

No. 20-13360

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In the  
**United States Court of Appeals**  
**for the Eleventh Circuit**

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THE NEW GEORGIA PROJECT; REAGAN JENNINGS;  
CANDACE WOODALL; AND BEVERLY PYNE,  
*Plaintiffs,*

v.

BRAD RAFFENSPERGER, in his official capacity as Secretary of  
State of Georgia and the Chair of the Georgia State Election  
Board; and REBECCA N. SULLIVAN, DAVID J. WORLEY,  
MATTHEW MASHBURN, and ANH LE, in their official  
capacities as Members of the Georgia State Election Board,  
*Defendants-Appellants.*

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On Appeal from the United States District Court for the  
Northern District of Georgia, Atlanta Division.  
No. 1-20-CV-01986 — Eleanor Ross, *Judge*

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**MOTION TO STAY INJUNCTION PENDING APPEAL**

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**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rules 26.1-1 through 26.1-3, counsel for Defendants-Appellants hereby certify that the below is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal.

1. Aiken, Fred: Member of the Cobb County Board of Registration and Elections and defendant in the underlying case.
2. Andrews, Wanda: Member of the Chatham County Board of Registrars and defendant in the underlying case.
3. Augusta Georgia Law Department: Counsel for defendants Sherry T. Barnes, Marcia Brown, Terrence Dicks, Bob Finnegan, and Tim McFalls, members of the Richmond County Board of Elections, in the underlying case.
4. Bahl, Neera: Member of the Cobb County Board of Registration and Elections and defendant in the underlying case.

5. Baldwin, Beauty: Member of the Gwinnett County Board of Registration and Elections and defendant in the underlying case.
6. Barger, Gerald: Member of the Rockdale County Board of Elections and Voter Registration and defendant in the underlying case.
7. Barham, Gary: Former defendant in the underlying case. Terminated 6-17-2020.
8. Barnes, Sherry T.: Member of the Richmond County Board of Elections and defendant in the underlying case.
9. Belinfante, Joshua Barrett: Counsel for Appellants.
10. Blender, Matthew: Member of the Forsyth County Board of Registrations and Elections and defendant in the underlying case.
11. Boughey, Timothy M.: Counsel for defendants David C. Fedack, Myesha Good, Maurice Hurry, Robert Proctor, and Daniel Zimmermann, members of the Douglas County Board of Elections and Registration, in the underlying case.

12. Brinson, Askew, Berry, Seigler, Richardson & Davis, LLP: Counsel for defendants Jesse Evans, Willa Fambrough, Charles Knapper, and Ann Till, members of the Athens-Clarke County Board of Elections and Voter Registration, in the underlying case.
13. Brooks, Jessica M.: Member of the Cobb County Board of Registration and Elections and defendant in the underlying case.
14. Brown, Arch: Member of the Henry County Board of Elections and Registration and defendant in the underlying case.
15. Brown, Marcia: Member of the Richmond County Board of Elections and defendant in the underlying case.
16. Caldwell Propst & DeLoach, LLP: Counsel for Public Interest Legal Foundation, amicus curiae in the underlying case.
17. Callais, Amanda R.: Counsel for Appellees-Plaintiffs The New Georgia Project, Reagan Jennings, Candace Woodall and Beverly Pyne.

18. Callaway, Andy: Member of the Henry County Board of Elections and Registration and defendant in the underlying case.
19. Carr, Christopher Michael: Counsel for Appellants.
20. Chatham County Attorney: Counsel for defendant Colin Mcrae, member of the Chatham County Board of Registrars, in the underlying case.
21. Clark, Jr., James Clinton: Counsel for Uhland Roberts, Margaret Jenkins, Diane Scrimshire, and Eleanor White, members of the Columbus-Muscogee County Board of Elections in the underlying case.
22. Clemmons, Dee: Former defendant in the underlying case. Terminated 6-17-2020.
23. Cole, David Alan: Counsel for defendants David C. Fedack, Myesha Good, Maurice Hurry, Robert Proctor, and Daniel Zimmermann, members of the Douglas County Board of Elections and Registration, in the underlying case.
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25. Cooney, Mary Carole: Member of the Fulton County Board of Registration and Elections and defendant in the underlying case.
26. Daniell, Phil: Member of the Cobb County Board of Registration and Elections and defendant in the underlying case.
27. Day, Stephen: Member of the Gwinnett County Board of Registration and Elections and defendant in the underlying case.
28. DeKalb County Law Department: Counsel for defendants Anthony Lewis, Susan Motter, Dele Lowman Smith, Samuel E. Tillman, and Baoky N. Vu, members of the DeKalb County Board of Registration and Elections, in the underlying case.
29. Denton, Alexander Fraser: Counsel for Appellants.
30. Dicks, Terrence: Member of the Richmond County Board of Elections and defendant in the underlying case.

31. Elias, Marc E.: Counsel for Appellees-Plaintiffs The New Georgia Project, Reagan Jennings, Candace Woodall, and Beverly Pyne.
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33. Fambrough, Willa: Member of the Athens-Clarke County Board of Elections and Voter Registration and defendant in the underlying case.
34. Fedack, David C.: Member of the Douglas County Board of Elections and Registration and defendant in the underlying case.
35. Ficklin, Henry: Member of the Macon-Bibb County Board of Elections and defendant in the underlying case.
36. Finnegan, Bob: Member of the Richmond County Board of Elections and defendant in the underlying case.
37. Forys, Matthew C.: Counsel for Landmark Legal Foundation, amicus curiae in the underlying case.



