Case No: 18-13951-DD

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DONNA CURLING, et al.
Plaintiffs/Appellees,

v.

BRIAN KEMP, et al.
Defendants/Appellants.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
DISTRICT COURT DOCKET NO: 1:17-CV-02989-AT

INITIAL BRIEF OF APPELLANTS

JOHN F. SALTER
Georgia Bar No. 623325
john@barneslawgroup.com

ROY E. BARNES
Georgia Bar No. 039000
roy@barneslawgroup.com

BARNES LAW GROUP, LLC
31 Atlanta Street
Marietta, GA 30060
(770) 227-6375
(770) 227-6373 (fax)

Counsel for Appellants
Brian P. Kemp, David J. Worley, Rebecca N. Sullivan, Ralph F. "Rusty" Simpson, Seth Harp, & The State Election Board

CERTIFICATE OF INTERESTED PERSONS

The Appellants, Brian P. Kemp, David J. Worley, Rebecca N. Sullivan, Ralph F. "Rusty" Simpson, Seth Harp, & The State Election Board submit this list, which includes the trial judge, and all attorneys, persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of this review:

Adams, Kimberly M. Esmond
[Fulton County Superior Court, Judge]

Altshuler Berzon, LLP
[Law Firm For Amicus Common Cause]

Aikemn, Fred
[Defendant-Terminated]

Attorney General's Office-Atl

Barnes Law Group, LLC
[Law Firm For The State Appellants]

Barnes, Roy E.
[Counsel For The State Appellants]

Barron, Richard
[Defendant]

Bentrott, Jane P.
[Counsel For Appellees]

Berzo, Stephen P.
[Counsel For Amicus, Common Cause/National Election Defense/Protect Democracy]

Bondurant Mixson, & Elmore, LLP
[Former Law Firm of Appellees]

Brooks, Jessica
[Defendant-Terminated]

Brown, Bruce P.
[Counsel For Appellees]

Bruce P. Brown Law
[Law Firm For Appellees]

Bryan, Bennett Davis
[Former Counsel For Defendant, DeKalb County]

Burge, David J.
[Defendant]

Burwell, Kaye Woodard
[Counsel For Defendant, Fulton County]

Caldwell Jr., Joe Robert
[Former Counsel For Appellees]

Carlin, John P.
[Counsel For Appellees]

Chappel, Catherine
[Counsel For Appellees]

Curling, Donna
[Appellee]

Coalition For Good Governance
[Appellee]

Common Cause
[Amicus]

Cooney, Mary Carole
[Defendant]

Correia, Cristina
[Former Counsel For The State Appellants]

Coveny, Michael P.
[Defendant-Terminated]

Cross, David A.
[Counsel For Appellees]

Daniell, Phil
[Defendant-Terminated]

Daniels, Maxine
[Defendant-Terminated]

Davis, Ricardo
[Appellee]

Diggs, Laura
[Appellee]

Diggs III, William
[Appellee]

DeKalb County District Attorney's Office

Eveler, Janine
[Defendant-Terminated]

Handel, Karen C.
[Defendant-Terminated]

Harp, Seth
[Appellant]

Haynie Litchfield Crane & White
[Law Firm For Defendant, DeKalb County]

Heidt, Josiah Benjamin
[Former Counsel For The State Appellants]

Hendrix, Barclay
[Former Counsel For Defendant Karen C. Handel]

Highsmith, Robert S.
[Former Counsel For Merle King]

Holcombe and Ward, LLP
[Former Law Firm of Plaintiffs]

Holland & Knight LLP -Atl
[Former Law Firm For Defendant, Merle King]

Ichter, Cary
[Counsel For Appellees]

Ichter Davis, LLC
[Law Firm For Appellees]

Jon L. Schwartz, Attorney at Law, P.C.
[Law Firm For Amicus Common Cause]

Johnson, Aaron
[Defendant]

Johnson, Laura K.
[Former Counsel For Defendant, DeKalb County]

Kemp, Brian P.
[Appellant/Defendant]

King, Merle
[Defendant-Terminated]

Krevolin & Horst, LLC
[Law Firm For Appellees]

Krugman, Edward B.
[Former Counsel For Appellees]

Knapp Jr., Halsey G.
[Counsel For Appellees]

Lewis, Anne Ware
[Former Counsel For Defendant Karen C. Handel]

Lewis, Anthony
[Defendant-Terminated]

Leyton, Stacy M.
[Counsel For Amicus, Common Cause]

Lim, Marvin
[Former Counsel For Appellees]

Lowman, David R.
[Counsel For Defendant, Fulton County]

Manoso, Robert W.
[Counsel For Appellees]

Matarazzo, Stan
[Defendant-Terminated]

McGuire III, Robert Alexander
[Counsel For Appellees]

Missett, Megan
[Plaintiff]

Monyak, Elizabeth Ahern
[Former Counsel For The State Appellants]

Morrison & Foerster, LLP-DC
[Law Firm For Appellees]

Murray, Matthew J.
[Counsel For Amicus, Common Cause]

National Election Defense Coalition
[Amicus]

Ney Hoffecker Peacock & Hayle LLC
[Law Firm For Appellees]

Ney, William Brent
[Counsel For Appellees]

Nuriddin, Vernetta
[Defendant]

Office of Fulton County Attorney

Ossoff, Thomas Jonathan
[Terminated]

Palmore, Joseph R.
[Counsel for Appellees]

Phillips, Terry G.
[Former Counsel For Defendant, DeKalb County]

Perry, Leona
[Defendant-Terminated]

Pettit, Joe
[Defendant-Terminated]

Price, Donna
[Appellee]

Protect Democracy
[Amicus]

Qian, Michael F.
[Counsel for Appellees]

Ringer, Cheryl
[Counsel For Defendant, Fulton County]

Robbins Ross Alloy Belinfante Littlefield, LLC -Atl
[Former Law Firm of Defendant, Karen C. Handel]

Robert McGuire Law Firm
[Law Firm For Appellees]

Russo Jr., Vincent Robert
[Former Counsel For Defendant Karen C. Handel]

Salter, John F.
[Counsel For The State Appellants/Defendants]

Schnell, Grant Edward
[Former Counsel For Defendant, Merle King]

Schoenberg, Jeffrey
[Appellee/Plaintiff]

Schwartz, Edward Bruce
[Former Counsel For Appellees]

Schwartz, Jonathan Lee
[Counsel For Amicus, Common Cause/National Election Defense/Protect]

Simpson, Ralph "Rusty"
[Appellant/Defendant]

Sparks, Adam Martin
[Counsel For Appellees]

Steptoe & Johnson-DC
[Former Law Firm For Appellees]

Strickland Brockington Lewis, LLP
[*Former Law Firm For Defendant, Karen C. Handel]*

Strickland, Frank B.
[Former Counsel For Defendant Karen C. Handel]

Sullivan, Rebecca N.
[Appellant]

The Cobb County Board of Elections and Registration
[Defendant-Terminated]

The Center for Election Systems at KSU
[Defendant-Terminated]

The DeKalb County Board of Registrations and Elections
[Defendant-Terminated]

The Fulton County Board of Registration and Elections
[Defendant]

The State Election Board
[Appellant]

Terry, Edward Curtis
[Plaintiff-Terminated]

Tillman, Samuel
[Defendant-Terminated]

Totenburg, Amy
[United States District Court For The Northern District, Judge]

Vu, Baoky
[Defendant-Terminated]

Waldon Adelman Castilla Hiestand & Prout
[Former Law Firm For Thomas Jonathan Ossoff]

Waldon, Russell
[Former Counsel For Thomas Jonathan Ossoff]

Ward, Bryan Myerson
[Former Counsel For Appellees]

White, Daniel Walter
[Counsel For Defendant, DeKalb County]

Wilson, Darryl O.
[Defendant-Terminated]

Wingate, Mark
[Defendant-Terminated]

Worley, David J.
[Appellant/Defendant]

Wright, Aaron
[Former Counsel For Appellees]

STATEMENT REGARDING ORAL ARGUMENT

This lawsuit concerns a legal challenge to the method by which voters in Georgia cast their ballot during in-person voting on Election Day, i.e., through the Direct Recording Electronic (DRE) machine. Plaintiffs bring claims against the Secretary of State, the State Election Board and each of its members (of which the Secretary is one), alleging generalized fears that Georgia's election machinery is vulnerable to malicious tampering. Plaintiffs contend the State Defendants[1] "abused their discretion [by] subjecting voters to cast votes on" DRE machines that should be "*presumed* to be compromised." Doc. 70 at ¶ 62 (emphasis supplied); Doc. 226 at ¶ 119; *Id*. at 115.

Courts may neither "presume" jurisdiction, nor standing, nor its prerequisites. Nor may courts guess away the immunity afforded by the Eleventh Amendment by assuming an "ongoing and continuous violation" of a federal right sufficient to trigger *Ex Parte Young*'s exception. *See Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). After tolerating repeat amendments of Plaintiffs' Complaints, the district court allowed the Plaintiffs to splinter into two factions, each with their own operative complaint. *See* Docs. 70 and 226. Defendants have filed motions to dismiss at every turn and requested rulings

[1] The Appellants are hereinafter referred to as the "State Defendants," to distinguish them from non-appellant defendants in the court below, such as elections officials in Fulton, Cobb and DeKalb counties.

thereon. After more than a year, the district court erred by finally denying—either outright or "effectively"—jurisdictional and immunity grounds for dismissal. In support of their appeal, the State Defendants respectfully request oral argument to address why, based upon threshold issues of Eleventh Amendment immunity, absolute legislative immunity and the absence of standing required by Article III, that decision should be reversed with instructions to dismiss.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

Constitutional Amendments

Other Authorities

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (final decisions of district courts) because denials of immunities under the Eleventh Amendment and absolute legislative immunity are deemed final within the meaning of § 1291 and immediately appealable. *Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1355 (11th Cir. 2014); *Summit Medical Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1334 (11th Cir. 1999) (denial of Eleventh Amendment immunity "appealable immediately"); *Woods v. Gamel*, 132 F.3d 1417, 1419 n. 3 (11th Cir. 1998) (denial of absolute legislative immunity "immediately appealable under the collateral order doctrine").

