No. 25-11320

In the
United States Court of Appeals for the Eleventh Circuit

DONNA CURLING, *et al.*,
Plaintiffs-Appellants,
v.
DAVID WORLEY, *et al.*,
Defendants-Appellees.

On Appeal from the
United States District Court for the Northern District of Georgia

Brief *Amicus Curiae* of America's Future, Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, and Conservative Legal Defense and Education Fund in Support of Plaintiffs-Appellants and Reversal

PATRICK M. MCSWEENEY
3358 John Tree Hill Road
Powhatan, VA 23139

RICK BOYER
INTEGRITY LAW FIRM
P.O. Box 10953
Lynchburg, VA 24506

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
*Attorney of Record

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Attorneys for Amici Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The *amici curiae* herein, America's Future, Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, and Conservative Legal Defense and Education Fund, through their undersigned counsel, submit this Certificate of Interested Persons and Corporate Disclosure Statement pursuant to Federal Rules of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3.

America's Future, Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, and Conservative Legal Defense and Education Fund are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them.

The following is a list of persons or parties, in addition to those listed in Appellants' and Appellees' opening briefs and any other *amicus* briefs that may be filed, that have an interest in the outcome of this matter:

1. America's Future (*Amicus*)
2. Boyer, Rick (Counsel for *Amici* America's Future, *et al*.)
3. Conservative Legal Defense and Education Fund (*Amicus*)
4. Gun Owners Foundation (*Amicus*)

5. Gun Owners of America, Inc. (*Amicus*)

6. Gun Owners of California (*Amicus*)

7. Integrity Law Firm (Counsel for *Amici* America's Future, *et al*.)

8. McSweeney, Patrick (Counsel for *Amici* America's Future, *et al*.)

9. Morgan, Jeremiah L. (Counsel for *Amici* America's Future, *et al*.)

10. Olson, William J. (Counsel for *Amici* America's Future, *et al*.)

11. William J. Olson, P.C. (Counsel for *Amici* America's Future, *et al*.)

s/William J. Olson
William J. Olson

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INTEREST OF *AMICI CURIAE*[1]

America's Future, Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of law.

STATEMENT OF THE ISSUES

1. Whether the district court erred in dismissing individual plaintiffs' constitutional challenge to defendants' use of a Ballot Marketing Device (BMD) voting system for lack of standing?

2. Whether the district court erred in dismissing organizational plaintiffs' constitutional challenge to defendants' use of a Ballot Marketing Device (BMD) voting system for lack of standing.

3. Whether the district court erred in denying attorney's fees under 42 U.S.C. § 1988(b) to plaintiffs who obtained injunctive relief that permanently

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[1] All parties have consented to or do not oppose the filing of this brief *amicus curiae*. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

prohibited defendants' use of the unconstitutional Direct Recording Electronic (DRE) voting system.

4. Whether the district court abused its discretion by refusing to admit at trial Appellant Davis' evidence of actual injury to legally protected interests.

STATEMENT OF THE CASE

Beginning in 2017 and continuing for more than seven years, individual and organizational Plaintiffs brought challenges to two separate iterations of Georgia's electronic voting systems. Plaintiffs initially challenged Georgia's paperless touchscreen **Direct Recording Electronic** ("DRE") voting system as fundamentally insecure and vulnerable to malign manipulation of results. Plaintiffs achieved a complete victory when the district court for the Northern District of Georgia enjoined use of the DRE voting system. The state legislature adopted a different type of electronic voting, using a **Ballot Marking Device** ("BMD") system, resulting in Plaintiffs filing supplemental and amended complaints — which after trial the district court has dismissed for lack of individual or organizational standing. On the same date, the district court denied Plaintiffs' application for attorney fees relating to their successful challenge to the DRE voting system.

Shortly after Plaintiffs challenged the DRE voting system, Defendants moved to dismiss based both on standing and Eleventh Amendment immunity. In September 2018, the district court denied Defendants' motion. *See Curling v. Kemp*, 334 F. Supp. 3d 1303, 1319-21 (N.D. Ga. 2018). At the same time, the district court denied Plaintiffs' motion for a preliminary injunction against use of the DRE machines for the 2018 election because it was too close to the beginning of voting and the risk of electoral chaos was too great. *Id.* at 1326-27. However, the court recognized "a host of serious security vulnerabilities permitted by [Georgia's] outdated software and system operations," and warned that "further delay is not tolerable in their confronting and tackling the challenges before the State's election balloting system." *Id.* at 1327-28. The court admonished Defendants for having "stood by for far too long, given the mounting tide of evidence of the inadequacy and security risks of Georgia's DRE voting system and software." *Id.* at 1327.