38. Freeman Mathis & Gary, LLP: Counsel for defendants David C. Fedack, Myesha Good, Maurice Hurry, Robert Proctor, and Daniel Zimmermann, members of the Douglas County Board of Elections and Registration, in the underlying case; and counsel for defendants Diane Givens, Dorothy Foster Hall, Darlene Johnson, Patricia Pullar, and Carol Wesley, members of the Clayton County Board of Elections and Registration, in the underlying case.
39. Georgia Attorney General's Office: Counsel for Appellants.
40. Givens, Diane: Member of the Clayton County Board of Elections and Registration and defendant in the underlying case.
41. Good, Myesha: Member of the Douglas County Board of Elections and Registration and defendant in the underlying case.
42. Hall, Dorothy Foster: Member of the Clayton County Board of Elections and Registration and defendant in the underlying case.

43. Hamilton, Kevin J.: Counsel for Appellees-Plaintiffs The New Georgia Project, Reagan Jennings, Candace Woodall, and Beverly Pyne.
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49. Hicks, Darry: Member of the Fayette County Board of Elections and Voter Registration and defendant in the underlying case.
50. Holstein, Stephanie R.: Counsel for Appellees-Plaintiffs The New Georgia Project, Reagan Jennings, Candace Woodall, and Beverly Pyne.
51. Hurry, Maurice: Member of the Douglas County Board of Elections and Registration and defendant in the underlying case.
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Registration and Elections, in the underlying case; and defendants Darry Hicks, Addison Lester, and Aaron Wright, members of the Fayette County Board of Elections and Voter Registration, in the underlying case.

54. James, Karen: Member of the Rockdale County Board of Elections and Voter Registration and defendant in the underlying case.
55. Jarrard & Davis LLP: Counsel for defendants Matthew Blender, Randy Ingram, Barbara Luth, Joel Natt, and Carla Radzikinas, members of the Forsyth County Board of Registrations and Elections in the underlying case; defendants Arch Brown, Andy Callaway, Donna Morris-McBride, Dan Richardson, Mildred Schmelz, Vivian Thomas, and Johnny Wilson, members of the Henry County Board of Elections and Registration, in the underlying case; defendants Phil Johnson, Kelly Robinson, and Dustin Thompson, members of the Newton County Board of Elections and Registration, in the underlying case; and defendants Benny G. Hand, Pamela Middleton,

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58. Jennings, Reagan: Appellee-Plaintiff.
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60. Johnson, Darlene: Member of the Clayton County Board of Elections and Registration and defendant in the underlying case.
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62. Johnson, Phil: Member of the Newton County Board of Elections and Registration and defendant in the underlying case.
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79. Mangano, John: Member of the Gwinnett County Board of Registration and Elections and defendant in the underlying case.
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82. Mashburn, Matthew: Member of the Georgia State Election Board and Appellant-Defendant.
83. McFalls, Tim: Member of the Richmond County Board of Elections and defendant in the underlying case.
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85. Mcrae, Colin: Member of the Chatham County Board of Registrars and defendant in the underlying case.
86. Middleton, Pamela: Member of the Albany-Dougherty County Joint Board of Registration and Elections and defendant in the underlying case.

87. Miller, Carey Allen: Counsel for Appellants.
88. Momo, Shelley Driskell: Counsel for defendants Anthony Lewis, Susan Motter, Dele Lowman Smith, Samuel E. Tillman, and Baoky N. Vu, members of the DeKalb County Board of Registration and Elections, in the underlying case.
89. Morris-McBride, Donna: Member of the Henry County Board of Elections and Registration and defendant in the underlying case.
90. Motter, Susan: Member of the DeKalb County Board of Registration and Elections and defendant in the underlying case.
91. Natt, Joel: Member of the Forsyth County Board of Registrations and Elections and defendant in the underlying case.
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96. Nuriddin, Vernetta: Member of the Fulton County Board of Registration and Elections and defendant in the underlying case.
97. O'Lenick, Alice: Member of the Gwinnett County Board of Registration and Elections and defendant in the underlying case.
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100. Pannell, Jon: Member of the Chatham County Board of Registrars and defendant in the underlying case.

101. Paradise, Loree Anne: Counsel for defendants Beauty Baldwin, Stephen Day, John Mangano, Alice O'Lenick, and Ben Satterfield, members of the Gwinnett County Board of Registration and Elections, in the underlying case; and defendants Darry Hicks, Addison Lester, and Aaron Wright, members of the Fayette County Board of Elections and Voter Registration, in the underlying case.

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120. Robin, Kenneth Paul: Counsel for defendants Matthew Blender, Randy Ingram, Barbara Luth, Joel Natt, and Carla Radzikin, members of the Forsyth County Board of Registrations and Elections in the underlying case; defendants Arch Brown, Andy Callaway, Donna Morris-McBride, Dan Richardson, Mildred Schmelz, Vivian Thomas, and Johnny Wilson, members of the Henry County Board of Elections and Registration, in the underlying case; defendants Phil Johnson, Kelly Robinson, and Dustin Thompson, members of the Newton County Board of Elections and Registration, in the underlying case; and defendants Benny G. Hand, Pamela Middleton, Dontravious Simmons, Annabelle T. Stubbs, and Frederick Williams, members of the Albany-Dougherty County Joint Board of Registration and Elections, in the underlying case.
121. Robinson, Kelly: Member of the Newton County Board of Elections and Registration and defendant in the underlying case.