Defendants' motion(s) to dismiss also argued the absence of constitutional standing. This Court has discretion to review the denial of the motion to dismiss for lack of Article III standing under the doctrine of pendent appellate jurisdiction. Here, the individual Plaintiffs' lack of concrete harm and absence of other indicia of constitutional standing are "inextricably intertwined" with legislative immunity and why *Young*'s exception does not remove immunity under the Eleventh Amendment. *See Hudson v. Hall*, 231 F.3d 1289, 1294 (11th Cir. 2000) ("Under the pendent appellate jurisdiction doctrine, we may address otherwise nonappealable orders if they are 'inextricably intertwined' with an appealable decision or if review of the former decision is necessary to ensure meaningful

review of the latter."); *see also McCullough v. Finley*, No. 17-11554, 2018 WL 5318146 (11th Cir. Oct. 29, 2018) (reviewing sufficiency of complaint's allegations on official immunity as inextricably intertwined with absolute judicial immunity). Whether the Plaintiffs are proper plaintiffs implicates the entirety of this appeal, including all of the State Defendants' jurisdictional and immunity arguments.

The district court's order whereby it appears to have denied the jurisdictional aspects of Defendants' Motion(s) to Dismiss—either outright or effectively—was issued on September 17, 2018. Doc. 309. A timely notice of appeal was filed the next day. Doc. 310.

STATEMENT OF THE ISSUES

1. Under the doctrine of pendent appellate jurisdiction, this Court should address the State Defendants' standing arguments because they are "inextricably intertwined" with an appealable decision and because "review of the former decision is necessary to ensure meaningful review of the latter." *Summit Medical Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1335 (11th Cir. 1999). This case presents the question of whether this Court should reverse the lower court and direct entry of judgment in favor of the State Defendants because of a lack of constitutional standing for these Plaintiffs to bring the alleged claims.

2. Whether the district court erred in denying Eleventh Amendment immunity in this suit against Defendants in their official capacities, requiring this Court to reverse the lower court and direct entry of judgment in favor of the State Defendants because Eleventh Amendment immunity shields them from the alleged claims.

3. Whether the district court erred in denying—outright or effectively—the State Defendants' legislative immunity, requiring this Court to reverse the lower court and direct entry of judgment in favor of the State Defendants because legislative immunity shields them from the alleged claims.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS.

This case is a constitutional challenge to the method by which voters in Georgia cast their ballot during in-person voting, i.e. through the Direct Recording Electronic (DRE) machine. The respective complaints of the two Plaintiff groups—the Curling Faction and the Coalition Faction—generally allege § 1983 claims for violation of substantive Due Process and Equal Protection. *See* Docs. 70 and 226. Recently devolving into a maze of amendments,[2] dismissals, and fallouts between plaintiff-factions, this case began as an election contest alleging "uncertainty" in the Sixth Congressional District run-off election. In their original Complaint, Plaintiffs alleged "[i]t is presently *unknown* if any party interfered with Georgia's elections in 2016 or 2017." Doc. 1-2 ¶ 9 (emphasis supplied). Almost two years later, Plaintiffs still are relying on conjectural theories and mere presumptions of interference.

The State Defendants first moved the district court to dismiss on August 15, 2017. Doc. 8. Among other issues, the State Defendants raised jurisdictional issues regarding (1) insufficient standing under Article III (e.g. absence of concrete harm, etc.); (2) Eleventh Amendment immunity; and (3) the doctrine of absolute legislative immunity. Motions to Dismiss by the various Defendants

[2] After filing suit on July 3, 2017, the Plaintiffs began a series of amendments. Doc. 2; Doc. 7; Doc. 14; Doc. 15.

were filed, too. *See, e.g.*, Docs. 47-50. Two days later, Plaintiffs asked the district court to entertain yet another amendment to their Complaint, a request that was granted by oral ruling(s). Docs. 54; Doc. 57. Because the Motions to Dismiss raised jurisdictional defects and/or immunities, discovery and discovery-related activities were stayed. Doc. 56. By leave, a Second Amended Complaint was filed on September 15, 2017. Doc. 70.[3] Again, the State Defendants moved to dismiss, citing jurisdictional standing and immunities. Doc. 83 (Motion to Dismiss Second Amended Complaint, filed September 29, 2017). By entry of November 2, 2017, these motions were noted as under submission.

After fully briefing the Motion to Dismiss Plaintiffs' Second Amended Complaint, an apparent disagreement arose between the Plaintiffs. On November 3, 2017, then-counsel for all the original Plaintiffs moved to withdraw representation from a single Plaintiff, the Coalition for Good Governance (or "CGG"). Doc. 104. Several months of delay ensued, while the Plaintiffs wrangled in internecine disputes. Eventually, their lawyers moved to withdraw entirely from the case. Doc. 131; *see also, e.g.,* Doc. 329-1 at 5 (Curling Plaintiffs' Motion to Sever, claiming "CGG—an out-of-state organization--. . . was unable to work cooperatively with prior counsel and other Plaintiffs, thereby delaying critical

[3] The Second Amended Complaint dropped claims against Defendant Karen Handel and signaled a morphing of Plaintiffs' claims away from what had been a contest to the results of the Ossoff-Handel election for Georgia's Sixth Congressional District. *See, e.g.*, Doc. 76; Doc. 81.

relief for Georgia voters simply to serve its own ends"). Thereafter, various withdrawals and extensions of time followed, ultimately causing the administrative closure of the case for a period of time. *See, e.g.*, Docs. 104; 112; 114; 115 (CGG's motion to stay, filed Nov. 28, 2017); 116; 127; 135.

By April of 2018, the Plaintiffs were divided into two factions with separate legal teams. On one side were Donna Curling, Donna Price, and Jeffrey Schoenberg (i.e. the "Curling Plaintiffs"). The other group—comprised of CGG, Ricardo Davis, Laura Digges, Megan Missett, and William Digges, III—were represented by other counsel (hereinafter "the Coalition Plaintiffs").

Without the consent of the Curling Plaintiffs, the Coalition Plaintiffs moved on April 4, 2018, to file a Third Amended Complaint. Their motion was opposed by their former co-Plaintiffs. *Compare* R.160 (Coalition Plaintiffs' Motion for Leave) *with* Doc. 179 (Curling Plaintiffs' Response in Opposition). The Third Amended Complaint (Doc. 226), represents the Coalition Plaintiffs' attempt to plead around the immunity and jurisdictional defenses raised by Defendants' Motion to Dismiss the Second Amended Complaint. *See, e.g.,* Doc. 160 at 3. The Coalition Plaintiffs' Third Amended Complaint abandoned state-law claims, culling the allegations down to two federal constitutional claims: Count I being a substantive (no longer procedural) due process claim based on the "right to participate in a trustworthy and verifiable election process" (Doc. 226 ¶ 169), and

an equal protection claim (Count II). Doc. 226 at ¶¶ 176-83. The Coalition Plaintiffs effectively dropped Counts III through XI of the Second Amended Complaint. While the Coalition Plaintiffs deny their Third Amended Complaint makes any retrospective claims and insist it limits their relief to prospective-only injunctive relief, the State Defendants disagree.

The Curling Plaintiffs took a slightly different tack. The Curling Plaintiffs kept the Second Amended Complaint (Doc. 70), albeit in substantially downsized form. Plaintiffs retained the factual allegations that formerly animated putative counts for mandamus and state-law violations, only now artfully re-pled as alleged violations of due process and equal protection. Preferring to dismiss a substantial number of claims, defendants and theories, the Curling Plaintiffs modified the Second Amended Complaint (Doc. 70) by withdrawal or voluntary dismissal of certain claims. Docs. 222 and 223 (stipulation of dismissal).[4] Thus, the two Plaintiff-Factions began (and still do) operating under two different operative complaints.

In previous iterations of their Complaint, Plaintiffs sought to mandate a reexamination of the safety and accuracy of Georgia's voting system. Doc. 70, at ¶ 134 (former Count VIII, seeking writ of mandamus to compel Secretary "to

[4] By virtue of their dismissals, the Curling Plaintiffs deny they sought any longer to make retrospective claims, insisting to limiting their relief to prospective-only injunctive relief, characterizations disputed by the State Defendants.

conduct the reexamination required by Georgia Code Sections 21-2-379.2(b)"). Under Georgia's law, the Secretary of State may reexamine the DRE system and formally attest "in his or her opinion" whether "the kind of system so examined can be safely and accurately used by electors." O.C.G.A. § 21-2-379.2(b). At the outset of this lawsuit, the Secretary exercised his discretion to "conduct a reexamination that is thorough, methodologically sound, and able to be accomplished in a reasonable period of time" at no cost to the requesting electors, thus rendering the mandamus claim moot. *See* Doc. 49-6. Although Plaintiffs failed to meet all the statutory preconditions for such a reexamination of Georgia's DRE system, the Secretary conducted one anyway, ultimately certifying the recommendation of examiners that the system was safe and secure for use. Doc. 191-1 at 3.

Both the Curling and Coalition Plaintiffs adopted the posture that their changes to the pleadings mooted the immunities asserted by Defendants' Motions to Dismiss. The State Defendants disagreed. *See, e.g.*, Doc. 191 at 4 ("formidable immunities remain notwithstanding the Plaintiffs' respectively different attempts to plead artfully around them"). On July 3, 2018, the State Defendants' Motion to Dismiss (Doc. 234) contended the Coalition Plaintiffs' Third Amended Complaint should be dismissed just like the Curling Plaintiffs' Second Amended Complaint. Doc. 83 (Motion to Dismiss Second Amended Complaint). Believing the Plaintiffs

could not disguise the substance of the relief they still sought, and that formidable immunities remained, the State Defendants continued to seek the dismissal of both Plaintiffs-Factions' Complaints.