In 2019, this Court affirmed the denial of Defendants' motion to dismiss on Eleventh Amendment immunity grounds, but determined it did not have pendant appellate jurisdiction to consider whether Plaintiffs had standing. *Curling v. Worley*, 761 Fed. Appx. 927, 929 (11th Cir. 2019).

Later in 2019, Defendants again moved to dismiss, this time on *res judicata* grounds, based on a 2017 challenge that had been brought in state court by a group of plaintiffs, including some of the Plaintiffs herein. That earlier case challenged the accuracy of the DRE system in the April 2017 special election for Congress, seeking to enjoin its use in the ensuing runoff election in June 2017. *See Curling v. Raffensperger*, 403 F. Supp. 3d 1311, 1326-27 (N.D. Ga. 2019). The state court had ruled that the asserted state law claims were barred by sovereign immunity. *Id.* at 1327. Defendants here asserted that the prior state court ruling barred obtaining relief in federal court.

The district court rejected that *res judicata* argument for two reasons. First, some of the plaintiffs in the two cases were different. *Id.* at 1330. Second, the claims here involved federal law and involved "additional information … to substantiate the nature of the security vulnerabilities of the DRE voting system." *Id.* at 1333-35.

In April 2019, the state legislature voted to replace DRE with the Ballot Marking Device system. In response, the Plaintiffs amended their complaints to make constitutional challenges to the BMD system as well. *See Curling v. Raffensperger*, 702 F. Supp. 3d 1303, 1331 (N.D. Ga. 2023) ("*Curling 2023*").

In August 2019, the district court enjoined Defendants "from the use of the GEMS/DRE system in conducting elections after 2019." *Curling v. Raffensperger*, 397 F. Supp. 3d 1334, 1410 (N.D. Ga. 2019). The court explained the seriousness of the matter as follows: "'[a] wound … to the integrity of a state's election system carries grave consequences … as it pierces citizens' confidence in the electoral system….' The reality and public significance of the wounds here should be evident — and were last year as well." *Id.* at 1411 (internal citation omitted).

In July 2020, the district court granted in part and denied in part Defendants' motion to dismiss the Plaintiffs' Third Amended Complaint challenging the BMD system. Claims which were grounded in equal protection, due process, and the fundamental right to vote under the First and Fourteenth Amendments survived. *See Curling 2023* at 1331-32.

In September 2020, the district court granted plaintiffs further injunctive relief, requiring Georgia to maintain paper copies of all pollbooks at each polling place on Election Day 2020, in case electronic pollbooks malfunctioned. *See Curling v. Raffensperger*, 491 F. Supp. 3d 1289 (N.D. Ga. 2020).

In October 2020, the district court denied Plaintiffs' motion to require all in-person voting to be conducted by paper ballot. *See Curling v. Raffensperger*, 493 F. Supp. 3d 1264 (N.D. Ga. 2020). The Court concluded that the risks presented by the BMD system as it was then configured "are neither hypothetical nor remote under the current circumstances." *Id*. at 1341. Instead, the Court found that "[t]he Plaintiffs' national cybersecurity experts convincingly present[ed] evidence that this is not a question of 'might this actually ever happen?' — but 'when it will happen,' especially if further protective measures are not taken." *Id*. at 1342. The court, however, declined Plaintiffs' request to order a full paper ballot vote so close to the 2020 election.

Soon thereafter, the district court declined to issue a stay pending appeal of its injunction requiring paper copies of the pollbooks to be available at each precinct. *See Curling v. Raffensperger*, 2020 U.S. Dist. LEXIS 189759 (N.D. Ga. 2020). On October 24, 2020, this Court stayed the district court's injunction. *Curling v. Sec'y of Ga.*, 2020 U.S. App. LEXIS 34345 (11th Cir. 2020).

In November 2023, the district court granted partial summary judgment to Defendants, specifically finding that the claims involving the DRE machines

were now moot, as they had been replaced by the BMD machines. *Curling 2023* at 1370. But the court found that the organizational and individual plaintiffs had "provided sufficient evidence of Article III standing for purposes of summary judgment" with regard to their claims against the BMD machines. *Id.* at 1366, 1369. But, because the claims based on the DRE machines were dismissed, the court treated Plaintiffs as the "losers" in the DRE action, despite Plaintiffs' challenge having led to the issuance of an injunction against the DRE system.