122. Ross, Hon. Eleanor L.: United States District Judge for the Northern District of Georgia and judge in the underlying case.
123. Russo, Jr., Vincent Robert: Counsel for Appellants.
124. Ruiz, Christian Ramses: Counsel for Appellees-Plaintiffs The New Georgia Project, Reagan Jennings, Candace Woodall, and Beverly Pyne.
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126. Sadler, Sr., Aldren: Member of the Rockdale County Board of Elections and Voter Registration and defendant in the underlying case.
127. Satterfield, Ben: Member of the Gwinnett County Board of Registration and Elections and defendant in the underlying case.
128. Schmelz, Mildred: Member of the Henry County Board of Elections and Registration and defendant in the underlying case.



129. Scrimshire, Diane: Member of the Columbus-Muscogee County Board of Elections and defendant in the underlying case.
130. Simmons, Dontravious M.: Member of the Albany-Dougherty County Joint Board of Registration and Elections and defendant in the underlying case.
131. Slay, Randolph: Member of the Chatham County Board of Registrars and defendant in the underlying case.
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135. Sowell, Gregory C.: Counsel for defendants Jesse Evans, Willa Fambrough, Charles Knapper, and Ann Till, members of the Athens-Clarke County Board of Elections and Voter Registration, in the underlying case.
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138. Stubbs, Annabelle T.: Member of the Albany-Dougherty County Joint Board of Registration and Elections and defendant in the underlying case.
139. Sullivan, Rebecca N.: Member of the Georgia State Election Board and Appellant-Defendant.
140. Taylor English Duma LLP: Counsel for defendants Beauty Baldwin, Stephen Day, John Mangano, Alice O'Lenick, and Ben Satterfield, members of the Gwinnett County Board of Registration and Elections, in the underlying case; and defendants Darry Hicks, Addison Lester, and Aaron

Wright, members of the Fayette County Board of Elections and Voter Registration, in the underlying case.

141. The New Georgia Project: Appellee-Plaintiff.
142. Thomas, Vivian: Member of the Henry County Board of Elections and Registration and defendant in the underlying case.
143. Thompson, Dustin: Member of the Newton County Board of Elections and Registration and defendant in the underlying case.
144. Till, Ann: Member of the Athens-Clarke County Board of Elections and Voter Registration and defendant in the underlying case.
145. Tillman, Samuel E: Member of the DeKalb County Board of Registration and Elections and defendant in the underlying case.
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147. Tyson, Bryan P.: Counsel for defendants Beauty Baldwin, Stephen Day, John Mangano, Alice O'Lenick, and Ben Satterfield, members of the Gwinnett County Board of Registration and Elections, in the underlying case; and defendants Darry Hicks, Addison Lester, and Aaron Wright, members of the Fayette County Board of Elections and Voter Registration, in the underlying case.
148. Vander Els, Irene B.: Counsel for defendants Anthony Lewis, Susan Motter, Dele Lowman Smith, Samuel E. Tillman, and Baoky N. Vu, members of the DeKalb County Board of Registration and Elections, in the underlying case.
149. Vu, Baoky N.: Member of the DeKalb County Board of Registration and Elections and defendant in the underlying case.
150. Webb, Bryan K.: Counsel for Appellants.
151. Wesley, Carol: Member of the Clayton County Board of Elections and Registration and defendant in the underlying case.

152. White, Daniel Walter: Counsel for defendants Fred Aiken, Neera Bahl, Jessica M. Brooks, Phil Daniell, and Darryl O. Wilson, members of the Cobb County Board of Registration, in the underlying case.
153. White, Eleanor: Member of the Columbus-Muscogee County Board of Elections and defendant in the underlying case.
154. Willard, Russell D.: Counsel for Appellants.
155. Williams, Frederick: Member of the Albany-Dougherty County Joint Board of Registration and Elections and defendant in the underlying case.
156. Wilson, Jr., Darryl O.: Member of the Cobb County Board of Registration and Elections and defendant in the underlying case.
157. Wilson, Johnny: Former defendant in the underlying case. Terminated 6-17-2020.
158. Wilson, Rinda: Member of the Macon-Bibb County Board of Elections and defendant in the underlying case.

159. Wingate, Mark: Member of the Fulton County Board of Registration and Elections and defendant in the underlying case.
160. Wood, June: Former defendant in the underlying case. Terminated 6-17-2020.
161. Woodall, Candace: Appellee-Plaintiff.
162. Worley, David J.: Member of the Georgia State Election Board and Appellant-Defendant.
163. Wright, Aaron: Member of the Fayette County Board of Elections and Voter Registration and defendant in the underlying case.
164. Zimmermann, Daniel: Member of the Douglas County Board of Elections and Registration and defendant in the underlying case.

**CORPORATE DISCLOSURE STATEMENT**

Counsel for Appellants certify that Appellants are individuals, sued in their official capacities as representatives of State government entities. Counsel for Appellants further certify that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

*/s/ Josh Belinfante*  
Josh Belinfante

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In the  
**United States Court of Appeals**  
for the Eleventh Circuit

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**THE NEW GEORGIA PROJECT; REAGAN JENNINGS;  
CANDACE WOODALL; AND BEVERLY PYNE,**  
*Plaintiffs,*

v.

**BRAD RAFFENSPERGER, in his official capacity as Secretary of  
State of Georgia and the Chair of the Georgia State Election  
Board; and REBECCA N. SULLIVAN, DAVID J. WORLEY,  
MATTHEW MASHBURN, and ANH LE, in their official capacities  
as Members of the Georgia State Election Board,**  
*Defendants-Appellants.*

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On Appeal from the United States District Court for the  
Northern District of Georgia, Atlanta Division.  
No. 1-20-CV-01986 — Eleanor Ross, *Judge*

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**MOTION TO STAY INJUNCTION PENDING APPEAL**

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Appellants Brad Raffensperger, in his official capacity as Secretary of State and the Chair of the Georgia State Election Board, State Election Board Members Sullivan, Worley, Le, and Mashburn (“State Defendants”) move this Court to stay pending appeal the injunction ordered by the district court of August 31, 2020 granting in part preliminary injunctive relief to Appellees The New Georgia Project, Jennings, Woodall, and Pyne (“Plaintiffs”).