With election season pulling into view, the Coalition Plaintiffs filed a Motion for Preliminary Injunction on August 3, 2018 (Doc. 260), almost a year after the first motion to dismiss. The district court ordered the State Defendants to respond within a shortened timeframe. Doc. 263. Also, the district court ordered the State Defendants to focus their response on a singular issue: "The Court DIRECTS Defendants in their response brief to particularly focus on the public interest factors—i.e. the practical realities surrounding implementation of the requested relief in the next one to three months." Doc. 259 at 2.

Because discovery had been stayed by order of the district court pending the Motions to Dismiss (*see* Doc. 56), the State Defendants had not retained experts. Instead, using knowledgeable witnesses, the State Defendants' Response to the Motions for Preliminary Injunction[5] focused on how "statewide implementation of the requested relief in an expedited, limited time frame [would] actually compromise the reliability and the functionality of the voting system and therefore

[5] After the Coalition Plaintiffs moved for a preliminary injunction, the Curling Plaintiffs followed with their own, separate motion for preliminary injunction. Doc. 260.

adversely impact the public interest in this 2018 election cycle." Doc. 259 at 1-2; *see also, generally*, Doc. 265.

The district court had indicated several times it would issue a ruling on the Motion to Dismiss. *See, e.g.*, Doc. 204 at 18 ("there is no avoiding the fact that there is a substantial order that I have to deal with"). On August 28, 2018 (after Plaintiffs filed their submissions in support of their motions for preliminary injunction), the district court indicated it had "concluded that issues of standing, Georgia sovereign immunity, Eleventh Amendment immunity, res judicata, and collateral estoppel do not bar the Court's exercise of jurisdiction in this matter." Doc. 279 at 2. In the next sentence, the district court wrote that "[t]he Court will issue a memorandum decision with respect to this determination in the coming two weeks." *Id*. However, no such memorandum opinion came.

Instead, the district court seemed to change its mind and, in a subsequent order, scheduled a combined oral argument on Plaintiffs' motions for preliminary injunction, including the immunity and jurisdictional issues. Doc. 280 at 2. At the hearing, the district court ruled that the Plaintiffs had standing and that their claims were not barred by the Eleventh Amendment. Doc. 298; Doc. 307 at 34.[6]

[6] Although the State Defendants argued absolute legislative immunity at the hearing (Doc. 307 at 30), for reasons that are not clear the district court did not mention legislative immunity either during the hearing (Doc. 307 at 33-34) or in its order. Doc. 309.

On September 17, 2018, the Court issued a Memorandum Opinion delivering an apparently partial ruling on Defendants' Motions to Dismiss in order to address the Plaintiffs' respective Motions for Preliminary Injunctions. Doc. 309. Although this is the order under appeal, it appears to be less than a complete ruling because, in it, the district court promised to "more fully address . . . all other issues raised in Defendants' Motions to Dismiss in a separate, subsequent order." Doc. 309 at 3, n. 1. Although subsequent orders have occurred since, it does not appear that a more complete order has been issued fully addressing the other issues raised in Defendants' Motions to Dismiss.

II. STATEMENT OF FACTS.

Although the Plaintiffs have separated themselves into two camps with different operative Complaints, they plead the same generalized fears that Georgia's election machinery is vulnerable and continue to assert that tampering in elections should be presumed. *See, e.g.*, Doc. 70 ¶¶ 62 (alleging federal due process claim under section 1983 based on an election "system that must be presumed to be compromised and incapable of producing verifiable results"); *Id*. at ¶ 74 (alleging equal protection claim under section 1983 based on an election "system that must be presumed to be compromised and incapable of producing verifiable results"); ¶ 123 (despite being "aware of numerous expert opinions advising against the use of these systems, . . . because they . . . should have been

presumed to be compromised"). Even the Coalition Plaintiffs criticized the Second Amended Complaint as "contain[ing] only conclusory allegations that DRE systems have *unspecified vulnerabilities*." Doc. 190 at 9 (emphasis supplied). In truth, the Coalition Plaintiffs' pleading is just as wedded to "unspecified vulnerabilities" as their co-plaintiffs'.

When they amended their allegations in the Third Amended Complaint, the Coalition Plaintiffs retained this reliance upon presumed vulnerability of Georgia's DRE machines. Doc. 226. They continued to bring claims against the Secretary of State, the State Election Board and each of its members.[7] They also clung to tangential "public observance" allegations against certain officials of Fulton County having nothing to do with the State Defendants.[8]

As to both of the Plaintiff-Factions' Complaints, the allegations do not plausibly show they were treated differently than similarly-situated voters, that their votes were diluted as compared to others, that election officials refused to count their votes or that election officials violated a federal law, either statutory or

[7] Plaintiffs allege State Election Board members are responsible for "promulgating rules and regulations to obtain uniformity in election practices" and that are "consistent with law" in addition to "investigat[ing] the administration of primary and election laws and frauds and irregularities in elections." Doc. 226, ¶ 36.

[8] Allegations that government officials were the principal architect or "instrument behind" an unlawful policy, without supporting allegations, are not "entitled to be presumed true." *McCullough v. Finley*, No. 17-11554, 2018 WL 5318146, *17 (11th Cir. Oct. 29, 2018), quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 681, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

constitutional. Plaintiffs allege only generalized fears that because Georgia's election machinery is presumptively vulnerable to tampering, they are denied the alleged constitutional right to reassurance of the franchise's integrity. Doc. 226 ¶ 169. Based upon the central thesis that Georgia's DRE machines should be "*presumed* to be compromised," both Plaintiff-Factions demand that future elections in Georgia must be conducted using only paper ballots. *See, e.g.*, Doc. 226 ¶¶ 119, 115 (emphasis supplied).

Plaintiffs' lawsuit is not about state officials enforcing a law against them personally. This case is brought because of Plaintiffs' impatience for legislative policymaking in line with their agenda. *See, e.g.*, 226 ¶ 1 (complaining Georgia's elections officials "refused to take administrative, regulatory or legislative action"); *id*. at ¶ 10 ("complaining that Georgia's General Assembly "debated the issue" in a proposed bill "but without ultimately enacting that bill or any other palliative measure . . . . thus [doing] nothing to improve an election infrastructure that is widely recognized as one of the least secure in the country").

Plaintiffs' objective is to co-opt the coercive power of a federal decree to compel legislative action by the elected representatives of the State of Georgia and force a conversion of Georgia's elections machinery to paper ballots marked by hand. This case bears the hallmarks of generalized grievances for which standing is not recognized under Article III. Further, suing Georgia's officials because its

Legislature did not enact the agenda of a private group implicates absolute legislative immunity. As argued *infra*, the absence of concrete harm required for constitutional standing overlaps with the absence of the ongoing and continuous violation of federal law required to apply *Young*'s exception to immunity under the Eleventh Amendment.

III. STANDARD OF REVIEW

This Court reviews denial of immunity *de novo*. *Summit Medical Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1334 (11th Cir. 1999) (denial of Eleventh Amendment immunity reviewed *de novo*); *Woods v. Gamel*, 132 F.3d 1417, 1419 (11th Cir. 1998) (denial of absolute legislative immunity reviewed *de novo*). As to whether the allegations of the complaint plausibly plead standing under Article III, the district court's conclusion on this question also is reviewed *de novo*. *Dillard v. Chilton Cty. Com'n*, 495 F.3d 1324, 1330 (11th Cir. 2007).

SUMMARY OF THE ARGUMENT

Man has not invented a perfect voting system, or one that is invulnerable to criminal manipulation. But there is no plausible allegation that anyone in Georgia—much less these Plaintiffs—lost a vote because of manipulation of Georgia's DRE machines during an election. The gravamen of Plaintiffs' complaints center on "presumptions" of unspecified "vulnerability." Citing their need for "assurances" of "trustworthiness," Plaintiffs demand all voters be required

to use some form of paper ballots in conjunction with post-election audits. These voters' allegations involve only hypothetical fears of future harm, not the concrete and particularized injury specified by the precedent of this Court, the Supreme Court and the U.S. Constitution.

"A federal court cannot pronounce any statute, either of a State or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (internal marks omitted); *see also id.* at 206 (holding that only those "voters who allege facts showing disadvantage to themselves as individuals have standing to sue"). "Election law, as it pertains to state and local elections, is for the most part a preserve that lies within the exclusive competence of the state courts." *Bonas v. Town of N. Smithfield,* 265 F.3d 69, 74 (1st Cir. 2001). The Plaintiffs' apprehension that, sometime in the future, their vote *might* be lost to malicious tampering cannot elevate to justiciability their demand for "assurance" their votes will be counted. The standing question permeates this appeal.

Plaintiffs' failure to plausibly plead a concrete and particularized harm ricochets through this case, impacting other legal and immunity doctrines. Plaintiffs' inability to establish an injury in fact is intertwined with the absence of an "ongoing and continuous violation" of a federal law for purposes of *Young*'s

exception. Because of the peculiar remedial theories in Plaintiffs' case, standing is also enmeshed in legislative immunity. *See, e.g., Scott v. Taylor*, 405 F.3d 1251, 1259 (11th Cir. 2005) (Jordan, J., concurring) (analyzing injury in fact and redressability alongside legislative immunity). Plaintiffs seek to use federal injunctions to rewrite a state's election laws. *Scott*'s example illustrates how analysis of legislative immunity sometimes overlaps, and becomes intertwined with, constitutional standing. Here, Plaintiffs' standing problems bleed over into all aspects of this appeal, defying neat categorization.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT ERRED BY DENYING THE MOTION TO DISMISS ON GROUNDS THE PLAINTIFFS FAILED TO ALLEGE ADEQUATE STANDING.

The Plaintiffs lacked standing sufficient to confer jurisdiction on the district court below. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997). Plaintiffs believe DRE machines should be "presumed" as too vulnerable to be "trustworthy." Such claims are the kind of "undifferentiated, generalized grievance" that signifies a lack of particularized stake in litigation. *Lance v. Coffman*, 549 U.S. 437, 442, 127 S.Ct. 1194, 167

L.Ed.2d 29 (2007) (four voters' concern that Constitution's Elections Clause was not being followed insufficient to confer standing).

