E-mail: rsmith@smithliss.com

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the within and foregoing 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

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

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 November 25th 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

UNITED STATES DISTRICT COURT OF APPEALS

ELEVENTH CIRCUIT

CASE NO. 20-14418-RR

L. LIN WOOD, JR.,

Appellant,

vs.

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

Appellees.
_____/

INITIAL BRIEF OF APPELLANT

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

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

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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.

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McGowan, Charlene S. - Counsel for Appellee

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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

STATEMENT REGARDING ORAL ARGUMENT

Appellant believes that oral argument would benefit the Court. This appeal involves important constitutional issues regarding the dilution and impairment of Plaintiff's fundamental right to vote and the Defendants' illegal and unconstitutional procedures for processing and rejecting absentee ballots in the 2020 elections. These procedures violated Plaintiff's rights to Equal Protection under the United States Constitution. Unless this Court intervenes, said unconstitutional procedures will not only continue to impair Plaintiff's right to vote, but also will adversely affect and taint the upcoming Senatorial runoff election.

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OTHER AUTHORITY

U.S. Const. Art. I, § 4, cl. 1

Ga. Const. Art. III, § I, Para. I;

U.S. Const. amend XIV

U.S. Const. amend XIV, § 1

JURISDICTIONAL STATEMENT

This is an appeal of an interlocutory order of a district court of the United States refusing an application for an injunction, which appeal is authorized by 28 U.S.C. § 1292(a)(1). See *Bognet v. Secretary Commonwealth of Pennsylvania, et al.* 2020 WL 6686120 *5 (3d Cir. November 13, 2020) (recognizing the immediate appealability of voter and candidates motion for temporary restraining order and preliminary injunction.); *Schaivo v. Schaivo*, 403 F. 3d 1223, 1225 (when denial of TRO might have serious, perhaps irreparable consequence, same can be effectively challenged only by immediate appeal).

STATEMENT OF THE CASE AND FACTS

Appellant/Plaintiff, an individual residing in Fulton County, Georgia, is a qualified, registered "elector" who possesses all of the qualifications for voting in the State of Georgia. See O.C.G.A. §§ 21-2-2(7), 21-2-216(a); (see also Verified Am. Compl. for Decl. and Inj. Relief (DE 5, the "Complaint", at 8). Plaintiff sought declaratory relief and an emergency injunction from the district court below, among other things, halting the certification of Georgia's results for the November 3, 2020 presidential election and determining that the results were defective. As a result of the appellees'/defendants' violations of the United States Constitution and other election laws, Plaintiff alleged below the Georgia's election tallies are suspect and tainted with impropriety.

On November 13, 2020, Plaintiff filed his original Verified Complaint for Declaratory and Injunctive Relief, which was subsequently amended. The named defendants include Defendant Brad Raffensperger, in his official capacity as Secretary of State of Georgia and as Chairperson of Georgia's State Election Board, as well as the other members of the State Election Board in their official capacities - Rebecca N. Sullivan, David J. Worley, Matthew Mashburn, and Anh Le (hereinafter the "State Election Board"). *(See* DE 5, Compl., at 9-10.) The Complaint alleges violations of the United States Constitution and the amendments

thereto in the regards to the November 3, 2020 general election, as well as the "full hand recount" of all ballots cast in that election, to be completed by November 18, 2020 (the "Hand Recount"), with those same violations likely to occur again in the January 5, 2021 run-off election for Georgia's United States Senators. (See generally *id*.)

The Georgia Legislature established a clear an efficient process for handling absentee ballots. To the extent that there is any change in that process, that change must, under Article I, Section 4 of the Constitution, be prescribed by the Georgia Legislature. *(See* DE 5 Compl., at 17-18.)

