

Case No. 20-13730 and 20-14067

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DONNA CURLING, DONNA PRICE, JEFFERY SCHOENBERG
and
COALITION FOR GOOD GOVERNANCE, LAURA DIGGES, WILLIAM
DIGGES III, RICARDO DAVIS, AND MEGAN MISSETT,

Plaintiffs-Appellees,

v.

BRAD RAFFENSPERGER, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia, Atlanta Division
Case No. 1:17-cv-2989-AT
Honorable Amy Totenberg

**BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION
AND FREE SPEECH FOR PEOPLE IN SUPPORT OF PLAINTIFFS-
APPELLEES**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 amici curiae make the following disclosures:

Amicus Electronic Frontier Foundation is a nonprofit organization that has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

Amicus Free Speech For People is a nonprofit organization that has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

Dated: June 9, 2021

Respectfully submitted,

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INTEREST OF AMICI¹

The Electronic Frontier Foundation (“EFF”) is a member-supported, non-profit civil liberties organization that works to protect free speech and privacy in the digital world. Founded in 1990, EFF has more than 38,000 active donors and dues-paying members across the United States and internationally, including 498 active donors in Georgia. EFF represents the interests of those who rely on, build, and secure new technologies in specific court cases and broader policy debates surrounding the development and application of law in the digital age.

EFF was one of the first national organizations to raise concerns about the security of the paperless, unauditible electronic voting equipment that was introduced after the federal elections in 2000. Since then, EFF has litigated or filed amicus briefs in multiple cases arising from security and reliability concerns arising from the use of electronic voting equipment. This includes *Wexler v. Anderson*, 452 F.3d 1226, 1232 (11th Cir. 2006), and two other cases arising in Florida, along with cases in Ohio, North Carolina, New Jersey, Maryland, and California.

Amicus EFF here represents not only individual voters concerned about

¹ All parties consent to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no party’s counsel authored this brief in whole or in part, and neither any party, nor any party’s counsel, contributed money towards the preparation of this brief. No person other than amici, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

protecting their franchise, but also the perspectives of security professionals, academics, and computer scientists who have long raised alarm about, and sought to remedy, the serious, systemic problems that have arisen with the introduction of new technologies into voting. As an organization, we have worked to ensure that the use of digital technologies throughout the voting process includes careful technical, policy, and procedural support to ensure that all voters may vote and that all voters' ballots are accurately counted.

Amicus Free Speech For People is a national non-partisan, non-profit organization that works to restore republican democracy to the people, including through legal advocacy and legal action aimed at advancing a new jurisprudence grounded in the promises of political equality and democratic self-government. Free Speech For People's thousands of supporters around the country, including in Georgia, engage in education and non-partisan advocacy to promote policies and actions to protect the right to vote, and to have each vote cast as intended and counted as cast. Free Speech For People's Election Protection project is dedicated to fighting for free and fair elections by challenging voter suppression, the use of unreliable and insecure electronic voting systems, and unequal voting conditions.

Both Amici have a strong interest in ensuring that the courts remain available to voters seeking to protect their votes as election administrators deploy new voting technologies. Since the widespread introduction of Direct Recording

Electronic technologies into voting systems after the 2000 election, the way most Americans vote has changed significantly. This has been due to new voting machines, but also due to new surrounding technologies like pollbooks, voter databases and scanners at issue here. While these new technologies have some benefits, they have created significant and often complex problems. When a voter's franchise is burdened or eliminated by these changes, election officials have often been slow to acknowledge and mitigate these harms. Voters must have recourse to the courts and the courts must take steps to prevent or mitigate the serious harm that voters face.

Accordingly, Amici have a direct and substantial interest in ensuring that the legal rules governing standing in voting cases are interpreted to ensure that voters still have access to the federal courts when voting technology causes or creates a burden or risk of disenfranchisement. Amici also have an interest in ensuring that courts do not mistake serious systemic, preventable, and mitigatable problems with these systems as mere “glitches” for purpose of evaluating the burden on plaintiffs under the *Anderson/Burdick* framework.