Voters can challenge a state election procedure in federal court only in limited circumstances, such as when the complained of conduct discriminates against a discrete group of voters, *see, e.g., U.S. v. Hays,* 515 U.S. 737, 744–45, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995); *Griffin v. Burns,* 570 F.2d 1065, 1074 (1st Cir. 1978) (absentee voters whose votes were not counted challenging post-election decision not to count absentee votes); when election officials refuse to hold an election though required by state law, resulting in a complete disenfranchisement, *see Duncan v. Poythress,* 657 F.2d 691, 693 (5th Cir. 1981); or when the willful and illegal conduct of election officials results in fraudulently obtained or fundamentally unfair voting results, *see United States v. Saylor,* 322 U.S. 385, 388–89, 64 S.Ct. 1101, 88 L.Ed. 1341 (1944) (fraudulent ballot stuffing).

Regarding the performance of Georgia's DRE machines, Plaintiffs do not plead any events or facts particular to themselves personally. For example, as to their central thesis regarding DRE machines, the Coalition Plaintiffs cite "warnings" from "news reports" (Doc. 226 ¶ 79), "findings" in "studies" concerning DREs in states like California and Ohio (¶¶ 84-85), and recycled conjecture about an alleged past lapse relating to voter data and a publicly-facing server at Kennesaw State University. *See* Doc. 226 at ¶¶ 93-108. The Complaints

contain nothing to connect these dots to anything relating to the actual performance or accuracy of Georgia's DRE machines, much less these particular Plaintiffs. To the contrary, Plaintiffs admit that "[w]hen operating properly, AccuVote DRES use software installed on the unit to record the voter's choice on both the DRE's removable memory card and into the machine's internal flash memory." *See, e.g.*, Doc. 226 at ¶ 71.

A "plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017), quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008). "[A]t the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016) (citation omitted). It is by now well settled that "the irreducible constitutional minimum of standing" contains three elements. *Hays*, 515 U.S. at 742-743, quoting *Lujan* v. *Defenders of Wildlife,* 504 U.S. 555, 560-561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *Id.*[9] Second, there must be a causal connection between the injury and the conduct complained of. Third, it

[9] "Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be concrete." *Spokeo*, 136 S. Ct. at 1548. "A 'concrete' injury must be 'de facto'; that is, it must actually exist." *Id.,* quoting BLACK'S LAW DICTIONARY 479 (9th ed. 2009).

must be likely (and not merely speculative), that the injury will be redressed by a favorable decision.

A. PLAINTIFFS DID NOT SUFFICIENTLY ALLEGE STANDING.

1. Plaintiffs Did Not Sufficiently Allege Harm, i.e. "Injury In Fact."

It is not enough merely to seek to protect "an asserted interest in being free of an allegedly illegal electoral system." *Dillard v. Chilton Cty. Com'n*, 495 F.3d 1324, 1333 (11th Cir. 2007). The Supreme Court has "repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power." *Hays*, 515 U.S. at 743. As an initial matter, "[f]or an injury to be particularized, it must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560. Here, Plaintiffs are not affected in a personal way.

A generalized fear that malicious activity might occur is not sufficiently concrete to confer standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (rejecting "reasonable likelihood" of injury as sufficient to meet the injury in fact standard). In determining whether the Plaintiffs had standing to sue, the district court was bound by determinations of the Supreme Court like *Clapper*. Here, Plaintiffs' allegations do not even rise to the level rejected as insufficient in *Clapper*, a seminal case on standing under Article III. A mere "presumption" is even more ephemeral than the "reasonable

likelihood" standard *Clapper* rejected as insufficient. Thus, Plaintiffs' "presumption" that they might become impacted by malicious tampering somehow in the future is insufficient because it dilutes the requirement that an injury must be "certainly impending" to constitute an injury in fact. *Clapper*, 568 U.S. at 409-10.

The district court avoided the only post-*Clapper* case regarding a constitutional challenge to DRE voting machines, where a federal court ruled that "allegations that voting machines may be 'hackable,' and the seemingly rhetorical question they pose respecting the accuracy of the vote count, *simply do not constitute injury-in-fact*." *Stein v. Cortes*, 223 F.Supp.3d 423, 432 (E.D. Pa. 2016) (emphasis supplied) (holding that failure to allege vote was inaccurately recorded by DRE meant plaintiffs lacked standing).

The district court erred because jurisdiction requires more than "an asserted interest in being free of an allegedly illegal electoral system." *Dillard, supra,* at 1333. In *Dillard*, this Court recognized that the U.S. Supreme Court's opinion in *Lance v. Coffman* abrogated prior Circuit precedents on voter standing. *Id.* at 1331, discussing *Dillard v. Baldwin County Comm'rs (Baldwin III),* 225 F.3d 1271, 1277 (11th Cir. 2000). This Court realized that *Lance* altered its law, requiring a differentiation between plaintiffs **"**who alleged concrete and personalized injuries in the form of denials of equal treatment or of vote dilution, and plaintiffs like

those in the instant case, ... who merely seek to protect an asserted interest in being free of an allegedly illegal electoral system." *Dillard,* 495 F.3d at 1333.[10]

The Supreme Court has long recognized that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974).[11] "DREs that register votes electronically without a voter-verified ballot do not severely restrict the right to vote." *Banfield v. Cortés*, 631 Pa. 229, 265 (Pa. 2015). This Court reached a similar conclusion in a 2006 challenge to Florida's DRE machines:

> [I]f voters in touchscreen counties are burdened at all, that burden is the *mere possibility* that should they cast residual ballots, those ballots will receive a different, and allegedly inferior, type of review in the event of a manual recount. Such a burden, borne of a reasonable, nondiscriminatory regulation, is not so substantial that strict scrutiny is appropriate.

Wexler v. Anderson, 452 F.3d 1226, 1232-33 (11th Cir. 2006), *cert. denied*, 549 U.S. 1111 (2007) (emphasis supplied). There is no equal protection violation for

---

[10] "[W]here large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance." *Fed. Election Comm'n v. Akins,* 524 U.S. 11, 23 (1998).

[11] "Regulations imposing severe burdens on Appellants' 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).

treating dissimilar persons unequally. *Griffin Indus. v. Irvin*, 496 F.3d 1189, 1207 (11th Cir. 2007). As the Supreme Court of Georgia recognized regarding DRE machines, voters do not have a right to a particular ballot system; "it is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems." *Favorito v. Handel,* 285 Ga. 795, 798 (2009).

The district court's order fails to recognize the significance to standing analysis of the United State Supreme Court's seminal decision in *Clapper v. Amnesty Int'l USA*. As this Court has interpreted *Clapper*, "allegations of possible future injury" are not enough. *Georgia Republican Party v. Sec. & Exch. Comm'n*, 888 F.3d 1198, 1203 (11th Cir. 2018), quoting *Clapper,* 568 U.S. at 409.[12]

The district court's citations to case-law predating the Supreme Court's 2013 opinion in *Clapper*—cases like *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006) and *Banfield v. Cortes*, 922 A.2d 36 (Pa. Commw. Ct. 2007)—miss the point. *See* Doc. 309 at 21. The only other opinion hearing a federal constitutional challenge to DRE machines issued after *Clapper*, *Stein v. Cortes*, was ignored by the district court below even though it relied expressly upon *Clapper* for the conclusion that plaintiffs like these failed to satisfy standing. *Stein v. Cortes*, 223 F.Supp.3d at 432.

[12] In *Ga. Republican Party*, this Court applied this test for standing to an entity like CGG, writing that "probabilistic standing ignores the requirement that organizations must 'make specific allegations establishing that at least one identified member had suffered or would suffer harm.'" 888 F.3d 1204 (citation omitted).

Clapper disapproved another argument in the district court's order. The district court erred in thinking that standing may be shown indirectly through measures a plaintiff undertakes to avoid DRE machines. Doc. 309 at 27. "The Supreme Court has never upheld standing based solely on a governmental policy lacking compulsion, regulation, or constraints on individual action." *Citizen Center v. Gessler*, 770 F.3d 900, 912 (10th Cir. 2014) (allegations of "chilling effect" on voting were too conjectural to establish injury in fact). Such an analysis, the Supreme Court makes clear, "improperly waters down the fundamental requirements of Article III." *Clapper*, 568 U.S. at 416. Plaintiffs' allegations echo those found insufficient in *Lance*, *Dillard*, and *Clapper*.

This is not to say a DRE challenge could never satisfy Article III's prerequisite for injury in fact.[13] But there is nothing in the Complaints that provides a plausible allegation that the use of DREs directly interferes with the

[13] In contrast to other voting rights cases, the complaints do not allege that using DREs causes the State to "value one person's vote over another" *Bush v. Gore*, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) (*per curium*); or results in "[w]eighting the votes of citizens differently," *Reynolds v. Sims*, 377 U.S. 533, 563, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); or makes one man's vote in a congressional election worth more than another's as in *Wesberry v. Sanders*, 376 U.S. 1, 7-8, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964). Wholly absent from the complaints is any factual allegation of even one iota's difference in the actual accuracy rates between voting systems (i.e. voting absentee by paper ballot versus by DRE). According to Plaintiffs' theory, a hypothetical touchscreen voting system that is so nearly accurate as to approach zero defects would nevertheless be constitutionally suspect if it were not susceptible to a paper audit using a substantially similar manual recount procedure as to that applying to the far less accurate voting system of paper ballots counted by hand.

Plaintiffs' actual right to vote. This is not to say that such a claim could not be stated in the future.

For instance, standing might be shown if there were some plausible or reasonable suspicion that the DREs lost or miscounted votes, if precinct totals were suspiciously different from historical voting trends, or if machines were subjected to actual tampering. This case began as a putative election challenge to the results of the 2017 election for the Sixth Congressional District. One can imagine potential factual scenarios where a truly disenfranchised voter or unsuccessful candidate for office might plausibly allege the particularized and concrete harm necessary for a legal challenge to DRE machines. But this Court's jurisprudence forfends dispensing with the requirement to articulate some plausible allegation of harm in order to supply jurisdiction under Article III.