In March 2025, one year after a 2024 trial on the BMD system, the district court reversed its position and accepted Defendants' arguments that Plaintiffs no longer had standing. *See Curling v. Raffensperger*, 2025 U.S. Dist. LEXIS 60546 (N.D. Ga. 2025) ("*Curling 2025*").

The court's decision on standing was based on its view that Plaintiffs were not "*legally protected*" because they did not claim or prove that individual Plaintiffs would be prevented from voting, having their vote diluted, or having their vote not be counted. *See id.* at *12. The district court concluded that the following claims by Plaintiffs did not involve "*legally protected*" interests:

- because the new BMD system read ballots based on their QR code and not the human-readable selections made by the voter, Plaintiffs had no way to ensure that their votes was actually read correctly by the machine. *Id.* at *11-12.

- once their ballot was cast, and the voter required to verify his choices, the printed version of the ballot only showed the name of the candidate selected for each office, but not the office involved or the names of the other candidates, voters found it burdensome to certify the correctness of their ballot. *Id.* at *12.

Thus, the court characterized the injury to voters not in terms of the accuracy of the vote, but of Plaintiffs' inability "to verify the data in the QR codes on their printed ballots." *Id.* at *35-36. This harm and the requirement to review the ballot after voting, the court ruled, were not deemed sufficient injuries to impart standing to the individual Plaintiffs. *Id.* at *36-38.

The court likewise ruled against the organizational Plaintiff. Since it found the harms inflicted on individual voters did not grant standing, it denied organizational standing as well and dismissed the case. *Id.* at *42-43.

Later the same day, the court denied attorney's fees to Plaintiffs. *See* Brief of Appellants Coalition for Good Governance, *et al*. (Doc. 42) at 9.

SUMMARY OF ARGUMENT

From the filing of the case in 2017 until the post-trial decision of the district court on March 25, 2025, the plaintiffs have survived defense challenges to their standing to show a violation of their constitutional rights by use of the DRE and BMD voting systems. The court's March 2025 post-trial ruling that

plaintiffs did not have standing was not based on any higher evidentiary burden at trial or failure of proof at trial. Rather, it was based in a change in the court's view — that voters had no "*legally protected*" interests in a voting system if it was not based on an infringement of the right to vote, vote dilution, or failure to have their vote counted. However, voters also have a "*legally protected*" interest to have their vote counted ACCURATELY. The reasons offered by the district court for its change of position on standing are not persuasive. The district court's denial of organizational standing to plaintiffs was based on the same flawed theory, and should also be reversed.

The district court denied an award of attorney fees due to the Supreme Courts decision earlier this year in *Lackey v. Stinnie*. The district court believed that *Lackey* removed its discretion to award attorneys fees because the invalidation of the DRE voting system was described as a preliminary injunction. However, that is not how *Lackey* determined eligibility for attorneys fees, which is allowed for obtaining a decision which provides "enduring judicial relief," and which "conclusively resolves" a dispute between the parties. On that test, the district court order demonstrated Appellant's eligibility for an award.

Lastly, with respect to Appellant Davis, a district court's series of rulings denying that one plaintiff the right to fully participate in the litigation was not justified. Davis desired to introduce evidence of actual, proven deficiencies in the BMD vote system as demonstrated in the 2021 election, which the other plaintiffs chose not to introduce. These rulings kept out of the record evidence that the flaws in BMD are not hypothetical, but demonstrable, which bears on the voter's constitutional right to have an ACCURATE vote count.

ARGUMENT

I. THE INDIVIDUAL PLAINTIFFS HAVE DEMONSTRATED STANDING TO CHALLENGE THE BMD ELECTRONIC VOTING SYSTEM.

A. The District Court Offered No Plausible Reason to Find a Lack of Standing after Trial.

The district court offered three reasons for the reversal on its rulings that Plaintiffs had standing to challenge Georgia's electronic voting systems.

> First, the Supreme Court has more clearly defined the legal requirements for standing.
> Second, Plaintiffs face a higher evidentiary burden to establish standing at trial than they did at earlier stages of this case — for example, by proceeding to trial, Plaintiffs no longer benefit from the favorable standards of review that helped them rebut Defendants' pretrial motions on standing.
> Finally, the injuries supporting Plaintiffs' standing argument have evolved. [*Curling 2025* at *11.]

1. Supposedly Changed Legal Standing Requirements.

The district court's first reason for its new position on standing — intervening Supreme Court authority — was merely asserted but not supported by any authority or analysis. Even in the portion of the decision below rejecting Plaintiffs' argument that standing had been established and is now the "law of the case" as approved by this Court in 2020 and 2022, no Supreme Court authority whatsoever was cited by the court. To support other propositions, the district court opinion references two Supreme Court cases decided after this Court's October 2020 decision, but neither case "more clearly defined" the burdens of proof for standing required at the various stages of litigation.