Specifically, the unconstitutional procedure in this case involved the unlawful and improper processing of absentee ballots. The Georgia Legislature instructed county registrars and clerks (the "County Officials") regarding the handling of absentee ballot O.C.G.A. §§ 21-2-386(a)(l)(B), 21-2-380.1. *(See* DE 5 Compl., at 19.) The Georgia Election Code instructs those who handle absentee ballots to follow a clear procedure:

> Upon receipt of each [absentee] ballot, a registrar or clerk ***shall*** write the day and hour of the receipt of the ballot on its envelope. The registrar or clerk ***shall*** then compare the identifying information on the oath with the information on file in his or her office, ***shall*** compare the signature or make on the oath with the signature or mark on the absentee elector's

> voter card or the most recent update to such absentee elector's voter registration card and application for absentee ballot or a facsimile of said signature or maker taken from said card or application, and ***shall,*** if the information and signature appear to be valid and other identifying information appears to be correct, so certify by signing or initialing his or her name below the voter's oath...

O.C.G.A. § 21-2-386(a)(l)(B) (emphasis added); *(see* DE 5 Compl., at 20).

The Georgia Legislature also established a clear and efficient process to be used by County Officials if they determine that an elector has failed to sign the oath on the outside envelope enclosing the ballot or that the signature does not conform with the signature on file in the registrar's or clerk's office (a "defective absentee ballot"). *See* O.C.G.A. § 21-2-386(a)(l)(C); (DE 5 Compl., at 22.) With respect to defective absentee ballots:

> *If the elector has failed to sign the oath, or if the signature does not appear to be valid,* or if the elector has failed to furnish required information *or information so furnished does not conform with that on file in the registrar's or clerk's office,* or if the elector is otherwise found disqualified to vote, the registrar or clerk *shall* write across the face of the envelope "Rejected," giving the reason therefor. The board of registrars or absentee ballot clerk *shall* promptly *notify the elector of such rejection,* a copy of which notification *shall* be retained in the files of the board of registrars or absentee ballot clerk for at least one year.

O.C.G.A. § 21-2-386(a)(l)(C) (emphasis added); *(see* DE 5 Compl., at 23). The

Georgia Legislature clearly contemplated the use of written notification by the county registrar or clerk in notifying the elector of the rejection. *(See* DE 5 Compl., at 24.)

In March 2020, Defendants Secretary Raffensperger, and the State Election Board, who administer the state elections (collectively the "Administrators") entered into a "Compromise and Settlement Agreement and Release" (the "Litigation Settlement") with the Democratic Party of Georgia, Inc., the Democrat Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee (the "Democrat Agencies"), *setting forth totally different standards to be followed by County Officials in processing absentee ballots in Georgia.* (*See* DE 5 Compl., 25-26.) See also *Democratic Party of Georgia, Inc., et al. v. Raffensperger, et al.*, Civil Action File No. 1:19-cv-05028-WMR, United States District Court for the Northern District of Georgia, Atlanta Division, Doc. 56-1 (DE 6, 30-35).

Although Secretary Raffensperger is authorized to promulgate rules and regulations that are "conducive to the fair, legal, and orderly conduct of primaries and elections," all such rules and regulations must be "consistent with law." O.C.G.A. § 21-2-31(2); *(see* DE 5 Compl., at 28).

Under the Litigation Settlement, the Administrators agreed to change

the statutorily-prescribed process of handling absentee ballots in a manner that was not consistent with the laws promulgated by the Georgia Legislature. *(See* DE 5 Compl., at 28.) The Litigation Settlement provides that the Secretary of State would issue an "Official Election Bulletin" to County Officials overriding the prescribed statutory procedures. The unauthorized Litigation Settlement procedure, set forth below, is more cumbersome, and makes it much more difficult to follow the statute with respect to defective absentee ballots. *(See* DE 5, Compl., at 30-32.)

Under the Litigation Settlement, the following language added to the pressures and complexity of processing defective absentee ballots, making it less likely that they would be identified or, if identified, processed for rejection:

> County registrars and absentee ballot clerks *are required,* upon receipt of each mail-in absentee ballot, to compare the signature or make of the elector on the mail-in absentee ballot envelope with the signatures or marks in eNet and on the application for the mail-in absentee ballot. If the signature does not appear to be valid, registrars and clerks are required to follow the procedure set forth in O.C.G.A. § 21- 2-386(a)(l)(C). When reviewing an elector's signature on the mail-in absentee ballot envelope, the registrar or clerk must compare the signature on the mail-in absentee ballot envelope to each signature contained in such elector's voter registration record in eNet and the elector's signature on the application for the mail-in absentee ballot.