The United States Supreme Court has repeatedly cautioned against judicial experimentation with elections, particularly when courts order ill-defined “relief” in close proximity to the election. *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (“*RNC*”) (citing *Purcell v. Gonzalez*, 549 U. S. 1 (2006) (per curiam)). When other district courts have entered injunctive relief in close proximity to elections this year, the Supreme Court and circuit courts have repeatedly stayed those orders. *See id.*; *Clarno v. People Not Politicians*, 2020 WL 4589742 (U.S. Aug. 11, 2020); *Little v. Reclaim Idaho*, No. 20A18, 2020 WL 4360897, at \*2 (U.S. July 30, 2020); *Merrill v. People First of Ala.*, No. 19A1063, 2020 WL 3604049, \*1 (U.S. July 2, 2020); *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (June 26, 2020) (denying motion to vacate stay); *Thompson v. DeWine*, No. 19A1054, 2020 WL 3456705, at \*1 (U.S. June 25, 2020) (denying motion to vacate stay); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 397 (5th Cir. June 4, 2020); *Thompson v. DeWine*, 959 F.3d 804, 813 (6th Cir. May 26, 2020) (per curiam). This case should be no different.

Nearly two weeks before the start of absentee voting in the 2020 General Election, the lower court changed the rules for voters and elections officials running the election in Georgia. The court’s order court enjoined State Defendants and 17 county boards of elections from enforcing Georgia law, O.C.G.A. § 21-2-386(a)(1)(F), that requires



absentee ballots to be received by county registrars by 7:00 p.m. on Election Day to be counted (the “Election Day Deadline”). [Doc. 134 at 69].<sup>1</sup> The order also requires all defendants to “accept and count otherwise valid absentee ballots from qualified voters that are postmarked by Election Day, and arrive at their respective county’s office within three (3) business days of Election Day by 7:00 p.m.” [Doc. 134 at 69-70]. But 142 counties in Georgia and the Governor, who enumerates and ascertains the votes for presidential electors, are not subject to the order, and deciphering whether a ballot has a valid and timely postmark pursuant to the order inserts new subjective considerations into the administrative process.

In the wake of the district court’s order, three things are certain. One, voters will be confused: ballots already have preprinted instructions that refer to the Election Day Deadline in contradiction of the district court’s order. Two, the cure period for voters whose absentee ballots are rejected due to failure to sign the oath, a signature mismatch, or failure to provide required information will also have to be delayed. *See* O.C.G.A. § 21-2-386(a)(1)(C); *see also* Ga. Comp. R. & Regs. 183-1-14-.13. Three, ensuring election integrity will be more difficult as changing the ballot receipt deadline will likely increase instances of

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<sup>1</sup> Pincite references to ECF-stamped documents refer to the ECF page numbers. 11<sup>th</sup> Cir. R. 27-1(a)(11).

double voting. Along with the postmark directive set by the district court (which will require each county election official to determine whether a ballot received after Election Day has an imprint applied by the postal service indicating the location and date the postal service accepted custody of the ballot based on bar codes, circular stamps, or other tracking marks on the envelope [Doc. 134 at n.34]), the order's terms threaten the uniform administration of elections and timely certification of the results. Consequently, the impact of the district court's order on election administration is neither discrete nor easily manageable.

For these reasons, the Supreme Court has “repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve an election.” *RNC*, 140 S. Ct. at 1207 (citations omitted). Such last-minute challenges to longstanding election procedures are strongly disfavored because they threaten to disrupt the orderly administration of elections, which is essential to the functioning of our participatory democracy. *See, e.g., Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018). The district court's preliminary injunction is no exception: changing the Election Day Deadline injects delay and confusion into the election process. This, in turn, risks delaying the Electoral College process and disenfranchising voters in Georgia, including preventing voters from casting ballots in likely runoff elections.

State Defendants cannot and are not obligated to eliminate all burdens on voting. The Election Day Deadline has been in place for nearly fifty years, and the percentage of absentee ballots rejected as late in the June 2020 Primary was less than in recent, pre-pandemic election years. It is not an unconstitutional burden on the right to vote, even in the COVID-19 era, because the virus “has not suddenly obligated [Georgia] to do what the Constitution has never been interpreted to command.” *Abbott*, 961 F.3d at 409. Staying the preliminary injunction to allow review by this Court will ensure at least a measure of careful deliberation before upending the State’s election processes during a General Election. Indeed, it is the most consistent act this Court can take in light of binding precedent.

## STATEMENT

### A. Statutory Framework

Georgia law governing absentee voting is expansive and generous. First, *any* Georgia voter may vote by absentee ballot without showing cause or necessity. *See* O.C.G.A. § 21-2-380. Second, absentee votes will be counted as long as absentee voters deliver their absentee ballots to their county board or absentee clerk by the close of the polls on Election Day. O.C.G.A. § 21-2-386(a)(1)(F). And this deadline is made crystal clear to every absentee voter: each is required to sign an oath that the voter has read and understands the instructions accompanying their

ballot, which includes acknowledgement of and explanation of the Election Day Deadline. *See* O.C.G.A. § 21-2-384(c)(1); [Doc. 91-3 ¶5.]

Further, the time to request, receive, and return an absentee ballot is substantial. Absentee ballot requests can be made as early as 180 days before Election Day, O.C.G.A. § 21-2-381(a)(1)(A), and voters can receive absentee ballots as early as 49 days prior to Election Day, O.C.G.A. § 21-2-384(a)(2).