STATEMENT OF ISSUES

Amici address only two key issues here:

- 1) Whether Plaintiffs have suffered an “injury in fact” sufficient for standing, and not merely a generalized grievance, when the use of

technologies in voting systems results in a burden on their right to vote, up to and including their individual disenfranchisement.

- 2) Whether the demonstrated security and reliability issues in voting technologies found by the District Court are rightly characterized as serious, and not mere “glitches,” for purposes of assessing the burden under the *Anderson/Burdick* framework.

INTRODUCTION AND SUMMARY OF ARGUMENT

All Americans voters have the right to vote and to have their votes counted. This bedrock guarantee remains, and requires vigilance, even as digital technologies are introduced and utilized in elections’ processes. Indeed, access to the courts has been long essential in ensuring that voters can protect their right to vote. The context of technological change to voting systems that potentially disenfranchise or burden individual voters should be no different.

Amici file this brief because, first, the arguments raised by Appellants here seek to dangerously mischaracterize voters seeking to vindicate their own basic rights as mere “bystanders,” Appellants’ Br. 29, who have no standing to seek federal judicial relief when the introduction of new voting systems threaten these most cherished rights, simply because many other voters face the same harms. Amici also seek to correct the mischaracterization of the known, systemic risks to Plaintiffs’ individual voting rights due to problems with Georgia’s e-pollbooks,

voter registration databases, and scanners as mere “glitches” akin to a snowstorm or traffic jam on election day for purposes of the *Anderson/Burdick* framework.

ARGUMENT

I. The Plaintiffs Have Standing and the Generalized Grievance Analysis is Inapplicable.

A voter’s interest in seeking to vindicate their own “right to vote” is “a ‘fundamental political right’ that is ‘preservative of all rights.’” *Williams v. Rhodes*, 393 U.S. 23, 38 (1968) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

Thus, it is concerning that Appellants assert that Appellees here, who raise clear and unequivocal concerns that their own votes are burdened by the voting technologies used by Georgia, are merely “concerned bystanders,” Appellants’ Br. 29, whose claims are generalized grievances, Appellants’ Br. 32. To the contrary, Plaintiffs in this case are seeking to vindicate their own rights to vote and to have their votes counted, meeting the Article III injury in fact threshold.²

Thus, this Court’s recent decision in *Wood v. Raffensperger*, 981 F.3d 1307 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 1379 (2021), is of little relevance here. That case was not fundamentally about Wood’s own vote but about his generalized

² And correspondingly, not only have the Coalition for Good Governance’s members established an injury but also the organization itself can also bring a claim based on a diversion-of-resources theory. See *Curling v. Raffensperger*, 491 F. Supp. 3d 1289, 1320 n.19 (N.D. Ga. 2020).

concern about ensuring a properly functioning election and, specifically, his allegations concerning other people's allegedly unlawfully cast ballots.

Instead, Amici respectfully suggest that the Ninth Circuit's holding in *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 909 (9th Cir. 2011), is more instructive. There, in considering a claim arising from the individual impact of widespread government surveillance on the plaintiffs, the court recognized that "the fact that a harm is widely shared does not necessarily render it a generalized grievance." *Id.* Similarly here, the fact that many other citizens face a similar risk or burden on their individual right to vote due to the issues raised by Plaintiffs does not mean that each Plaintiff has not individually suffered an injury in fact.