> ***If the registrar or absentee ballot clerk determines that the voter's signature on the mail-in absentee ballot envelope does not match any of the voter's signatures on file in eNet or on the absentee ballot application, the registrar or absentee ballot clerk must seek review from two other registrars, deputy registrars, or absentee ballot clerks. A mail-in absentee ballot shall not be rejected unless a majority of the registrars, deputy registrars, or absentee ballot clerks reviewing the signature agree that the signature does not match any of the voter's signatures on file in eNet or on the absentee ballot application. If a determination is made that the elector's signature on the mail-in absentee ballot envelope does not match any of the voter's signatures on file in eNet or on the absentee ballot application, the registrar or absentee ballot clerk shall write the names of the three elections officials who conducted the signature review across the face of the absentee ballot envelope, which shall be in addition to writing "Rejected" and the reason for the rejection as required under O.C.G.A. § 21-2-386(a)(1)(C).*** Then, the registrar or absentee ballot clerk shall commence the notification procedure set forth in O.C.G.A. § 21-2-386(a)(1)(C) and State Election Board Rule 183-1-14-.13.

(*See* DE 5 Compl., paragraph 33; *see* Ex. A, Litigation Settlement, p. 3-4, paragraph 3, "Signature Match" (emphasis added).)

SUMMARY OF ARGUMENT

The Plaintiff suffered an injury in fact and actual harm as a result of the unconstitutional absentee ballot processing procedures utilized in connection with the November 3, 2020 presidential election and the manual re-count. The procedures were illegal and in derogation of the state legislature's clear statutory scheme for elections and accordingly, were unconstitutional. The procedures were promulgated by the Defendants' in violation of the non-delegation doctrine. Moreover, in issuing these procedures, the Defendants exceeded their statutory authority. These procedures violated the Plaintiff's constitutional rights to Equal Protection under the law.

As a result, this Court should reverse the district court and enter, or direct that the district court enter, an injunction declaring that the election results are defective, and ordering the Defendants to cure their constitutional violations by re-doing the election in a manner consistent with the requirements of the United States Constitution.

ARGUMENT

THE DISTRICT COURT ERRED IN DENYING INJUNCTIVE RELIEF BECAUSE THE ELECTION WAS, AND ABSENT INJUNCTIVE RELIEF, THE RUNOFF ELECTION WILL BE CONDUCTED IN AN UNLAWFUL MANNER RENDERING IT UNCONSTITUTIONAL AND VIOLATIVE OF THE PLAINTIFF'S FUNDAMENTAL RIGHT TO VOTE

Standard of review

The Court of Appeals reviews a district court's decision to deny a preliminary injunction for abuse of discretion. *Fish v. Kobach*, 840 F. 3d 710, 723 (10th Cir. 2016). This Court reviews the district court's factual findings for clear error and its conclusions of law *de novo. Id.* Although review of a denial of a preliminary inunction is normally limited to whether the district court abused its discretion, an appellate court under some circumstances may decide the merits of a case in connection with such a review. *Siegel v. Lepore*, 254 Fed. 3d 1163, 1171 n.4 (11th Cir. 2000).

Merits

A. The Appellant Has Standing to Maintain This Lawsuit

The requirements for standing, under Article III of the Constitution, are three-fold: First, the plaintiff must have suffered, or must face an imminent and not merely hypothetical prospect of suffering, an invasion of a legally protected interest resulting in a "concrete and particularized" injury. Second, the injury must have been caused by the defendant's complained-of actions. Third, the plaintiff's injury or threat of injury must likely be redressable by a favorable court decision. *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1159 (11th Cir.2008). An injury sufficient for standing purposes is "an invasion of a legally protected

interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, (1992).