Georgia voters can return their absentee ballots through the mail, a drop box, hand-delivery, or early in-person voting. *See* O.C.G.A. § 21-2-385; Ga. Comp. R. & Regs. 183-1-14-0.6-.14. Voters may even vote in person after requesting and receiving their absentee ballot, so long as they properly cancel their absentee ballot. *See* O.C.G.A. § 21-2-388.

## **B. Proceedings Below**

Despite the many years this law has been on the books, the Plaintiffs in this case, a voting advocacy group and individual voters, filed an initial complaint on May 8, 2020. Almost a month later, on June 3, 2020, they filed an Amended Complaint with sweeping challenges to several Georgia election laws and procedures, including: (1) the statute governing incomplete absentee-ballot-request forms; (2) the statute allowing elderly, disabled, military, and overseas voters to request absentee ballots for an entire election cycle; (3) whether the State should provide pre-paid postage with absentee ballots; (4) the statutory

prohibition on third-party ballot harvesting; and (5) the Election Day Deadline (the “Challenged Policies”). [Doc. 33, ¶¶ 130-38.]

On June 10, 2020, Plaintiffs moved for a preliminary and mandatory injunction on each of the Challenged Policies. State Defendants responded on July 8, 2020 and filed a court-allowed sur-reply on August 12, 2020.

After a hearing, the district court granted the motion in part and denied it in part. The court denied Plaintiffs’ Motion with respect to each of the challenged policies *except* the Election Day Deadline, although the court did not grant the relief Plaintiffs requested. Despite finding 1.1 million absentee ballots were counted in the June 2020 Primary and only 7,281 ballots were rejected as late, the court found that the Election Day Deadline imposed a “severe” burden on Georgia’s voters. [Doc. 134 at 57-58, 60.] While acknowledging Georgia’s “strong” and “important” interests in conducting an efficient election, maintaining order, quickly certifying election results, and preventing voter fraud, the court found that such interests were not so compelling as to justify continued enforcement of the Election Day Deadline. *Id.* at 61. The court declined, however, to order the specific relief requested by Plaintiffs: extension of the absentee ballot receipt deadline by at least five business days. Instead, the court ordered that State Defendants and the County Defendants must “accept as otherwise valid, absentee

ballots from qualified voters that are postmarked by Election Day and arrive at their respective county's office within three (3) business days after Election Day.” *Id.* at 68. The court did not address any other deadline, policy, or practice of Georgia's elections or absentee voting process that may be affected by its order.

On September 4, 2020, State Defendants appealed and moved the district court to stay its order pending appeal. On September 16, 2020, the court denied State Defendants' Motion. [Doc. 145.] State Defendants now move this Court for a stay of the court's order pending appeal. Fed. R. App. P 8(a)(2)(A)(ii).

## ARGUMENT

### **I. A stay is warranted because the district court lacked jurisdiction to enjoin State Defendants.**

#### **A. The district court lacked jurisdiction to issue the injunction against State Defendants because Plaintiffs' injuries are not traceable to or redressable by those officials.**

Although the district court found that Plaintiffs had established an injury-in-fact to challenge the Election Day Deadline—that is, potentially not having their ballots received after the deadline counted—those claims are not likely to succeed against State Defendants because their asserted injuries are neither traceable to nor redressable by those officials. *Friends of the Earth, Inc. v. Laidlaw*

*Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (“[A] plaintiff must demonstrate standing separately for each form of relief sought.”). The State Defendants do not receive absentee ballots from voters pursuant to O.C.G.A. § 21-2-386(a)(1)(F), the statute enjoined by the district court—county election officials do. But Plaintiffs did not name the 142 other boards of election throughout the State, who will not be bound by the district court’s order.

For these reasons, this case presents the same standing problem regarding the State Defendants as in *Jacobson v. Florida Secretary of State*, No. 19-14552, 2020 WL 5289377 (11th Cir. Sept. 3, 2020). There, the plaintiffs sued the Florida Secretary of State challenging a law governing the order in which candidates appear on the ballot, but they did not sue any county officials. When the district court enjoined the enforcement of a statute, like the one here, that was implemented by county election officials, this Court reversed, because “the [Secretary] didn’t do (or fail to do) anything that contributed to [their] harm,’ the voters and organizations ‘cannot meet Article III’s traceability requirement.” *Id.* at \*30-31 (quoting *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1301 (11th Cir. 2019) (en banc)).

As in *Jacobson*, the 142 non-party Georgia counties “are not ‘obliged ... in any binding sense ... to honor an incidental legal determination [this] suit produce[s].” 2020 WL 5289377 at \*33 (quoting

*Lewis*, 944 F.3d at 1302). The resulting patchwork of applicable law presents its own problem—disparate treatment of similarly situated voters (more acutely, their absentee ballots) dependent on whether they reside in a county named by the Plaintiffs and bound by the order. And the order enjoining those counties so named (and enjoining the State for that matter) does not resolve the problem, this Court can have no confidence those nonparties would simply discard state law prescribing their duties in favor such an order. *See Jacobson* 2020 WL 5289377 at \*15.

**B. The political question doctrine deprives the district court of jurisdiction.**

Plaintiffs’ challenge to the Election Day Deadline also presents a political question into which “the judicial department has no business entertaining [a] claim of unlawfulness.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019) (citation omitted). Foundationally, the Elections Clause commits the administration of elections to coordinate political departments—Congress and state legislatures. U.S. Const. Art. I, § 4, cl. 1. This delegation includes matters concerning “notices, registration, supervision of voting, protection of voters, prevention of fraud ... counting votes, duties of [local officials] and making and publication of election returns.” *Smiley v. Holm*, 285 U.S. 355, 366 (1932).