A. The abridgment of the right to vote is an injury in fact.

Amici address the first of the three standing requirements: That a plaintiff suffer an "injury in fact" that is both "concrete and particularized." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Concrete injuries are, in the Supreme Court's words, "real" and "not 'abstract'" and a particularized injury is one that "affect[s] the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

The existence of an injury in fact is the dividing line between a cognizable claim and what the Supreme Court has labeled a generalized grievance. In reviewing its generalized grievance cases, the Court has specified that a

generalized grievance is a claim lacking in *both* particularity and concreteness. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23 (1998) (noting that in generalized grievance cases “the harm at issue is not only widely shared, but is also of an abstract and indefinite nature”). The Court has also explained that where the plaintiff states “only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large,” there is no “Article III case or controversy.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, at 573–74 (1992). For example, the *Lujan* court pointed to a decision finding that a claim alleging that the Nineteenth Amendment was not properly ratified amounted to attempting to “require that the Government be administered according to law and that the public moneys be not wasted,” as a paradigmatic generalized grievance. *See* 504 U.S. at 574 (quoting *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922)).

In light of that law, the direct abridgment of a citizen's right to cast their own ballot is not a generalized grievance. It is instead a concrete and particularized injury. As a starting point, the Supreme Court has “long recognized that a person's right to vote is ‘individual and personal in nature.’” *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)). And accordingly, “‘voters who allege facts showing disadvantage to themselves as

individuals have standing to sue’ to remedy that disadvantage.” *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 206 (1962)). The Court has also established that even the wrongful denial of information that is “related to voting” is an injury sufficient to confer standing, making plain that the abridgment of the vote itself is a cognizable injury. *See* 524 U.S. at 24–25 (1998).

Courts have also long recognized that an individual’s right to vote runs deeper than merely the opportunity to fill out a ballot. In *Baker*, 369 U.S. at 208, for instance, the Court noted: “[Plaintiffs] are asserting ‘a plain, direct and adequate interest in maintaining the effectiveness of their votes,’ not merely a claim of ‘the right, possessed by every citizen, to require that the government be administered according to law.’” (citations omitted) (holding that the plaintiffs had standing to challenge a state apportionment statute). The right to vote also includes “the right of qualified voters within a state to cast their ballots and have them counted.” *United States v. Classic*, 313 U.S. 299, 315 (1941).

That the right includes the right to have a vote counted is also plainly established. As this Court has recognized, “voting alone is not enough to keep democracy’s heart beating. Legitimately cast votes must then be counted.” *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1315 (11th Cir. 2019); *see also Stewart v. Blackwell*, 444 F.3d 843, 868 (6th Cir. 2006) (“We easily conclude that the right to have one’s vote counted on equal terms is part of the right to vote.

No other conclusion is possible.”), *depublished by* 473 F.3d 692 (6th Cir. 2007)(state admittedly “caused the mootness by abandoning the election machines that Plaintiffs attacked”)

Where voting systems risk disenfranchising voters, courts have relied on the principle that the right encompasses the right to have one’s vote counted in determining that plaintiffs have suffered a constitutional injury. In *Stewart*, the plaintiffs challenged the use of two types of unreliable voting technology. 444 F.3d at 846. Addressing their standing arguments head-on, the *Stewart* court determined that: “The increased probability that [plaintiffs’] votes will be improperly counted based on punch-card and central-count optical scan technology” was an Article III injury. *Id.* at 855. And the Sixth Circuit more recently affirmed that plaintiffs’ constitutional claims that “Ohio’s voting system is so deficient as to deny or severely burden their fundamental right to vote” could go forward, although that court did not explicitly address standing. *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 466 (6th Cir. 2008). In *Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill. 2002), the court similarly found that the plaintiffs had standing to challenge the use of punch-card systems. *Id.* at 895. The court there relied on statistical evidence showing that punch-card machines were more prone to error than other systems. *Id.* In turn, the court found that “higher probability of that vote not being counted as a result of the voting systems used” was indeed an injury in

fact. *Id.*

Plaintiffs' injuries in this case are indeed fully consistent with the abridgments of the right to vote, including those due to difficulties in technology, that have been previously found cognizable. As the district court wrote in the Pollbook Order, Plaintiffs alleged: "deficiencies in the voter registration database system and pollbooks as well as their handling by State Defendants effectively block or deter some voters from exercising their right to vote or casting a vote without experiencing inordinate burdens." *Curling v. Raffensperger*, 491 F. Supp. 3d 1289, 1293 (N.D. Ga. 2020). Similarly, in the Scanner Order, the court noted that: "Plaintiffs' challenge embraces an array of associated issues involving the electronic voting process that impact if an individual's vote (whether recorded from a scanned BMD-generated barcode or a hand-marked paper ballot) will be correctly captured, scanned, and accurately counted," *Curling v. Raffensperger*, 493 F. Supp. 3d 1264, 1269 (N.D. Ga. 2020), and "the alleged intrusion on voters' free exercise of their right to cast a secret ballot at the polls," *id.* at 1270.