In the voting context, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue," *Baker v. Carr*, 369 U.S. 186, 206, (1962), so long as their claimed injuries are "distinct from a 'generally available grievance about the government,'" *Gill v. Whitford*, 138 S.Ct. 1916, 1923 (2018)(quoting *Lance v. Coffman*, 549 U.S. 437, 439, 1 (2007) (per curiam)).

Contrary to the District Judge's conclusion (DE 54 at 12), Plaintiff Wood consistent with several constitutional provisions, established an injury sufficient for standing. Specifically, under the Fourteenth Amendment of the U.S. Constitution, a state may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Fourteenth Amendment is one of several constitutional provisions that "protects the right of all qualified citizens to vote, in state as well as federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). Because the Fourteenth Amendment protects not only the "initial allocation of the franchise," as well as "the manner of its exercise," *Bush v. Gore*, 531 U.S. 98, 104, (2000), "lines may not be drawn which are inconsistent with the Equal

Protection Clause ....” *Id*. at 105 (citing *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966)).

The Supreme Court has identified two theories of voting harms prohibited by the Fourteenth Amendment. First, the Court has identified a harm caused by “debasement or dilution of the weight of a citizen's vote,” also referred to “vote dilution.” *Reynolds*, 377 U.S. at 555. Plaintiff presented a dilution claim below.

Second, the Supreme Court has found that the Equal Protection Clause is violated where the state, “[h]aving once granted the right to vote on equal terms,” through “later arbitrary and disparate treatment, value[s] one person's vote over that of another.” *Bush*, 531 U.S. at 104-05 (2000); see also *Baker v. Carr*, 369 U.S. 186, 208 (1962) (“A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box.”) (internal citations omitted). The Plaintiff supplied evidence in the form of numerous affidavits (D.E. 6 at Page 45-54; DE 7, DE 20, DE 30, and DE 35) outlining numerous irregularities in the actual re-counting of votes including attributing the votes of one candidate to the other, the failure of counters to compare signatures on absentee ballots with other signatures on file, processing of absentee ballots that appear to be counterfeit

because they had no creases indicative of having been sent by mail, and the manner in which they were bubbled in, not allowing observers sufficient access to meaningfully observe the counting and concluding fraudulent conduct occurred during the vote re-counting as well as the live testimony of Susan Voyles. These irregularities rise to the level of an unconstitutional impairment and dilution of the Plaintiff's vote.

The second theory of voting harm requires courts to balance competing concerns around access to the ballot. On the one hand, a state should not engage in practices which prevent qualified voters from exercising their right to vote. A state must ensure that there is "no preferred class of voters but equality among those who meet the basic qualifications." *Gray v. Sanders*, 372 U.S. 368, 379-80, 83 (1963). On the other hand, the state must protect against "the diluting effect of illegal ballots." *Id*. at 380. Because "the right to have one's vote counted has the same dignity as the right to put a ballot in a box," *id.*, the vote dilution occurs only where there is both "arbitrary and disparate treatment." *Bush*, 531 U.S. at 105. To this end, states must have "specific rules designed to ensure uniform treatment" of a voter's ballot. *Id*. at 106.

In *Bush*, the Supreme Court held that, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value

one person's vote over that of another." 531 U.S. at 104-05. Plaintiff argued below that he has been subjected to arbitrary and disparate treatment because he voted under one set of rules, and other voters, through the guidance in the unlawful consent agreement, were permitted to vote invalidly under a different and unequal set of rules, and that this is a concrete and particularized injury.

For the purposes of determining whether Plaintiff has standing, is it not "necessary to decide whether [Plaintiff's] allegations of impairment of his vote" by Defendants' actions "will, ultimately, entitle them to any relief," *Baker*, 369 U.S. at 208; whether a harm has occurred is best left to this court's analysis of the merits of Plaintiff's claims. Instead, the appropriate inquiry is, "[i]f such impairment does produce a legally cognizable injury," whether Plaintiff "is among those who have sustained it." *Baker*, 369 U.S. at 208.

For purposes of standing, a denial of equal treatment is an actual injury even when the complainant is able to overcome the challenged barrier:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 666 (1993).