In addition, the district court did not (and was not asked to) determine the constitutionality of any deadline, but instead was asked to substitute the state’s deadline for Plaintiffs’ preference. Determining which is better involves questions of policy with no judicially manageable standards. *See Coalition for Good Governance v. Raffensperger*, 2020 WL 2509092 at \*1, \*3 (N.D. Ga. May 14, 2020) (citing *Rucho* and *Jacobson*, No. 19-14552, 2020 WL 2049076, at \*18 (11th Cir. Apr. 29, 2020) (William Pryor, J., concurring)). Finally, the same determination requires an initial policy determination of the kind reserved for legislative and executive branch officials—determining *when* the deadline should be in light of COVID-19 and purported delays within the United States Postal Service. “It would be inappropriate for a district court to undertake this responsibility in the unlikely event that it possessed the requisite technical competence to do so.” *Aktepe v. United States of America*, 105 F.3d 1400, 1404 (11th Cir. 1997) (concerning comparative judgments of military personnel).

Similar to this Court’s recent decision in *Jacobson*, “no judicially discernable and manageable standards exist” to determine what constitutes a “fair” return deadline for absentee ballots during the COVID-19 pandemic, and “picking among the competing visions of fairness ‘poses basic questions that are political, not legal.’” *Jacobson*, 2020 WL 5289377, at \*1 (quoting *Rucho*, 139 S. Ct. at 2500). Even if a

standard for fairness could be determined, “no objective measures exist to determine violations of that standard” during a pandemic. *Id.* As the record below suggests, the rate in which absentee ballots were rejected as late in the June 2020 Primary was lower than the rejection rate in the pre-COVID-19 era—a rejection rate of 0.6% in 2020 (7,281 late ballots of over 1.1 million absentee ballots cast) compared to 0.7% in 2014, 1.2% in 2016, and 1.6% in 2018. *See* [Doc.59-1 at 4-5.] The deadline for voters to vote is a policy choice, and the district court’s order overrides that policy choice.

In a similar case in the Northern District of Georgia, the plaintiffs’ preliminary injunction motion was recently denied, and that court granted State Defendants’ motion to dismiss in its entirety based, among other things, on the political question doctrine. *Coalition for Good Governance*, 2020 WL 2509092, at \*1, \*3 (citing *Rucho* and *Jacobson*, 2020 WL 2049076, at \*18). Here, the district court indulged the Plaintiffs’ request for it to interfere in the minutiae of election administration in the context of COVID-19. It erred in doing so.

## **II. A stay is warranted on the merits.**

A stay pending appeal should be granted if (1) the moving party is likely to succeed on the merits; (2) the moving party will be irreparably injured absent a stay; (3) a stay will not substantially injure the other parties interested in the proceeding; and (4) the public interest favors a

stay. *Hand v. Scott*, 888 F.3d 1206, 1207 (11th Cir. 2018) (citing *Nken v. Holder*, 556 U.S. 418, 426 (2009)). “The first two factors of the traditional standard are the most critical.” *Nken*, 556 U.S. at 434. Each of these factors supports granting a stay pending appeal here.

Also, while a district court’s grant of a preliminary injunction is generally reviewed for abuse of discretion, deferring to the lower court’s finding of fact, conclusions of law as to those facts are given no deference. *E. Remy Martin & Co., S.A. v. Shaw-Ross Int’l Imports, Inc.*, 756 F.2d 1525, 1529 (11th Cir. 1985); *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1216 (11th Cir. 2008).

Here, State Defendants are not contesting the district court’s factual findings: the existence of COVID-19 and the potential for it to affect voters casting absentee ballots in the November election. The Court’s errors are legal: misapplying the law to hold (1) that the pandemic gives rise to constitutional claims against State Defendants; and (2) that *Purcell* does not weigh in favor of denying Plaintiffs the relief they seek.

**A. State Defendants are likely to succeed on the merits of their appeal.**

**1. The *Anderson/Burdick* claim likely lacks merit.**

The district court granted an injunction based largely on its erroneous holding that Plaintiffs were substantially likely to succeed on

their claim that the Election Day Deadline imposes a severe burden on the right to vote. In the applicable *Anderson/Burdick* analysis, the evaluation of a fundamental-right-to-vote claim takes place under a sliding scale, which considers the alleged burden on the right to vote against the interest of government. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). “Regulations imposing severe burdens on plaintiffs’ rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State’s ‘important regulatory interests’ will usually be enough to justify ‘reasonable, nondiscriminatory restrictions.’” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). This framework imposes no burden of proof or evidentiary showing on states. *Common Cause/GA v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009).

- a. The district court erred in concluding a severe burden on voting exists.

Plaintiffs have failed to show the Election Day Deadline imposes any unconstitutional burden on their right to vote, much less a severe one. To the contrary, the evidence Plaintiffs presented indicates a *lower* rate of absentee ballots rejections in the June 2020 Primary than in the pre-COVID-19 era. See [Doc.59-1 at 4-5.]

Despite this, the district court decided that the Election Day Deadline imposed a severe burden “on voters.” [Doc. 134 at 60] (emphasis added). However, under the *Anderson/Burdick* analysis, the court considers the burden on the right to vote, not the burden on the individual. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring in judgment) (“[T]he first step is to decide whether a challenged law severely burdens the right to vote.”). The Election Day Deadline applies to all voters and should not have been viewed as applicable only to those voters whose ballots are rejected as late. [Doc. 144 at 13.] Moreover, “[o]rdinary and widespread burdens, such as those requiring ‘nominal effort’ of everyone, are not severe.” *Id.* (citations omitted). Neither are mere inconveniences. *See Storer v. Brown*, 415 U.S. 724, 728–729 (1974).