The Plaintiffs' apprehension that, sometime in the future, their vote might be lost to malicious hacking cannot elevate to justiciability their demand for "assurance" their votes actually will be counted. Nor can this "substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 14, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972). As in *Spokeo*, Plaintiffs have failed to articulate any concrete injury from the use of the DRE machines, either in any prior election or in any future election. Plaintiffs' claims are premised entirely on the mere *possibility* that Georgia's election system *might*

be subjected to malicious interference. "Plaintiffs' allegation that voting machines may be 'hackable,' and the seemingly rhetorical question they pose respecting the accuracy of the vote count, simply do not constitute injury-in-fact." *Stein v. Cortes*, *supra* at 432.

The district court's order dilutes the constitutional requirements for standing whenever it is alleged that the fundamental right to vote is at stake. Doc. 309 at 27 (distinguishing *Clapper* because it did not involve "the right to vote"). This Court holds, however, that alleging the right to vote "may" be impaired does not show injury in fact. *Dimaio v. Democratic Nat'l Comm.*, 520 F.3d 1299, 1301 (11th Cir. 2008). This highlights the pervasive error that permeates the district court's order: just because a case concerns voting rights neither enlarges the powers of a federal court, nor lowers the threshold of Article III.

The Supreme Court has "repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power." *Hays*, 515 U.S. at 743. It has also made clear that "the assumption that if [plaintiffs] have not standing to sue, no one would have standing, is not a reason to find standing." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc*., 454 U.S. 464, 489, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). Contrary to the evident premise of the district

court, it is not enough to plead "an asserted interest in being free of an allegedly illegal electoral system." *Dillard*, 495 F.3d at 1333.

2. *There is Insufficient Causal Connection Between Plaintiffs' Alleged Injury And Any of the State Defendants' Conduct.*

Even if Plaintiffs' alleged injuries were more than speculative, the injuries are not traceable to the State Defendants. Plaintiffs' allegations about criminal interference with the voting system concern hypothetical third parties, not the State Defendants. *Clapper*, 568 U.S. at 411 (holding that speculation about whether plaintiffs would be subjected to surveillance under the challenged federal statute, "or some other authority—shows that [plaintiffs] cannot satisfy the requirement that any injury in fact must be fairly traceable to" the challenged statute).

"A prospective injury that is contingent on the choices of a third party is less likely to establish standing." *Georgia Republican Party*, 888 F.3d at 1202; *see also Allen v. Wright*, 468 U.S. 737, 752-753 (1984) (holding that parents of school children did not have standing to challenge federal tax exemptions to racially discriminatory private schools because the alleged injury was not "fairly traceable to the assertedly unlawful conduct of the IRS."). Here, any injury would be traced to illegal hacking or malicious and/or criminal conduct by rogue actors, not the proper use of DREs. There is no dispute that when working properly, DRE machines record a vote in the same manner as it is cast. Doc. 226 at ¶ 71. It is only hypothetical third-party interference that creates any potential injury to Plaintiffs.

3. *It is Unlikely That Any Favorable Decision Will Redress Plaintiffs' Alleged Injury.*

Plaintiffs' pleadings target the wrong actors as defendants. The Secretary and State Election Board members are neither the agents of any "enforcement" of the law against Plaintiffs, nor are they the source of the requirement, as a general rule, that DREs be used in Georgia's elections. Although Plaintiffs complain of a State Election Board-promulgated rule (183-1-12-.01), that rule merely mirrors a statutory command requiring DREs generally in the absence of enumerated exceptions that do not apply here.

Targeting injunctive relief at these State Defendants misunderstands Georgia law. The recurrent theme of the Plaintiffs is that the State Defendants must be enjoined from "enforcing" O.C.G.A. § 21-2-383(b) so as to "require[e] voters to vote using DREs." *See, e.g.*, Doc. 226 at ¶ 175. Reading the relevant statutes, however, exposes Plaintiffs' construct as a convenient fiction.

Since 2001, the General Assembly has mandated the use of DREs but for limited exceptions that do not apply here. *See* O.C.G.A. § 21-2-383(b) (requiring use of DRE machines to count official absentee ballots on election day). Plaintiffs' allegation about State Election Board Rule 183-1-12 being "enforced" is implausible for legal reasons. First, the SEB Rule is not, and has not created, an enforcement action directed at any individual Plaintiff. Second, it affixes no

penalties or sanction against any Plaintiff, none of whom can show a concrete or particularized harm to their personal rights on account of it.

Being addressed to county elections officials, the SEB's Rule reflects a statutory requirement of the General Assembly (contingent upon an appropriation that occurred in 2001), for uniformity of election equipment statewide. *See* O.C.G.A. § 21-2-300 ("Provided that the General Assembly specifically appropriates funding to the Secretary of State to implement this subsection, the equipment used for casting and counting votes in county, state, and federal elections shall, by the July, 2004, primary election and afterwards, *be the same in each county in this state* and shall be provided *to each county* by the state, as determined by the Secretary of State) (emphasis supplied). Of course, Plaintiffs have no constitutional right to prevent counties (or the State) from favoring uniformity of election equipment. It strains the imagination to portray the SEB's Rule mirroring Section 21-2-300's codification of uniform election equipment as an "enforcement" against the Plaintiffs in violation of their personal constitutional rights. Consequently, an injunction that purported to enjoin Defendants "from enforcing O.C.G.A. § 21-2-383(b) . . . and from requiring voters to vote using DREs" (Doc. 226, at ¶ 175), would not provide any meaningful redress to the Plaintiffs.

Further, Plaintiffs' speculation that a different balloting system would eliminate potential third party interference with voting ignores the reality that no election system is flawless. *Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003) ("The unfortunate reality is that the possibility of electoral fraud can never be *completely* eliminated, no matter which type of ballot is used.") (emphasis in original); *Favorito v. Handel*, 285 Ga. at 797 (same).

4. *Plaintiffs May Not Manufacture Standing by Inflicting Harm on Themselves.*

Plaintiffs cannot manufacture standing by incurring a harm on themselves. Plaintiffs base their standing upon their future intention to vote. *See, e.g.*, Doc. 226, ¶¶ 24-27 (pleading standing exists because they "intend[] to vote" in the November 2018 Election). But if Plaintiffs object to using DRE machines and insist upon using a paper ballot, they are free to vote by paper ballot without any precondition and on any day except the actual day of the election. *See, e.g.*, O.C.G.A. § 21-2-380 (absentee elector, defined as ballot cast other than in person on the day of the election, "shall not be required to provide a reason in order to cast an absentee ballot"). All voters in Georgia may choose to vote in person using a DRE machine, or alternatively by absentee *paper* ballot. *Favorito*, 285 Ga. at 798 ("Under Georgia law, every eligible voter in Georgia can make a decision to vote utilizing absentee ballots."). Consequently, the simple solution for voters who, like

Plaintiffs, fear their vote might not be counted unless it is written on paper is to exercise their unrestrained right to vote by early absentee paper ballot.[14]

Plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 556 U.S. at 416. "[A]bsentee voters 'have not been treated differently from the polling place voters, except in a manner permissible under the election statutes' and as a result of their own choice." *Favorito*, 285 Ga. at 798 (citation omitted). "This court cannot understand how voluntary exposure to purportedly offensive conduct can establish standing to obtain an injunction barring such conduct." *Alabama Freethought Ass'n v. Moore*, 893 F. Supp. 1522, 1536 (N.D. Ala. 1995). Such "clever machination . . . would make a mockery" of Article III's case or controversy requirement. *Id.*; *see also Lujan,* 504 U.S. at 565 n. 2 ("[I]mminence ... has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, *and the acts necessary to make the injury happen are at least partly within the plaintiff's own control* ") (emphasis added).

[14] Plaintiffs cannot satisfy standing by pointing to generalized insecurity in the integrity of the election based upon letting other people vote using allegedly "vulnerable" DRE machines. "As a general rule, if there is no constitutional defect in the application of a statute *to a litigant*, he does not have standing to argue that it would be unconstitutional *if applied to third persons in hypothetical situations*." *Cty. Ct. of Ulster Cty., N.Y. v. Allen*, 442 U.S. 140, 155 (1979) (emphasis supplied).

B. THE DISTRICT COURT ERRED IN USING HEARING EVIDENCE TO EMBELLISH DEFICIENT ALLEGATIONS OF INJURY FOR STANDING PURPOSES.

"If the plaintiff fails to meet its burden, th[e] court lacks the power to create jurisdiction by embellishing a deficient allegation of injury." *Dimaio*, 520 F.3d at 1301, quoting *Elend v. Basham*, 471 F.3d 1199, 1206 (11th Cir. 2006); *see also Miccosukee Tribe of Indians of Florida v. Florida Athletic Com'n*, 226 F.3d 1226, 1230 (11th Cir. 2000) ("A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient complaints of standing."), citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Here, Plaintiffs failed to allege a concrete injury and therefore lacked standing to bring this action. Their complaints should have been dismissed months ago. Instead, the district court delayed action on the motions and eventually used evidence submitted in support of a preliminary injunction to embellish a case for jurisdiction that did not truly exist.

With election season pulling into view, the Coalition Plaintiffs' Motion for Preliminary Injunction was such a surprise, even their co-Plaintiffs were taken off guard. Doc. 329-1 at 12 (Curling Plaintiffs were "surprised by the Coalition Plaintiffs' unilateral filing on August 3"). The district court reacted by ordering the State Defendants to respond within a shortened timeframe. Further, the district court directed the State Defendants to focus their response on a singular issue: "The Court DIRECTS Defendants in their response brief to particularly focus on

the public interest factor—i.e. the practical realities surrounding implementation of the requested relief in the next one to three months." Doc. 259 at 2 (court's emphasis retained). Because discovery had been stayed (Doc. 56), the State Defendants had not retained any experts (on the subject of cybersecurity or otherwise). Heeding the district court's direction, the State Defendants focused on how "statewide implementation of the requested relief in an expedited, limited time frame [would] actually compromise the reliability and functionality of the voting system and therefore adversely impact the public interest in this 2018 election cycle." Doc. 259 at 1-2.[15]

At the hearing, however, the district court's references to evidence outside the four corners of the Plaintiffs' complaints (i.e. evidentiary submission and so-called "expert" testimony), suggested Plaintiffs' evidentiary submissions influenced its jurisdictional rulings. Doc. 307 at 34 (referencing the "evidence that is presently before the Court"). The district court cited this evidence as a basis for distinguishing certain cases on the issue of standing like the Supreme Court's opinion in *Clapper*. *Id*. (citing "evidence that has been submitted" as basis for distinguishing *Clapper* and finding jurisdiction). This was error.