The Supreme Court has rejected the argument that an injury must be "significant"; a small injury, "an identifiable trifle," is sufficient to confer standing. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n. 14, 93 (1973). Plaintiff Wood submits that he has suffered an injury sufficient to confer standing. "A plaintiff need not have the franchise wholly denied to suffer injury. Any concrete, particularized, non-hypothetical injury to a legally protected interest is sufficient." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005).

For instance, requiring a registered voter to produce photo identification to vote in person, but not requiring a voter to produce identification to cast an absentee or provisional ballot is sufficient to demonstrate disparate treatment and thus, an injury sufficient for standing.

Additionally, the inability of a voter to pay a poll tax, for example, is not required to challenge a statute that imposes a tax on voting, *see Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966), and the lack of an acceptable photo identification is not necessary to challenge a statute that requires photo identification to vote in person. Because Plaintiff Wood has demonstrated that the

unlawful "Consent Agreement" subjected him to arbitrary and disparate treatment, vis-à-vis, other voters, he has clearly suffered a sufficient injury. See also *Roe v. Alabama*, 43 F. 3d 574, 580-581 (11th Cir. 1995)(voter and candidates in statewide election had standing to allege violation of their constitutional rights based on the counting of improperly completed absentee ballots, which diluted votes of the voters who met requirements of absentee ballot statute and those who went to the polls on election day.)

B. The Appellees Instituted a Procedure for Processing Absentee Ballots That Conflicts with State Law and is Unconstitutional

The Elections Clause of the United States Constitution states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives *shall be prescribed in each State by the Legislature thereof;* but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." U.S. Const. Art. I, § 4, cl. 1 (emphasis added); *(see* DE 5 Compl., at 12). Regulations of congressional and presidential elections, thus, "must be in accordance with the method which the state has prescribed for legislative enactments." *Smiley v. Holm*, 285 U.S. 355, 367 (1932); *see also Ariz. St. Leg. v. Ariz. Indep. Redistricting Comm'n,*

576 U.S. 787, 807-08 (2015); *(see* DE 5 Compl. at 13). In Georgia, the "legislature" is the General Assembly (the "Georgia Legislature"). *See* Ga. Const. Art. III, § I, Para. I; *(see* DE 5 Compl., at 14).

The Supreme Court of Georgia has recognized that statutes delegating legislative authority violate constitutional nondelegation and separation of powers. *Premier Health Care Investments, LLC. v. UHS of Anchor*, LP, 220 WL 5883325 (Ga. 2020). The non-delegation doctrine is rooted in the principle of separation of powers in that the integrity of the tripartite system of government mandates the general assembly not divest itself of the legislative power granted to it by the State Constitution. *Department of Trans. v. City of Atlanta*, 260 Ga. 699, 703 (Ga. 1990)(finding OCGA § 50-16-180 through 183 created an impermissible delegation of legislative authority). See also *Mitchell v. Wilkerson, 258 Ga. 608, 610 (Ga. 1988)*(election recall statute's attempt to transfer the selection of the reasons to the applicant amounted to an impermissible delegation of legislative authority.)

Because the Constitution reserves for state legislatures the power to set the time, place, and manner of holding federal elections, state executive officers have no authority to unilaterally exercise that power, much less flout existing

legislation, nor to ignore existing legislation. (*See* DE 5 Compl., at 15.) While the Elections Clause "was not adopted to diminish a State's authority to determine its own lawmaking processes," it does hold states accountable to their chosen processes in regulating federal elections. *Ariz. St. Leg.*, 135 S.Ct. at 2677, 2668.

In *North Fulton Med. Center v. Stephenson*, 269 Ga. 540 (Ga. 1998), a hospital outpatient surgery center which had already relocated to a new site and commenced operations applied to the State Health Planning Agency for a certificate of need under the agency's second relocation rule, which certificate was provided by the agency. A competitor sought appellate relief and the Georgia Supreme Court held that the agency rule conflicted with the State Health Planning Act, and thus, was invalid and had to be stricken. Additionally, the supreme court held that the rule was the product of the agency's unconstitutional usurpation of the general assembly's power to define the thing to which the statute was to be applied. *Id* at 544. See also *Moore v. Circosta*, 2020 WL 6063332 (MDNC October 14, 2020)(North Carolina State Board of Elections exceeded its statutory authority when it entered into consent agreement and eliminated witness requirements for mail-in ballots).