While the district court credited the State for providing solutions to potential mail delays (e.g., drop boxes) in other sections of its order, the court inexplicably did not address drop boxes when evaluating the Election Day Deadline. *See* [Doc. 134 at 45, 47.] This point cannot be gainsaid: voters concerned about mail delays and COVID-19 can simply drop off their ballot either in-person at their county election office or in a secure drop box on or before 7:00 P.M. on Election Day. This all but eliminates any claim of burden.

The district court reached a contrary conclusion based largely on the decision in *RNC*. 140 S. Ct. 1205, 1208 (2020). In that case, the only issue before the Supreme Court was a stay of the trial court’s injunction to the extent it required Wisconsin to count absentee ballots postmarked after election day. *See Id.* at 1206. The Supreme Court made this clear:

The Court's decision on the narrow question before the Court should not be viewed as expressing an opinion on the broader question of whether to hold the election, or whether other reforms or modifications in election procedures in light of COVID–19 are appropriate. That point cannot be stressed enough.

*Id.* at 1208. Thus, the *RNC* holding weighs strongly in favor of a stay of the order in this case: “By changing the election rules so close to the election date and by affording relief that the plaintiffs themselves did not ask for in their preliminary injunction motions, the court contravened this Court’s precedents and erred by ordering such relief. This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.” *Id.*

The district court reached an opposite conclusion by misapplying *RNC*’s holding. Specifically, the district court reasoned that the *RNC* decision was “a reason to *deny* Defendants’ request for a stay, not to grant it.” [Doc. 144 at 20.] According to the district court, the Supreme Court in *RNC* upheld and endorsed the lower court’s ruling requiring

Wisconsin to count ballots mailed by election day but received up to six days after election day, and it granted a *partial* stay. [Docs. 134 at 59; 144 at 20.] The Court did neither, as those issues were not before it. Thus, the district court's reliance on *RNC* is mistaken.

b. The State's interests are important.

The district court found that State Defendants' interests—conducting an efficient election, maintaining order, quickly certifying election results, and preventing voter fraud—are “strong [and] important.” [Doc. 134 at 60.] Accordingly, when these interests are balanced against the light burden on the right to vote, the Election Day Deadline should be upheld. When alleged burdens are not severe, a “compelling interest” is not required, *Burdick*, 504 U.S. at 434, 439, and “the States' regulatory interest is generally enough to uphold a reasonable, nondiscriminatory restriction on voting rights.” *Timmons*, 520 U.S. at 358.

**2. The district court erred in concluding that Plaintiffs are likely to prevail on the merits of their claim that the Election Day Deadline violates procedural due process.**

The district court also erred in concluding that Plaintiffs are likely to succeed on their procedural due process claim challenging the Election Day Deadline. To support a procedural due process claim, Plaintiffs must show they have been deprived of a liberty interest and

that such deprivation was committed under color of state law. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999); *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003). If so, courts next apply the *Mathews* balancing test and consider three factors: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of such interest along with the value, if any, of additional safeguards; and (3) the government's interest, including the burden of additional safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Plaintiffs assert they possess a private liberty interest in “voting and having one’s ballot counted,” which is at risk of deprivation by the deadline because of the pandemic’s effect on the postal service. [Doc. 58 at 2-5, 10-11, 22-25.] The district court expressed concern about “massive delays and exigent circumstances *caused* by COVID-19.” [Doc. 134 at 62 (emphasis added).] This theory excludes the requisite *state* action. *See Doe v. Fla. Bar*, 630 F.3d 1336, 1342 (11th Cir. 2011); *see also Mathews*, 424 U.S. at 335. Postal delays and a virus are not state acts. *See Georgia Shift v. Gwinnett Cnty.*, 2020 WL 864938 at \*5 (N.D. Ga. Feb. 12, 2020); *see also Coalition for Good Governance*, 2020 WL 2509092, at \*3 (distinguishing between COVID-19 and State acts).

A deadline to vote does not erroneously deprive a liberty interest because voters lack the right to cast a ballot at any time or in any particular manner. *See Burdick*, 504 U.S. at 433 (“It does not follow,



however, that the right to vote in any manner. . . [is] absolute.”). And, there is no reason the Election Day Deadline is any better or worse than the one imposed by the district court: some ballots will remain untimely. Safeguards apply too: voters are reminded of the Election Day Deadline in the instructions that accompany every absentee ballot. [Doc. 91-3 at ¶ 5]. Voters’ knowledge of this, [Doc. 107-10 at ¶ 9], alleviates the risk of an erroneous deprivation.

Regarding the third *Mathews* factor, the district court “acknowledge[d] that [State] Defendants have a strong interest in certifying election results and maintaining the integrity of elections.” [Doc. 134 at 63]. Extending the deadline for county elections officials to receive absentee ballots is not an additional procedural safeguard. It is a different deadline and different policy not made by the elected representatives in Georgia. Some voters will doubtlessly miss the extended deadline, but the burden imposed on the State’s interests remains heavy. Timely certification of election results promotes certainty in elections, itself an important state interest. *Broughton v. Douglas Cty. Bd. of Elections*, 286 Ga. 528, 528–29 (2010). So too is maintaining the integrity of elections. *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231(1989). This is compounded by the fact that the district court’s order applies to only 17 counties and contradicts the pre-printed instructions on absentee ballots.

**B. State Defendants will suffer irreparable harm absent a stay.**

Along with the likelihood of success on the merits, irreparable injury is a “most critical” factor presented by this motion. *Hand*, 888 F.3d at 1207. This factor—supported by concerns of delay, voter confusion, and delayed cure periods—weighs strongly in favor of State Defendants.