In *Carney v. Adams*, 592 U.S. 53 (2020), the Supreme Court determined that, "at the time he filed suit," the plaintiff had failed to establish that he was injured by a Delaware law reserving state judgeships to members of political parties rather than independents. *Id*. at 59. This decision did not in any way deal with burdens of proof at later stages of litigation. Nor did the case in any way "clarify" the law of standing.

The other case, *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024), was a suit by physicians and physician associations against the Food and

Drug Administration ("FDA") seeking to reverse the FDA's approval of the abortion pill mifepristone. Addressing the district court's preliminary injunction against the FDA, the Supreme Court determined that, at the early, preliminary injunction stage, the plaintiffs had not proven any injury to themselves from the FDA's approval of the drug. As with *Carney*, the Court neither addressed heightened burdens of proof at later stages of the case nor "clarified" anything relevant here.

2. Higher Evidentiary Burden for Standing at Trial.

The general point of law asserted by the district court is not disputed. As explained in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992):

> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice.... In response to a summary judgment motion, however, the plaintiff ... must "set forth" by affidavit or other evidence "specific facts".... And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial." [*Id*. at 561.]

However, the district court's ruling on standing did not reflect any failure of proof at trial, but the nature of the injury asserted, as discussed in Section I.A.3, *infra*. The district court found that Plaintiffs had a "legally protected" interest in challenging the unreliable and hackable DRE voting system, but not

the unreliable and hackable BMD voting system. These two rulings are impossible to square.

The district court explained that even though it did not have Article III authority to address the merits of the alleged deficiencies in the BMD system, its opinion would detail many of those significant and important deficiencies as part of the "relevant procedural history." *Curling 2025* at *14, n.1. In doing so, the district court demonstrated that the vulnerabilities of both systems were highly similar. Plaintiffs' initial challenge to the DRE electronic voting system was based on its being so vulnerable to hacking that it "ultimately enjoin[ed] the State's use of the DRE system in August 2019." *Curling 2025* at *14. Plaintiffs' subsequent challenge to the BMD electronic voting system was based on its being so vulnerable to hacking that it also should be enjoined.

Additionally, the district court addressed the problems with the BMD voting system in detail **as recently as its 2023 ruling in this case**:

> In its 2020 PI Order, the Court noted that Dr. [Alex] Halderman's findings were consistent with a "broad consensus" among the nation's cybersecurity experts that electronic voting systems, such as the BMD system, are susceptible to malware…. The same experts also agreed that these vulnerabilities "take on greater significance" in the context of a BMD system, like Georgia's, because it relies on unauditable QR codes for counting votes that cannot be read and verified by the voters before tabulation. [*Curling 2023* at 1333.]

There, the district court determined that Plaintiffs had standing not just at early stages of the case, but also **after the 2020 preliminary injunction hearing** referred to above:

> **the Court found that the evidence before it revealed** "serious system security vulnerability and operational issues" that **adversely affected Plaintiffs' right to cast an effective vote that is accurately counted**. [*Id.* at 1334 (emphasis added).]

Thus, the district court understood that the "legally protected" right was to obtain an accurate vote count from the DRE voting system. This is exactly the same "legally protected" right asserted against the BMD voting system. The district court there also "explained that '[t]he substantial risks and long-run threats posed by Georgia's BMD system, at least as currently configured and implemented, are evident.'" *Id.* And, the court explained that Plaintiffs had "shown demonstrable evidence that the manner in which Defendants' alleged mode of implementation of the BMD voting system, logic and accuracy testing procedures, and audit protocols deprives them or puts them at imminent risk of deprivation of their fundamental right to cast an effective vote (*i.e.,* a vote that is accurately counted)." *Id.* at 1359.

In sum, the district court never explained how Plaintiffs had a "legally protected" right to ensure an accurate vote from one system, but not from the

other. It never explained how Plaintiffs had somehow "lost" standing between the court's early rulings — including those made after hearings based on record evidence — and its 2025 reversal.

3. Evolving Injuries.

On the third justification for reversal, the district court asserted Plaintiffs' injuries supporting standing had "evolved." The only possible relevant change noted in the district court's opinion related to the standing of Plaintiff Coalition for Good Governance ("CGG"). There, the district court stated that in challenging the DRE voting system: "[t]he injuries presented to the Eleventh Circuit were that Poll Pad malfunctions and the printing date of Georgia's paper pollbook backups led to **long voting lines** and **voter disenfranchisement**." *Curling 2025* at *40 (emphasis added). Apparently, the court believed there were no such allegations relating to the BMD voting system.