The Framers of the Constitution were concerned with just such a

usurpation of authority by State administrators. In Federalist No. 59, Alexander Hamilton defended the Elections Clause by noting that "a discretionary power over elections ought to exist somewhere (emphasis supplied) and then discussed why the Article 1, Clause 4 "lodged [the power]… primarily in the [State legislatures] and ultimately in the [Congress]." He defended the right of Congress to have the ultimate authority, observing that even though granting this right to states was necessary to secure their place in the national government, that power had to be subordinate to the Congressional mandates to prevent what could arise as the "sinister designs in the leading members of a few of the State legislatures."

Hamilton feared that the state legislatures might conspire against the Union but also that "influential characters in the State administrations" might "prefer[] their own emolument and advancement to the public weal." But in concluding his defense of this constitutional compromise, Hamilton noted that the Clause was designed to commit to the guardianship of election "those whose situation will uniformly beget an immediate interest in the faithful and vigilant performance of the trust."

The procedures for processing and rejecting ballots employed by the Defendants during the election. (See page ____, *infra)* constitute a

usurpation of the legislator's plenary authority. This is because the procedures are not consistent with- *and in fact conflict with*- the statute adopted by the Georgia Legislature governing processing of absentee ballots. *(See* DE 5 Compl., 34.) First, the Litigation Settlement overrides the clear statutory authorities granted to County Officials individually and forces them to form a committee of three if any one official believes that an absentee ballot is a defective absentee ballot. *(See* DE 5 Compl., 35.) Such a procedure creates a cumbersome bureaucratic procedure to be followed with each defective absentee ballot – and makes it likely that such ballots will simply not be identified by the County Officials. *(See id.,* 36.)

Second, the Litigation Settlement allows a County Official to compare signatures in ways not permitted by the statutory structure created by the Georgia Legislature. *(See id.,* 37.) The Georgia Legislature prescribed procedures to ensure that any request for an absentee ballot must be accompanied by sufficient identification of the elector's identity. *See* O.C.G.A. § 21-2-381(b)(1) (providing, in pertinent part, "In order to be found eligible to vote an absentee ballot in person at the registrar's office or absentee ballot clerk's office, such person shall show one of the forms of identification listed in Code Section 21-2-417 ..."); *(see* DE 5 Compl., 38.) Under

O.C.G.A. § 21-2-220(c), the elector must present identification, but need not submit identification if the electors submit with their application information such that the County Officials are able to match the elector's information with the state database, generally referred to as the eNet system. *(See* DE 5 Compl., 39.) The system for identifying absentee ballots was carefully constructed by the Georgia Legislature to ensure that electors were identified by acceptable identification, but at some point in the process, the Georgia Legislature mandated the system whereby the elector be identified for each absentee ballot. *(See* DE 5 Compl., 40.) Under the Litigation Settlement, any determination of a signature mismatch would lead to the cumbersome process described in the settlement, which was not intended by the Georgia Legislature, which authorized those decisions to be made by single election officials. *(See id.,* 41.) The Georgia Legislature also provided for the opportunity to cure (again, different from the opportunity to cure in the Litigation Settlement), but did not allocate funds for three County Officials for every mismatch decision. *(See id.,* 42.)

Finally, under paragraph 4 of the Litigation Settlement, the Administrators delegated their responsibilities for determining when there was a signature mismatch by considering in good faith "additional guidance

and training materials" drafted by the "handwriting and signature review expert" of the Democrat Agencies. *(See* DE 5 Compl., at 47; *see* Ex. A, Litigation Settlement, p. 4, at 4, "Consideration of Additional Guidance for Signature Matching.") Allowing a single political party to write rules for reviewing signatures is not "conducive to the fair...conduct of primaries and elections" or "consistent with law" under O.C.G.A. § 21-2-31. *(See* DE 5 Compl., at 48.)