[15] When the district court issued its Sept. 17 Order (Doc. 309), it was almost as if there never had been a direction to focus on the implementation concerns. The district court attacked the State Defendants for failing to respond to the Coalition Plaintiffs' surprise Motion with a ready "cybersecurity expert," despite a prior court order staying discovery (Doc. 56), and the suddenness of the district court's demand the State respond within days. Doc. 259.

The district court appears to have allowed evidence submitted at the preliminary hearing to embellish deficient allegations of injury and jurisdiction. *Anderson v. City of Alpharetta*, 770 F.2d 1575, 1582 (11th Cir. 1985) (federal court should not speculate concerning the existence of standing or "piece together support for the plaintiff"). The purpose of a preliminary injunction is to preserve the "status quo," not decide issues on their merits. Although the State Defendants had adequate notice of the hearing on the preliminary injunctions, they were not given sufficient notice of the district court's intention to treat that motion as a mini-trial on the merits of jurisdictional matters. *University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981) (district court should not consolidate hearing for preliminary relief with trial on merits unless court has given both parties "clear and unambiguous notice" of its intent to do so).

The district court failed to give the State Defendants fair notice of its intent to treat evidentiary submissions on the Motions for Preliminary Injunction as influencing its decision on jurisdictional issues such as standing, Eleventh Amendment immunity, and legislative immunity. This prejudiced the State Defendants who were promised a ruling on their motion to dismiss repeatedly in the months before the hearing only to suddenly, without prior notice, watch the district court turn the decision on jurisdiction into a quasi-evidentiary matter, as opposed to one on the pleadings. *Georgia S. & F. Ry. Co. v. Atl. Coast Line R. Co.*,

373 F.2d 493, 498 (5th Cir. 1967) ("The notice requirements of Rule 12 guarantee that the automatic change of a motion to dismiss into a motion for summary judgment will not be accomplished by an unforeseeable thrust with no chance to parry."). The chronology of this case in the court below illustrates the wisdom of addressing threshold jurisdictional issues early in a case. "Drive-by" jurisdictional decision-making is disapproved, especially when, as it did to the State Defendants, it works an unfairness against the parties. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998).

II. THE DISTRICT COURT ERRED BY DENYING THE MOTION TO DISMISS ON GROUNDS OF ELEVENTH AMENDMENT IMMUNITY.

"Relaxation of standing requirements is directly related to the expansion of judicial power." *Clapper*, *supra*, at 408, quoting *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring). In weighing whether the Eleventh Amendment applies, this Court should look to "the essential nature and effect of the proceeding." *Cassady v. Hall*, No. 18-10667, 2018 WL 2991972, *2 (11th Cir. June 15, 2018). Here, the district court order's relaxation of standing augurs a muscular federal judicial power that would unduly erode the sovereignty of state government.

Eleventh Amendment immunity is a jurisdictional issue. Here, the immunity was raised from the outset of the case as a "facial attack" on the sufficiency of the

allegations in the complaint, merely requiring the district court "to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1999). The Eleventh Amendment bars suits against state officials where the state is, in reality, the true party in interest. *See, e.g., Manders v. Lee*, 338 F.3d 1304, 1308 (11th. Cir. 2003) (to receive Eleventh Amendment immunity, defendant need only be acting as the "arms of the State"). Here, Plaintiffs' continued request for relief against the public officials in their official capacity is implicated because the state is, in fact, "the real party in interest." Such claims against the State Defendants in their official capacities are barred by the Eleventh Amendment. *Kentucky v. Graham*, 473 U.S. 159, 169, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985).[16] An exception to this immunity, pursuant to *Ex parte Young*, 209 U.S. 123 (1908), does not apply and the district court erred in holding otherwise.

A. *YOUNG*'S EXCEPTION CANNOT APPLY IN THE ABSENCE OF THREATENED ENFORCEMENT BY THE STATE DEFENDANTS AGAINST THESE PLAINTIFFS.

The district court's order overlooked the requirement that, for *Young*'s exception to apply, the state official must threaten, or be about to commence, proceedings adverse to the particular individual plaintiff. In truth, this case is not

[16] The Supreme Court has held that "§ 1983 does not override a State's Eleventh Amendment immunity." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 63 (1989); *Quern v. Jordan*, 440 U.S. 332, 342 (1979); *Kentucky*, 473 U.S. at 169.

about enjoining enforcement of an allegedly unconstitutional statute against the Plaintiffs. SEB Rule 183-1-12 is not being "enforced" against Plaintiffs by the State Defendants so as to trigger *Young*'s exception. First, the SEB Rule is not, and has not created, an enforcement action directed at any individual Plaintiff. Second, it affixes no penalties or sanction against any Plaintiff, none of whom can show a concrete or particularized harm to their personal rights on account of it. *C.f. Summit Medical Assocs.*, 180 F.3d at 1339 (threatened enforcement of criminal liability provisions of statutes fell squarely within *Young*'s exception).

Being addressed to county elections officials, the State Election Board's Rule reflects a statutory requirement of the General Assembly (contingent upon an appropriation that occurred in 2001), for uniformity of election equipment statewide. *See* O.C.G.A. § 21-2-300 ("Provided that the General Assembly specifically appropriates funding to the Secretary of State to implement this subsection, the equipment used for casting and counting votes in county, state, and federal elections shall, by the July, 2004, primary election and afterwards, *be the same in each county in this state* and shall be provided *to each county* by the state, as determined by the Secretary of State) (emphasis supplied). Of course, Plaintiffs have no constitutional right to prevent counties (or the State) from favoring uniformly-deployed election equipment.

It strains the imagination to portray the SEB's Rule mirroring Section 21-2-300's codification of uniform election equipment as an "enforcement" against the Plaintiffs in violation of their personal constitutional rights. Plaintiffs are not directly harmed by a statute like O.C.G.A. § 21-2-50(15) that merely requires the Secretary of State to maintain DRE machines "for use by counties."[17] These Plaintiffs claim grievance on account of state officers' alleged failure to act, i.e. a failure to implement certain policies Plaintiffs believe are proper. This turns *Young* inside out.

The Supreme Court has never read *Young* so expansively. *Young* "was based on a determination that an unconstitutional state enactment is void and that any action by a state official that is purportedly authorized by that enactment cannot be taken in an official capacity . . . ." *Papasan v. Allain*, 478 U.S. 265, 276, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). This "action" requirement is indispensable to a proper understanding of *Young*:

> If, because they were law officers of the state, a case could be made for . . . testing the constitutionality of the statute, by an injunction suit against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general. . . . That would be a very convenient way for obtaining a speedy judicial determination of . . . constitutional law . . . ., but it is a mode which cannot be applied to the states . . . consistently with the fundamental principle

[17] Nor can Plaintiffs claim harm from a statute, like section 21-2-379.2, that permits the Secretary of State to re-examine the DRE system and attest to his or her opinion of its security. The remedial nature of this law is proven by Plaintiffs' invocation of it as mandamus relief. *See, e.g.*, Doc. 70 ¶ 128.

> that they cannot, without their assent, be brought into any court at the suit of private persons. . . .

Young, 209 U.S. at 157. This is why *Young*'s requirement of real or threatened *action* on the part of the state official exists. *Western Union Tel. Co. v. Andrews*, 216 U.S. 165, 166, 30 S.Ct. 286, 54 L.Ed. 430 (1910) (holding that *Young* applies when a statute charges prosecutors with enforcement and they threaten and are about to commence proceedings to enforce the statute).

Were the district court's order the law, *Young* would extend far beyond what the Supreme Court intended. State officials could be hauled into court purely for their failure to act as plaintiffs wish. Here, Plaintiffs "named the offices [of the Secretary of State and State Elections Board] in an effort to obtain a judgment binding the State . . . as an entity, a step that Congress did not authorize when enacting 42 U.S.C. § 1983 and that the Eleventh Amendment does not permit in the absence of such authorization." *Sherman v. Community Consol. School Dist. 21*, 980 F.2d 437, 441 (7th Cir. 1992) (citations omitted).

This case is nowhere near the classic *Young* paradigm where a law enforcement official has already begun—or is poised to commence—a legal action or criminal prosecution against an individual using an unconstitutional law. *C.f. Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988). "[U]nless the state officer has some responsibility to enforce the statute or provision at issue, the 'fiction' of *Ex parte Young* cannot operate." *Summit Medical Assocs.*, 180 F.3d at 1341; *see also*

Women's Emergency Network v. Bush, 323 F.3d 937, 949-50 (11th Cir. 2003) (refusing to apply *Young*'s exception to Eleventh Amendment immunity "[w]here the enforcement of a statute is the responsibility of parties other than" the defendant officer); *Boglin v. Board of Trustees of Alabama Agricultural & Mechanical University*, 290 F.Supp.3d 1257, 1265 (N.D. Ala. 2018). Neither the Secretary of State, nor the State Election Board "enforce" or threaten to use any statute to cause harm to the individual Plaintiffs.

It was the General Assembly of Georgia, not the State Defendants, that enacted a comprehensive statutory scheme that, in 2001, was built around DRE machines as the workhorse of Georgia's elections system. The Secretary of State's role is to (1) maintain the DRE system for use by Georgia's counties and (2) under appropriate circumstances, re-examine and express his opinion as to whether DRE machines can be safely and securely used. O.C.G.A. § 21-2-379.2(b). Facilitating the use of a DRE system by Georgia's counties does not constitute an "enforcement proceeding" against the individual plaintiffs.