Although one cannot tell with any certainty from its opinion, if this is the injury which the district court claims had "evolved," that would mean that this "voter disenfranchisement" injury was the singular basis for the case against DRE, and the absence of this "long lines" assertion in the case against BMD is fatal to standing here. If this is what the district court intended, it would be a

curious argument which assumes voters have no "legally protected" right to an accurate vote count unless it results in long lines outside the polls. Stated another way, the only "legally protected" injury a voter can suffer is if he gets discouraged by long lines and goes home, while another voter who remains and votes has no entitlement to judicial vindication of his right to an ACCURATE reporting of his vote.

Actually, the district court identified the injuries suffered by the BMD system to be substantially the same as its earlier findings regarding the DRE system — the threat to an accurate vote count. Here are the injuries that the district court believed Plaintiffs suffered:

> First, they argue that the voting system makes it **impossible for these voters to verify** that the QR codes on their printed ballots, which are used to tabulate their votes, accurately reflect the ballot selections they made on the voting machines. In support of this alleged injury, Plaintiffs elicited expert testimony regarding how **hackers could exploit** the election system's cybersecurity vulnerabilities to manipulate ballot QR codes. Because QR codes are not human readable, these **voters cannot confirm** that the data in the QR code reflects their selections, rather than an error or manipulated voting data.
>
> Second, Plaintiffs argue that these voters are injured by having to complete the burdensome process of revieing [sic. reviewing] their ballot selections twice: once on the voting machine screen and again by verifying the limited information on their printed ballot. Plaintiffs emphasize that while the printed ballot lists their

> selections, it omits other key information, such as the names of the other candidates and a full description of each race or ballot question. [*Id*. at *11-12 (emphasis added).]

From this, the court concluded that "neither of these asserted injuries constitute an invasion of a *legally protected* interest [because] Plaintiffs do not claim [they] [i] prevent[] the individual Plaintiffs … from voting, [ii] dilutes their votes, or [iii] prevents their votes from being counted." *Id*. at *12. Thus, the district court ruled based on the false notion that voters have no "legally protected" interest in ensuring that the electronic voting system chosen by the State ACCURATELY records their votes.

This case may not fall into the more frequently litigated categories of (i) vote prevention; (ii) vote dilution; or (iii) prevention of votes being counted, viewed narrowly. However, "prevention of votes being counted" is not limited to having the ballot counted, but also includes having the candidate choices of the voters being ACCURATELY counted. Having one's vote counted is meaningless apart from a system that can verify that the votes being counted are those chosen by the voter, not a "hacker," which the district court found could alter the QR codes.

The district court's decision to strike down Georgia's use of what could only be described as a readily hackable electronic voting system — the DRE system — may be the only such decision involving electronic voting in the history of the country. These types of cases require careful study of expert testimony, and, for the effort expended to carefully analyze Plaintiffs' claims and testimony about the vulnerabilities of the system, the district court deserves great credit. However, the district court did not ever get to the merits of the vulnerabilities of the BMD system, based on its view that no voter has a "legally protected" interest in ensuring his ballot is correctly counted.

It must be stressed that the district court never denied that Plaintiffs had raised valid claims. Indeed, the court repeatedly complemented the Plaintiffs on the validity of the points they raised. The district court stated: "Plaintiffs have **capably, thoughtfully, and diligently** pursued their opposition to Georgia's use of the BMD system, [but] the Court **cannot consider the merits** of their claims without such a legally cognizable injury." *Curling 2025* at *34 (emphasis added). And why could the district court not consider the merits of these likely valid criticisms of the BMD system? It is because the injury claimed by Plaintiffs, as explained by the district court, "is unlike any that the Supreme

Court or the Eleventh Circuit have recognized as legally cognizable harm to voting or associational rights." *Id.* at *36.

Thus, it may be that the district court is looking to this court to establish a new rule — to be elevated right along with the right to vote, voter dilution, and vote counting — that a voter suffers "legally cognizable" harm when the state chooses an electronic ballot system where hackers can change the way voters cast their votes and voters cannot tell, preventing an ACCURATE vote count.