In short, the Litigation Settlement by itself has created confusion, misplaced incentives, and undermined the confidence of the voters of the State of Georgia in the electoral system. *(See* DE 5 Compl., at 49.) Neither it nor any of the activities spawned by it were authorized by the Georgia Legislature, as required by the United States Constitution. *(See* DE 5 Compl., at 50.)

"A consent degree must of course be modified, if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under Federal law." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367388 (1992). As such, the lower court should be reversed and the injunction requested below should be granted.

C. The Appellees' Procedure for Processing Absentee Ballots Violates Appellant's Rights to Equal Protection under the United States Constitution

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. This constitutional provision requires "that all persons similarly situated should be treated alike." *City of Cleburne v. Clerburn Living Center*, 473 U.S. 432, 439 (1985).

And this applies to voting. "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). The appellees have failed to ensure that Georgia voters are treated equally regardless of whether they vote in person or through absentee ballot. Under the Equal Protection Clause of the 14th amendment, a state cannot utilize election practices that unduly burden the right to vote or that dilute votes.

When deciding a constitutional challenge to state election laws, the flexible standard outlined in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992) applies. Under *Anderson* and *Burdick*,

courts must "weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (citations and quotations omitted). "[E]ven when a law imposes only a slight burden on the right to vote, relevant and legitimate interests of sufficient weight still must justify that burden." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318-19 (11th Cir. 2019).

"To establish an undue burden on the right to vote under the *Anderson-Burdick* test, Plaintiffs need not demonstrate discriminatory intent behind the signature-match scheme or the notice provisions because we are considering the constitutionality of a generalized burden on the fundamental right to vote, for which we apply the *Anderson-Burdick* balancing test instead of a traditional equal protection inquiry." *Lee*, 915 F.3d at 1319.

Plaintiff's equal protection claim is straightforward: states may not, by arbitrary action or other unreasonable impairment, burden a citizen's right to vote. *See Baker v. Carr*, 369 U.S. 186, 208 (1962) ("citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a

right secured by the Constitution"). "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value on person's vote over that of another." *Bush*, 531 U.S. at 104-05. Among other things, this requires "specific rules designed to ensure uniform treatment" in order to prevent "arbitrary and disparate treatment to voters." *Id.* at 106-07; *see also Dunn v. Bloomstein*, 405 U.S. 330, 336 (1972) (providing that each citizen "has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction").

"The right to vote extends to all phases of the voting process, from being permitted to place one's vote in the ballot box to having that vote actually counted. Thus, the right to vote applies equally to the initial allocation of the franchise as well as the manner of its exercise. Once the right to vote is granted, a state may not draw distinctions between voters that are inconsistent with the guarantees of the Fourteenth Amendment's equal protection clause." *Pierce v. Allegheny County Bd. of Elections*, 324 F.Supp.2d 684, 695 (W.D. Pa. 2003) (citations and quotations omitted). "[T]reating voters differently" thus "violate[s] the Equal Protection Clause" when the disparate treatment is the result of arbitrary, ad hoc processes. *Charfauros v. Bd. of Elections*, 249 F.3d

941, 954 (9th Cir. 2001). Indeed, a "minimum requirement for non-arbitrary treatment of voters [is] necessary to secure the fundamental right [to vote]." *Bush*, 531 U.S. at 105.

Defendants are not part of the Georgia Legislature and cannot exercise legislative power to enact rules or regulations regarding the handling of defective absentee ballots that are contrary to the Georgia Election Code. By entering the Litigation Settlement, however, Defendants unilaterally and without authority altered the Georgia Election Code and the procedure for processing defective absentee ballots. The result is that absentee ballots have been processed differently by County Officials than the process created by the Georgia Legislature and set forth in the Georgia Election Code. Further, allowing a single political party to write rules for reviewing signatures, as paragraph 4 of the Litigation Settlement provides, is not "conducive to the fair...conduct of primaries and elections" or "consistent with law" under O.C.G.A. § 21-2-31.