"Only if a state officer has the authority to enforce an unconstitutional act in the name of the state can the Supremacy Clause be invoked to strip the officer or his official or representative character and subject him to the individual consequences of his conduct." *Summit Medical Assocs.*, *supra* at 1341. To the extent the Complaints use the Secretary of State and SEB Members as surrogates,

or "targets of convenience," to influence the Georgia Legislature to make broad changes in the name of election security, the same redressability concerns that prevent Plaintiffs from showing standing also preclude *Ex parte Young*'s exception to Eleventh Amendment immunity.

These Plaintiffs are not complaining of any action against them by any of the State Defendants. Plaintiffs' grievance is that State Defendants "ha[ve] *taken no action* to mandate the use of paper ballots to protect Georgia's elections." Doc. 226 ¶ 15 (emphasis supplied). The unmistakable objective of this lawsuit is to "remedy" alleged inaction by the Georgia Legislature by resorting to a federal judicial decree, so that the State of Georgia (and its elected representatives) will be goaded into rewriting its election law to the satisfaction of the individual Plaintiffs. *See, e.g.*, Doc. 309 at 22 (Plaintiffs allege Defendants "*failed to take adequate steps* to address those breaches," "that Defendants have continued to *fail to take action* to remedy the DRE system's vulnerabilities," "that this *failure* . . . impacts the integrity of the voting system") (emphasis supplied).

Young was intended to shield private citizens from the action of state officials, not their inaction. This difference is substantive, not merely semantic. What we have here is not *action*, but *inaction*. *Young* was never intended to apply to such a situation. Plaintiffs' grievances on account of the State Defendants' *inaction* places *Young*'s exception to immunity out of reach.

B. *EX PARTE YOUNG*'S IMMUNITY EXCEPTION IS INAPPLICABLE WITHOUT AN ONGOING AND CONTINUOUS VIOLATION OF A FEDERAL LAW.

Young's exception to Eleventh Amendment immunity is limited to suits for prospective relief against an "ongoing and continuous" violation of federal law. *See, e.g., Summit Med. Assocs.*, 180 F.3d at 1337. "*Young* has been focused on cases in which a violation of federal law by a state official is ongoing" because its primary rationale is rooted in "vindicat[ing] the federal interest in assuring the supremacy of that law." *Papasan*, 478 U.S. at 277-78. Therefore, "*Young* applies only where the [state law] underlying authorization upon which the named official acts is asserted to be illegal." *Id*. at 277, citing *Cory v. White*, 457 U.S. 85 (1982). Without a *bona fide* conflict between federal and state law, *Young*'s imperative to vindicate federal supremacy evaporates.

The harm and redressability concerns raised in the motions to dismiss overlap with *Ex parte Young*. Harm, injury, violation and redressability tend to overlap conceptually. Plaintiffs' lack of concrete harm is inextricably intertwined with their inability to show a federal violation that is continuous and ongoing within the meaning of *Young's* exception to Eleventh Amendment immunity.

Nowhere in either of the Plaintiff-Factions' respective Complaints is there identified a single, relevant security breach *of a DRE machine*—or loss of *one Plaintiffs' vote*—in a Georgia election. Also absent is a plausible allegation that raises beyond conjecture the imminence of a "malicious hack" that will change,

dilute or negate a single one of the individual Plaintiffs' votes in an upcoming election. To the contrary, Plaintiffs admit that "[w]hen operating properly, AccuVote DRES use software installed on the unit to record the voter's choice on both the DRE's removable memory card and into the machine's internal flash memory." *See, e.g.*, Doc. 226 at ¶ 71.

It is irrelevant to *Young*'s exception that, in support of their claims of "insecurity," the Plaintiffs rely upon media reports, studies from "blue-ribbon panels," or even the published findings of Congressional committees. *See, e.g.*, Doc. 226 ¶¶ 79-91; Doc. 309 at 8-10. None of these carry the force of federal law. Without such a federal violation, the imperative for *Young*'s exception—vindicating the supremacy of federal law—is null.

Citing *Young*'s exception, Plaintiffs cannot evade Eleventh Amendment immunity using conclusory allegations that the DRE system is "untrustworthy" when the complaint lacks *any* factual allegation that even a single vote has been incorrectly recorded. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level . . . ."). Conjecture regarding discrete future events does not suffice to create an ongoing violation. *See DeBauche v. Trani*, 191 F.3d 499, 505 (4th Cir. 1999) (refusing to apply *Young*'s exception to Eleventh Amendment). Just as "mere conjecture" is insufficient to plead standing, so is it

also inadequate to "plausibly allege[]" an ongoing violation for purposes of *Young*. *Jemsek v. Rhyne*, 662 F.App'x 206, 212 (4th Cir. 2016).

Nor was it proper for the district court to invent a federal right that does not truly exist for purposes of triggering *Young*'s exception. Plaintiffs' alleged violations do not infringe the right to have their vote counted, but their alleged right to *assurance* that their vote was counted, which is not the same thing. *See, e.g.*, Doc. 226 at 169 (claiming "right to participate in a trustworthy and verifiable election process" is "[i]nherent in individuals' fundamental right to vote"). Plaintiffs' presumptions that such rights are "inherent in the right to vote" are legal conclusions not entitled to the assumption of truth. *Ashcroft v. Iqbal*, 556 U.S. at 679. Merely alleging a constitutional right to reassurance, or to be free of subjective apprehension that one's vote might be lost to malicious tampering, does not mean such a constitutional right exists as a matter of law.

There can be no "ongoing violation" of a federal right that does not exist. Plaintiffs allege a right to "auditable" elections, but cannot cite any judicial recognition of such a federal right under the Constitution, either under the Due Process or Equal Protection Clauses. "[I]n deciding to forego the privilege of voting early on a paper ballot, voters *assume the risk* of necessarily different procedures if a recount is required." *Favorito v. Handel*, 285 Ga. at 798 (emphasis supplied).

There is no federal law mandating either the use of paper ballots or requiring post-election "audits." "[C]ontentions regarding the accuracy of recounts 'are *merely hypothetical*.'" *Favorito*, 285 Ga. at 800 (emphasis supplied) (citations omitted). For the same reasons Plaintiffs lack standing, mere presumptions of vulnerability or future harm are not equivalent to "ongoing and continuous violations" of federal law implicating *Young*'s balancing of state sovereignty against federal supremacy.

C. *YOUNG*'S EXCEPTION TO IMMUNITY DOES NOT APPLY BECAUSE PLAINTIFFS' RELIEF IS NOT "PURELY PROSPECTIVE."

Notwithstanding Plaintiffs' disguising their claims as "only" for prospective relief, Plaintiffs still want "to adjudicate the legality of past conduct," meaning their relief is not purely prospective. The *Ex parte Young* exception does not allow a plaintiff "to adjudicate the legality of past conduct." *Papasan*, 478 U.S. at 277-78. The gravamen of Plaintiffs' case is that alleged breaches occurred in the past and that the State Defendants "failed to take adequate steps to address those breaches." Doc. 309 at 22.

Plaintiffs' allegations remain "backward-looking" because they seek to remedy harm "resulting from a past breach of a legal duty on the part of the defendant state officials." *Seminole Tribe of Fla. v. Fla. Dep't of Revenue*, 750

F.3d 1238, 1249 (11th Cir. 2014) (internal quotation omitted).[18] Plaintiffs insist that their case does not offend *Young*'s prohibition on retrospective relief. But the errant posting of data to a public-facing server in 2017 is the cudgel Plaintiffs use to distinguish their case from the ranks of DRE lawsuits that have seen defeat across this country.[19] These allegations all relate to past "harm."

The reality is that a substantial part of this case is a fight over the truth (or, more accurately, exaggeration) of what really happened in the past at KSU, a historical fact that holds little current import because of administrative changes implemented since 2017. Plaintiffs' posturing that their declaratory relief is not backward looking is, therefore, borderline disingenuous.

D. *YOUNG*'S EXCEPTION TO IMMUNITY DOES NOT APPLY BECAUSE PLAINTIFFS' RELIEF "IMPLICATES SPECIAL SOVEREIGNTY INTERESTS" BY USURPING THE STATE'S ROLE IN THE NEUTRAL REGULATION OF ELECTIONS.

The Eleventh Amendment does not exist solely in order to "preven[t] federal-court judgments that must be paid out of a State's treasury." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), citing *Hess v. Port Authority Trans–Hudson Corporation,* 513 U.S. 30, 48 (1994).

---

[18] Simply because the remedy will occur in the future, does not transform it into "prospective" relief, especially where "the relevant events [to Plaintiffs' claims] have already occurred." *Fedorov v. Board of Regents for University of Georgia*, 194 F.Supp.2d 1378, 1387 (S.D. Ga. 2002).

[19] *See, e.g.,* Doc. 226 ¶ 95 ("The information hosted on the 'elections.kennesaw.edu' server was not authorized to be publicly accessible.").

"It also serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Id*. Because Plaintiffs' suit "implicates special sovereignty interests" for the reasons discussed *supra*, Plaintiffs cannot use *Young* to evade immunity.

Young balances infringement of state sovereignty against the interests of federal supremacy. Neutral and non-discriminatory regulation of elections is not only a state prerogative, but an absolute necessity in order for organized elections to occur. *Wexler v. Anderson*, 452 F.3d 1226, 1232 (11th Cir. 2006) ("[S]tates are entitled to burden that right [to vote] to ensure that elections are fair, honest and efficient."). It is beyond cavil that a federal court action "to direct the exercise of any discretion committed to its officers," infringes a State's sovereignty. *Lathrop v. Deal*, 301 Ga. 408, 417 (2017), quoting *Holcombe v. Ga. Milk Producers Confederation*, 188 Ga. 358, 363 (1939).