B. The Flaws in the BMD System Were Made Manifest by Plaintiffs.

The state of Georgia was wrong when it used the DRE voter system assuming it to be reliable, and is wrong now that it uses the BMD voter system assuming it to be reliable. The district court opinion indicates the evidentiary proof of deficiencies in the BMD system are not unlike than the deficiencies in the DRE system. Indeed, the district court repeatedly praised Plaintiffs for exposing deficiencies in both of Georgia's electronic voting systems:

> Although Plaintiffs have not ultimately prevailed on their legal claims, their work has **identified substantial concerns** about the administration, maintenance, and security of Georgia's electronic in-person voting system, including those described by their expert witness, Dr. Alex Halderman. These investigative and educational efforts have **prompted meaningful legislative action to bolster the transparency and accountability** of Georgia's voting systems.

> Thus, while this lawsuit must now come to an end, the impact of **Plaintiffs' important work** will endure. [*Id.* at *13-14 (emphasis added).]

The district court went out of its way to praise the same expert witness, Dr. J. Alex Halderman, who revealed deficiencies in both the DRE and BMD systems:

> The Court has previously listed Dr. Halderman's **significant qualifications and expertise** in the area of cybersecurity. *See, e.g., Curling et al.*, 702 F. Supp. 3d 1303, 2023 WL 7463462, at *3. Defendants do not challenge Dr. Halderman's expertise. [*Curling 2025* at *18, n.6 (emphasis added).]

Finally, in concluding its opinion, the district court repeated its high praise for the criticism of electronic voting brought forth by Plaintiffs:

> Over the past seven years, Plaintiffs have demonstrated many times over their **dedication to ensuring that Georgia's elections are conducted in a transparent, safe, and reliable manner**. They have expended significant time and resources to educate the public about the **risks** of BMD system and the DRE system before it. **At trial,** Plaintiffs **presented substantial evidence** supporting their deeply held concerns about the administration, maintenance, and security of the BMD system. These are undoubtedly **concerns of long-term public import**….
>
> Although **Plaintiffs** have not prevailed in this court of law, their **advocacy has helped spark real legislative action**. In the months after trial, **Georgia enacted legislation that, in part, addresses issues at the heart of Plaintiffs' claims**. For example, Section 7 of SB 189 promises to effectively eliminate QR codes on BMD ballots and instead use the human-readable text on a voter's printed ballot

> for tabulation and auditing purposes. *See* (SB 189, Doc. 1851-1). These measures — slated to take effect on **July 1, 2026 — will require funding and further government action to implement**…. **If** these legislative measures are ultimately funded and implemented, they are the type of timely legislative action that can bolster public confidence in the management and security of Georgia's voting system. Through litigation and other means, **Plaintiffs no doubt played a part in prompting these changes**. [*Id*. at *44-45 (emphasis added).]

Here the district court identified exactly why it is necessary for this Court to find that a voter has a "legally cognizable" interest in having an **accurate** tabulation of his vote. The court explained that legislative measures "slated to take effect on July 1, 2026," may not occur. They will require further action of the Georgia legislature, which, if this litigation is allowed to be dismissed, becomes ever more unlikely. It is only if this Court addresses the merits and declares a voter has a right to an **accurate** tabulation of his vote, finding Plaintiffs have standing, and sending the case back to district court to review its serious objections to the BMD system, that the constitutional interests of the individual Plaintiffs, the organizational Plaintiffs, and all the voters of Georgia will be vindicated.

C. Voters Have a "Legally Protected" Right to an ACCURATE Vote.

It should have come as no surprise to the district court that voters have the "legally protected" right to an ACCURATE vote count. Indeed, in its 2023 decision, the district court asserted that it was "Plaintiffs' right to cast an effective vote that is accurately counted." *Curling 2023* at 1334 (emphasis added). Yet in its 2025 decision, the district court asserted no such right existed.

The Supreme Court has made clear: "A citizen's **right to a vote** free of arbitrary impairment by state action has been judicially recognized as a right **secured by the Constitution**, when such impairment resulted from **dilution by a false tally**…." *Baker v. Carr*, 369 U.S. 186, 208 (1962) (emphasis added).

Thus, the district court's dismissal was based on its erroneous view that no higher court had previously recognized a "legally protected" interest in an ACCURATE count. It is now the duty of this Court to advise the district court that there is such a "legally protected" interest.

II. THE DISTRICT COURT ERRED IN DENYING ORGANIZATIONAL STANDING TO PLAINTIFF.

The district court evaluated the "organizational" standing of Plaintiff CGG, which asserted standing based on diversion of resources from its other

important programs of protecting First Amendment, due process, equal protection rights, and government transparency and elections. *Curling 2025* at *40-43. CGG explained that it had to divert resources to "educate voters about use of the system, to investigate and document the cybersecurity problems posed by the BMD system and its implementation, to gather information regarding the operating of the BMD system, and to oppose Georgia's use of the BMD System." *Id*. at *25.