In similar circumstances, the Supreme Court has agreed. *See, e.g., Purcell*, 549 U.S. at 4-5; *Benisek*, 138 S. Ct. at 1942. The State “has a substantial interest in avoiding chaos and uncertainty in [statewide] election procedures, and likely should not be forced to employ” a set of new, ad hoc procedures “created on an artificial deadline.” *Id.* Enjoining “the State from conducting this year’s elections pursuant to a statute enacted by the Legislature ... would seriously and irreparably harm the State.” *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). The harm is amplified during an election. *RNC*, 140 S. Ct. at 1207.

Court orders that change election laws on the eve of an election also threaten to undermine voter confidence and provide an incentive to remain away from the polls. *See Purcell*, 549 U.S. at 4-5; *Crawford*, 553 U.S. at 197. This Court should be “reluctant to upset the system now in place—particularly since [its] order creates so truncated a schedule—when there is a good chance [its] order may be overturned, and the system would need to be changed still again . . . Put another way, there

is wisdom in preserving the status quo ante until [this Court] has had an opportunity on full briefing to come to grips” with the constitutional issues raised in this case. *Purcell*, 549 U.S. at 4-5. That principle applies acutely here: Absentee voting has begun and pre-printed absentee ballots which recite the Election Day Deadline have been mailed to voters. O.C.G.A. § 21-2-384(a)(2).

Moreover, the district court did not address O.C.G.A. § 21-2-386(a)(1)(c), however, which allows voters whose absentee ballots are rejected due to certain deficiencies time to cure the issue until three days after the Election Day. Thus, voters’ whose absentee ballots are returned after Election Day and rejected due to missing information or a signature mismatch may not have the opportunity to cure before the end of the cure period. Nor did the district court consider the risk to Georgia’s newly required post-election, pre-certification audits, because it shortens the amount of time for counties to complete an entirely new audit process. *See* O.C.G.A. § 21-2-498.

Delay also jeopardizes the Governor’s ability to “enumerate and ascertain the number of votes for each person so voted and shall certify the slates of presidential electors receiving the highest number of votes,” no later than 18 days after Election Day (November 21, 2020). *See* O.C.G.A. § 21-2-499(b). Federal law requires that “[t]he electors of President and Vice President of each State shall meet and give their

votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct,” which is December 14, 2020, at noon. *See* 3 U.S.C. § 7; *see also* O.C.G.A. § 21-2-11.

Delays caused by the district court’s order also threatens to shorten the time for early and absentee voting in any runoff elections, which are scheduled for December 1, 2020 (state) and January 5, 2021 (federal). *See* O.C.G.A. § 21-2-501(a). Absentee-by-mail voting in runoff elections for state and local offices start as soon as possible prior to the December 1 runoff election, O.C.G.A. 21-2-384(a)(2); 21-2-385(d)(1)(D), and federal law requires absentee ballots to be mailed forty-five days prior to the January 5, 2021 runoff election, which is November 21, 2020, this year. *See* 52 U.S.C. § 20302(a)(8).

Finally, requiring absentee ballots received in the three days following Election Day to be counted jeopardizes election integrity, because it increases the possibility of double voting. These examples are likely not the only unintended consequences that will result from the district court’s order, especially because the order below is binding on only 17 Georgia counties. Thus, the last-minute change to election procedures results not only in prejudice to governmental defendants who must administer and supervise the elections, but also the public.

**C. Plaintiffs will not suffer irreparable injury.**

A stay pending appeal will not threaten Plaintiffs with irreparable harm because it maintains the status quo; Plaintiffs will still be able to vote by absentee ballot (now) or in person (early or on election day). This falls short of the requirement that the Plaintiffs’ “irreparable harm” be likely not merely possible. *See, e.g., Winter v. NRDC*, 555 U.S. 7, 22 (2008). Plaintiffs have alleged only a speculative and addressable threat of harm from the absence of a preliminary injunction. *See, e.g.,* [Docs. 59-6 at ¶ 10; 59-67 at ¶ 7]. Moreover, Plaintiffs have not shown that existing measures to protect voters are so deficient that the absence of additional federal-court-ordered measures threatens them with imminent harm. *See Ledford v. Comm’r, Georgia Dep’t of Corr.*, 856 F.3d 1312, 1315 (11th Cir. 2017). Accordingly, this factor weighs in favor of granting a stay.

**D. A stay will not harm the public interest.**

A stay would not harm the public interest. “Because the State is the appealing party, its interest and harm merge with that of the public.” *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam) (citing *Nken*, 556 U.S. at 435). Adding new, ad hoc processes to the mix risks creating uncertainty and confusion, disenfranchising voters and threatening the Electoral College process. *See Purcell*, 549 U.S. at 4 (“Confidence in the integrity of our electoral processes is essential to the

functioning of our participatory democracy.”). Granting a stay will assure the public that both the judiciary and the State will “ensur[e] proper consultation and careful deliberation” before disrupting the election process. *Hand*, 888 F.3d at 1215.

## CONCLUSION

For the reasons above, this Court should stay the district court’s preliminary injunction pending appeal.

Respectfully submitted this 18th day of September, 2020.

*/s/ Josh Belinfante*

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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 5,160 words as counted by the word-processing system used to prepare the document.

Respectfully submitted this 18th day of September, 2020.

/s/ Josh Belinfante  
Josh Belinfante

**CERTIFICATE OF SERVICE**

I hereby certify that on September 18, 2020 I served this Motion 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.

Respectfully submitted this 18th day of September, 2020.

/s/ Josh Belinfante  
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