The district court order's facade of restraint—pretending this lawsuit is not "usurping the State's role in regulating elections" because "Plaintiffs are not asking the Court to direct how the State counts ballots" (Doc. 309, at 30)—is pierced two sentences later when the order reveals that directing the State how to count ballots *is precisely* one of several infringements upon Georgia's sovereignty that is at stake. *Id*. (Plaintiffs "seek to require the State to implement a fully auditable ballot system to ensure the accuracy and reliability of the voting process."). This comes

through in the closing sentences of the district court order: "If a new balloting system is to be launched in Georgia in an effective manner, it should address democracy's critical need for transparent, fair, accurate, and verifiable election processes that guarantee each citizen's fundamental right to cast an accountable vote." Doc. 309 at 46.

There is no perfect system of voting. The question of whether an electronic system has adequate security measures against tampering necessarily begs a subjective determination. For this reason, Georgia's General Assembly delegated this discretionary decision to the Secretary. O.C.G.A. § 21-2-379.2(a) (Secretary of State may "in his or her discretion" reexamine Georgia's DRE voting system); *see also* O.C.G.A. § 21-2-379.2(b) (upon reexamination, Secretary of State stat[es] whether, in his or her opinion," the system can be safely and accurately used). Absent fraud, bad faith, abuse of discretion or clearly arbitrary action, there is no reason for a federal court to interfere with that neutral determination.

Because it gives no deference either to Georgia's statutory scheme or to the discretion delegated to the Secretary of State by Georgia's legislature, the order erodes state sovereignty, an explicit consideration under *Ex parte Young*. This case's assault on public officials' discretionary opinion and alleged "failures to act" contravene *Young*'s formulation to avoid "upset[ing] the balance of federal and state interests." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 277, 117

S.Ct. 2028, 138 L.Ed.2d 438 (1997). *Young*'s applicability "has been tailored to conform as precisely as possible" to those specific situations in which it is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." *Papasan, supra*, at 277-78. The district court order's misreading of *Ex parte Young* upsets the delicate equilibrium between federal and state sovereigns that *Young* was written to preserve, not erase. For all of these separate and independent reasons, the district court erred in rejecting the State Defendants' entitlement to Eleventh Amendment immunity.

III. THE DISTRICT COURT ERRED BY DENYING THE MOTION TO DISMISS ON GROUNDS OF ABSOLUTE LEGISLATIVE IMMUNITY.

In the court below, it was patent that the Plaintiffs' objective was to co-opt the coercive power of a federal decree to compel legislative action by the elected representatives of the State of Georgia and force a rewrite of Georgia's election laws to suit Plaintiffs' policy agenda. Nevertheless, the district court gave short shrift to the State Defendants' invocation of legislative immunity. Although the district court's order did not mention absolute legislative immunity, an order nonetheless may be directly appealed if it "effectively denied [the] immunity." *Howe v. City of Enterprise*, 861 F.3d 1300, 1302 (11th Cir. 2017).

Established in the Speech and Debate Clause of the United States Constitution (U.S. Const. art. I, sec. 6, cl. 1), legislative immunity protects not only the speech and debate of legislators, but also voting on legislative acts. *Kilbourn v. Thompson*, 103 U.S. 168, 204, 26 L.Ed. 377 (1880) ("It would be a narrow view of the constitutional provision to limit it to words spoken in debate."). Legislative immunity insulates state officials "acting in their legislative capacity." *Consumers Union v. Supreme Court of Virginia*, 446 U.S. 719, 734, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980). In addition, the acts of an executive official that are formally legislative are also protected by legislative immunity. *Bogan v. Scott-Harris*, 523 U.S. 44, 49, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998). This immunity "applies with equal force to suits seeking damages and those seeking declaratory or injunctive relief." *Scott*, 405 F.3d at 1254.

To the extent Plaintiffs' suit is premised on the SEB's promulgation of rules and regulations, the claim is barred by legislative immunity, regardless of the relief sought. More fundamentally, it offends legislative immunity for a district court to entertain injunctions aimed at coercing legislative enactment of a private policy agenda.

Absolute legislative immunity depends on the nature of the act, not the position or title of the actor. *Woods v. Gamel*, 132 F.3d at 1419 ("It is the nature of the act, and not the position of the actor, which determines when absolute

legislative immunity will apply.") (citation omitted). Rooted in a concern for the protection of the integrity of the legislative process, this immunity regards voting, debate and reacting to public opinion as "manifestly in furtherance of legislative duties." *Woods, supra* at 1420, quoting *DeSisto College, Inc. v. Line*, 888 F.2d 755, 765 (11th Cir. 1989). The protection applies to suits regardless of whether the suit is against a defendant in either an official or individual capacity. *Scott*, 405 F.3d at 1255.

The Complaints represent an attack on legislative immunity. In passing judgment on the "adequacy" of Georgia's elections system, the Complaints position the Plaintiffs and the district court in policymaking roles opposite the Georgia Legislature that constructed a statutory regime around DRE machines in 2001, the executive and administrative branches of Georgia that maintain it for use by county governments, and the unanimous opinion of Georgia's highest judicial tribunal that upheld the constitutionality of this statutory system. *See Favorito v. Handel*, 285 Ga. 795 (2009). Plaintiffs are using the State Defendants in their official capacities as mere convenient targets for their grievance against the Georgia Legislature's perceived failure to act quickly enough to enact into law these Plaintiffs' policy agenda.

Plaintiffs' main complaint is less against the State Defendants' actions than it is with an absence of legislative policymaking in line with Plaintiffs' agenda.

See, e.g., Doc. 226 ¶ 1 (complaining Georgia's elections officials "refused to take administrative, regulatory or legislative action"); *id.* at ¶ 10 ("complaining that General Assembly "debated the issue" in a proposed bill "but without ultimately enacting that bill or any other palliative measure . . . . thus [doing] nothing to improve an election infrastructure that is widely recognized as one of the least secure in the country"). Suing the State Defendants because State legislators did not enact into law a particular bill contravenes absolute legislative immunity.

The Plaintiffs hail paper ballots as a panacea. But paper ballots are anything but a completely secure voting system. To the contrary, opportunities for tampering with paper ballots abound from the moment a voter casts his or her ballot until the time a winner is declared. "The unfortunate reality is that the possibility of electoral fraud can never be *completely* eliminated, no matter which type of ballot is used." *Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003) (emphasis in original).

Balancing the competing pros and cons of different voting systems is quintessentially a legislative function, bearing all the hallmarks of policymaking and promulgating laws of general application. All voting systems are imperfect. None are immune from tampering. The Constitution cannot be read to impose a requirement of perfection that cannot be achieved. Nor does the failure of a State to meet such an unrealistic standard invite district courts to moonlight as

policymakers, weighing the pros and cons of different voting systems. *Weber*, *supra* at 1107 ("it is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems").

"An act is deemed legislative . . . when it is policymaking and of general application." *Woods*, 132 F.3d at 1420, citing *Brown v. Crawford Cty., Ga.*, 960 F.2d 1002, 1011 (11th Cir. 1992). The district court is not better positioned than a state legislature to weigh the advantages and disadvantages of paper ballots and/or DRE machines for an examination of the policy considerations that would arise from requiring voter-verified paper ballots. Yet the district court below appears poised to take the policy-making reins of Georgia state government out of the hands of its legislators and into its own. Doc. 309 at 46 ("If a new balloting system is to be launched in Georgia in an effective manner, it should address democracy's critical need for transparent, fair, accurate, and verifiable election processes that guarantee each citizen's fundamental right to cast an accountable vote."). However sincere or well-intentioned, the district court's order overlooked the absolute legislative immunity of the State Defendants.

CONCLUSION

It is an unacceptable stretch to call presumptions and conjecture into service as a substitute for allegations plausibly establishing jurisdiction and/or disproving immunities under the Eleventh Amendment and/or legislative immunity. The

district court erred when it did not recognize the absence of jurisdiction and the presence of immunity, denying the State Defendants' motions to dismiss. The Court of Appeals must reverse the district court and render judgment as a matter of law for the State Defendants.

This 2nd day of November, 2018.

BARNES LAW GROUP, LLC

/s/John F. Salter
JOHN F. SALTER
Georgia Bar No. 623325
ROY E. BARNES
Georgia Bar No. 039000

BARNES LAW GROUP, LLC
31 Atlanta Street
Marietta, GA 30060
(770) 227-6375
(770) 227-6373 (fax)
john@barneslawgroup.com
roy@barneslawgroup.com

Counsel for Appellants
Brian P. Kemp, David J. Worley, Rebecca N. Sullivan, Ralph F. "Rusty" Simpson, Seth Harp, & The State Election Board

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) as the brief contains 11,183 words, excluding those parts exempted by 11th Cir. Local R. 32-4.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) as this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

This 2nd day of November 2018.

BARNES LAW GROUP, LLC

/s/John F. Salter
JOHN F. SALTER
Georgia Bar No. 623325
ROY E. BARNES
Georgia Bar No. 039000

BARNES LAW GROUP, LLC
31 Atlanta Street
Marietta, GA 30060
(770) 227-6375
(770) 227-6373 (fax)
john@barneslawgroup.com
roy@barneslawgroup.com

Counsel for Appellants
Brian P. Kemp, David J. Worley, Rebecca N. Sullivan, Ralph F. "Rusty" Simpson, Seth Harp, & The State Election Board

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the **INITIAL BRIEF OF APPELLANTS** upon all counsel of record via the Court's CM/ECF electronic filing and notification system.

This 2nd day of November 2018.

BARNES LAW GROUP, LLC

/s/John F. Salter
JOHN F. SALTER
Georgia Bar No. 623325
ROY E. BARNES
Georgia Bar No. 039000

BARNES LAW GROUP, LLC
31 Atlanta Street
Marietta, GA 30060
(770) 227-6375
(770) 227-6373 (fax)
john@barneslawgroup.com
roy@barneslawgroup.com

Counsel for Appellants
Brian P. Kemp, David J. Worley, Rebecca N. Sullivan, Ralph F. "Rusty" Simpson, Seth Harp, & The State Election Board