After rejecting CGG's law-of-the-case argument (*id*. at *38-40), the district court turned to CGG's organizational standing argument. The court stated "CGG did establish that its mission concerns protecting constitutional liberties … [a]nd it presented testimony that outlined how it diverted significant resources…." *Id*. at *43. Thus, even though it accepted CGG's "diversion of resources" argument, it still determined it did not have standing because "the two injuries from which CGG seeks to protect its members are not 'legally cognizable Article III injuries.'" *Id*. at *42-43. Thus, organizational standing was denied to CGG for the same reason that individual standing was denied, as addressed in Section I. If the district court erred in its "legally cognizable" argument, both the individuals and organizational plaintiffs have standing.

III. THE DISTRICT COURT ERRED IN REFUSING TO AWARD ATTORNEYS' FEES.

A review of the Statement of the Case, *supra*, demonstrates that ballot security litigation is not for the faint of heart or scarce of resources. The district court litigation was highly technical and complex legally, involving novel matters of law and computer science. No litigator could review the course of proceedings and not be impressed by the diligence of the Plaintiffs or the intransigence of the government. The current litigation has now lasted for over seven years, and by any standard, achieved much for the People of Georgia, as repeatedly recognized by the district court. *See, e.g., Curling 2025* at *44-45 ("Plaintiffs have demonstrated many times over their dedication to ensuring that Georgia's elections are conducted in a transparent, safe, and reliable manner.")

This is the Plaintiffs' third trip to this Court in the litigation. Two separate electronic voting systems have been scrutinized by Plaintiffs, at great expense in attorneys' time and expert fees and other costs. Yet, the district court refused to make any award of attorneys' fees. Order, Doc. 1869 (Mar. 31, 2025). Given the great victory obtained by Plaintiffs for the People of Georgia, this denial is not only profoundly unfair, but it will send out a message that no private party should bother to bring civil rights challenges to state electronic voting systems

even if they are vulnerable to hacking and manipulation. This is exactly the wrong message for the federal courts to send.

On August 29, 2019, Plaintiffs moved to recover attorneys' fees under 42 U.S.C. § 1988(b), but the district court did not rule on this petition until March 31, 2025 — five years and seven months later. Under that statute, reasonable attorneys' fees may be awarded to the "prevailing party" as part of their costs. Here, the district court denied any attorneys' fees solely based on its reading of the Supreme Court February 2025 decision in *Lackey v. Stinnie*, 145 S.Ct. 659 (2025). However, Plaintiffs here have satisfied the test announced in *Lackey v. Stinnie* to determine whether they are prevailing parties for purposes of that statute:

> [A] plaintiff "**prevails**" under the statute when a court **conclusively resolves** a claim by granting **enduring judicial relief** on the merits that **materially alters** the legal relationship between the parties. [*Id.* at 669 (emphasis added).]

Unquestionably, the district court's 2019 preliminary injunction granted the permanent relief sought regarding Plaintiffs' DRE claim, constituting complete success on the merits of that claim. Nonetheless, the district court denied Plaintiffs' petition for attorneys' fees on the grounds that its injunction giving

complete relief did not resolve Plaintiffs' claims "conclusively." Order at 3, n.1.

The district court abused its discretion in concluding that Plaintiffs' DRE claim had not been resolved conclusively for several reasons. The preliminary injunction order itself stated unequivocally that it "PROHIBITS any use of the GEMS/DRE system after 2019." *Curling v. Raffensperger*, 397 F. Supp. 3d at 1412. Such relief by its terms was not temporary pending final adjudication. Defendants did not appeal that ruling. The district court rejected Plaintiffs' motion to sever the DRE claim from the BMD claims although the motion satisfied the requirements of F.R.Civ.P. 21. The district court acknowledged that the BMD claims involved a different analysis than it had employed in resolving the DRE claim. Final disposition of the DRE claim should have been granted to Plaintiffs at that stage of the litigation, accompanied by an award of attorneys' fees. At a subsequent stage, the district court admitted: "I thought we could have closed the other case." Doc. 1232 Tr. (11/19/2021) at 55:8-25. Plaintiffs should not be penalized by the unjustified inaction of the district court.