The rules and regulations set forth in the Litigation Settlement created an arbitrary, disparate, and ad hoc process for processing defective absentee ballots, and for determining which of such ballots should be "rejected," contrary to Georgia law. *See* O.C.G.A. § 21-2-386; *(see also* DE 5 Ex. A, Litigation Settlement, p. 3-4, if 3, "Signature Match"). This disparate treatment

is not justified by, and is not necessary to promote, any substantial or compelling state interest that cannot be accomplished by other, less restrictive means. As such, Plaintiff has been harmed by Defendants' violations of his equal protection rights, and an injunction should have been issued below. Accordingly, the district court erred in not finding the Plaintiff had a substantial likelihood of success on the merits.

Moreover, the irreparable nature of the harm to Plaintiff is apparent. "It is well-settled that an infringement on the fundamental right to vote amounts in an irreparable injury." *New Ga. Project v. Raffensperger*, 2020 WL 5200930 at *26 (N.D. Ga. Aug. 31, 2020). Indeed, the violation of a constitutional right must weigh heavily in the irreparable harm analysis on a motion for preliminary injunction. *Fish*, 840 F. 3d at 752. Further, because there can be no do-over or redress of a denial of the right to vote after an election becomes final, denial or impairment of the right to vote weighs heavily in determining the existence of irreparable harm. *Id*.

If the Georgia vote count, including defective absentee ballots that were not processed according to the Georgia Election Code, is permitted to stand, and if the same procedure is in place during the upcoming Senatorial runoff

election, then Georgia's election results are and will continue to be improper, illegal, and therefore unconstitutional. Plainly, there is no adequate remedy at law if this occurs.

The remaining two factors for the preliminary injunction test, "harm to the opposing party and weighing the public interest merge when the Government is the opposing party." *New Ga. Project v. Raffensperger*, 2020 WL 5200930 at *26 *(quoting Nken v. Holder*, 556 U.S. 418, 435 (2009) (alternations and punctuation omitted).

The fact that the State has certified the Georgia purported election results does not moot the Plaintiff's lawsuit because this litigation is ongoing. Plaintiff's fundamental right to vote continues to be impaired, President Trump has officially requested a recount and the constitutionally improper procedure would be employed in the recount, as well as in the upcoming Senatorial runoff election in January. *Siegel*, 234 F. 3d at 1372.

If the certified result is permitted to stand, and if the upcoming Senatorial runoff election is run according to the same unconstitutional process, the Plaintiff (and the citizens of Georgia) will be permanently harmed by the Defendants' infringement on Plaintiff's voting rights. *New Ga. Project v. Raffensperger*, 2020 WL 5200930 at *26-27 (concluding that movant satisfied balance of

harms/public interest factors, as "Plaintiffs will be forever harmed if they are unconstitutionally deprived of their right to vote").

Nor should the doctrine of latches operate to bar Plaintiff's claims. The lawsuit was filed within days of the election and until the Plaintiff cast his vote and all votes were purportedly in, Plaintiff had not suffered an injury. In any event, delay in seeking preliminary relief is only one factor to be considered among others, and there is no categorical rule that delay bars the issuance of an injunction. *Fish*, 840 F. 3d at 753.

Moreover, the public will be served by the relief requested. "[T]he public has a strong interest in exercising the fundamental political right to vote. That interest is best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful. The public interest therefore favors permitting as many qualified voters to vote as possible," and having those votes properly processed and tallied pursuant to Georgia law. *Obama for Am. v. Husted*, 697 F.3d 423, 436-37 (6th Cir. 2012) (citations and quotations omitted). As such, this Court should direct or reverse with instructions that the trial court direct that the election must be re-done in a constitutionally permissible manner.

CONCLUSION

For the reasons stated above, the District Court's order should be reversed with instructions to grant the Plaintiff 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 Defendants to cure said deficiencies in a manner consisted with Federal and Georgia law, and not in accordance with the improper procedures established in the litigation settlement. Further, the Defendants should be enjoined from employing the constitutionally defective procedures in the re-count requested by President Trump and in the upcoming Senatorial runoff election.

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 November ____, 2020.:

SMITH & LISS, LLC

_____

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