Under *Lackey*, Plaintiffs had clearly obtained "enduring judicial relief" on the merits of its DRE claim that "materially alter[ed] the legal relationship

between the parties." They were entitled to an attorneys' fee award upon obtaining that relief. The district court clearly erred in concluding that *Lackey* barred any award of attorneys' fees merely because the relevant ruling was denominated a preliminary injunction order, thereby ignoring the prevailing party test quoted above from the *Lackey* opinion.

The district court applied *Lackey* retroactively to deny a motion filed many years before. However, the court characterized *Lackey* as having "profoundly changed the circumstances under which civil rights plaintiffs may receive attorney's fees under § 1988(b)." Order at 4. In denying the motion, it established that all of the elements of the test in *Lackey* were met:

> the Court acknowledges that not allowing Plaintiffs to recover fees under these circumstances appears "**manifestly inequitable**, because it leaves [them] 'holding the bag' for considerable litigation fees" despite achieving relief sought by their lawsuit. *See Stinnie*, 145 S. Ct. at 680 (Jackson, J., dissenting). Although Plaintiffs' DRE claims were not fully adjudicated, Plaintiffs secured an injunction barring further use of the DRE system, which ensured Georgia's full, timely, and permanent transition to the BMD system. And in fact, it was Defendants' compliance with the Court's injunction that mooted Plaintiffs' DRE claims. [Order at 5-6 (emphasis added).]

Under *Harper v. Dep't of Taxation*, 509 U.S. 86 (1993), the Supreme Court stated the general principle that its decisions in civil cases are presumed to apply retroactively to cases that are still open. However, the only reason that

this case was still open in 2025 after *Lackey* was decided was that the district court declined to sever the initial challenge to DRE voting systems from the later challenge to BMD voting systems. Even assuming Plaintiffs did not meet the *Lackey* test, where these matters on which victory had been obtained should have been severed with fees awarded long ago, retroactive application here is, as the district court stated, "manifestly inequitable."

IV. APPELLANT DAVIS WAS DENIED HIS DUE PROCESS RIGHT TO PARTICIPATE FULLY AT TRIAL.

Appellant Ricardo Davis detailed several district court rulings which denied his ability to participate fully in the litigation of the case in district court. These rulings prevented Davis from introducing relevant evidence, denied his right to cross-examine witnesses, and prevented him from producing rebuttal witnesses. Aplt. Davis Br. at 17-18; 24-27. The district court opinion was not clear as to the reasons for its decision, but the court explained that Davis "retained new counsel to pursue a separate trial strategy." *Curling 2025* at *21. The court asserted that it did not want to allow the change of counsel "to 'inject … new narrative[s] for Defendants to defend against' at trial." *Id.* at *21, n.10 (citation omitted). However, Davis had been a plaintiff throughout, and he testified at trial. It appears that Davis was pursuing the same theories of injury

throughout litigation of the BMD voting system, but that he differed from the other Plaintiffs in that he sought to introduce what he believed to be compelling evidence of actual failures with the BMD voting system.

The district court's decision to limit participation by Davis' counsel of choice prevented Davis from introducing evidence to show "actual injury from miscounts" that had already occurred from that voting system. Aplt. Davis Br. at 3. Apparently, the other Plaintiffs chose not to present such evidence. *Id*. Appellant Davis explains that this evidence would have been highly persuasive to the court in that it demonstrated that the injuries from the hackable and flawed BMD voting system were not hypothetical, but had recently been documented. Thus, the Davis testimony could have persuasively demonstrated that the BMD system did not result in an ACCURATE count as required by, for example, *Baker v. Carr, supra*. This omission was highly significant because the district court appeared to recognize that the right to an ACCURATE count was a "*legally protected*" interest. *See* Section I.C, *supra*.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed.

Respectfully submitted,

/s/William J. Olson

PATRICK M. MCSWEENEY
3358 John Tree Hill Road
Powhatan, VA 23139

RICK BOYER
INTEGRITY LAW FIRM
P.O. Box 10953
Lynchburg, VA 24506

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
*Attorney of Record

Attorneys for Amici Curiae

July 16, 2025

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of America's Future, *et al.*, in Support of Plaintiffs-Appellants and Reversal, was made, this 16th day of July, 2025, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

/s/William J. Olson
William J. Olson
Attorney for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of America's Future, *et al.*, in Support of Plaintiffs-Appellants and Reversal complies with the type-volume limitation of Rule 29(a)(5), Federal Rules of Appellate Procedure, because this brief contains 6,262 words, excluding the parts of the brief exempted by Rule 32(f).

2. 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) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 21.0.0.194 in 14-point CG Times.

/s/ William J. Olson
William J. Olson
Counsel for *Amici*

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