Furthermore, the fact the harm Plaintiffs allege is also shared by many other Georgia voters does not render it non-particular. On multiple occasions, the Court has clarified this point. In *Baker*, the Court affirmed that since the plaintiffs were seeking to "vindicate an interest of their own" it was permissible that their claims would also provide relief to "those similarly situated," 369 U.S. at 207, and

explicitly rejected the argument that they were claiming “the right, possessed by every citizen, to require that the government be administered according to law,” *id.* at 208 (quoting 258 U.S. at 129). More recently, the Court employed the example of a “large number[] of voters [who] suffer interference with voting rights” as an illustration of the type of injury that is both concrete and widespread. 524 U.S. at 24. Like with “mass fraud or mass tort situations,” 504 U.S. at 572, the fact that a voting-related injury may reach many people is not an Article III hurdle. *See, id.*

B. The decision in *Wood* only affirms that Plaintiffs’ claims in this case are both concrete and particularized.

In *Wood*, 981 F.3d at 1310, this Court recently determined that a plaintiff did not have standing to bring claims that, in the 2020 election, absentee ballots were unlawfully counted and that there were “irregularities in the hand recount [process],” *id.* at 1312. While the plaintiff offered two theories of why his claims could move forward, they both boiled down to this: his “interest” in “ensur[ing] that] . . . only lawful ballots are counted.” *Id.* at 1314 (alteration in original). The only individual harm was that the inclusion of other people’s allegedly unlawful votes harmed the plaintiff’s own lawfully cast vote. *See id.* at 1314–15. Those arguments failed because they represented only a generalized interest in election systems being run without fraud. This Court specifically noted that, even if unlawful ballots were included in the final count, the plaintiff could not show that he himself was harmed in any way that was personal to him. *See id.* at 1315. He

was able to cast his own ballot, that ballot was counted, and accordingly, his own right to vote was not abridged.³

In turn, the *Wood* case serves as a useful foil to illustrate that Plaintiffs' claims in this case are personal and particularized.⁴ Plaintiffs' claims here are far more straightforward: They argue that the state's deficient voting systems put at risk their own ability to vote and the counting of their own votes. They do not advance nor need to rely election fraud by others or on any type of vote dilution theory, as Wood did. And while it is true that their injury is shared by many others, the direct abridgment of the right to vote, as discussed above, is a cognizable claim.

³ The *Wood* decision also noted that to the extent that an unlawfully counted ballot could have decreased the relative weight of his vote, the unlawfully included vote ultimately decreased the weight of all votes proportionally, so “no single voter is specifically disadvantaged.” *Id.* at 1314 (quoting *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 356 (3d Cir. 2020)). Amici believe the Court erred in finding that no particularized or concrete harm could arise where a vote is not given the weight afforded to it under the law. But regardless, this is not the basis upon which the Plaintiffs here claim an injury.

⁴ The Court’s decision in *Wood* repeatedly used the term “generalized grievance” but only focused on the particularity deficiency in the plaintiff’s claim. *See, e.g., Wood*, 981 F.3d 1314 (“A generalized grievance is ‘undifferentiated and common to all members of the public.’” (quoting 504 U.S. at 575)). But to apply the generalized grievance line of cases, the Court should have also analyzed the concreteness of the claim. *See supra* Section I.a.

C. The Court should look to the Ninth Circuit’s decision in *Jewel* which affirms that a widely shared harm is not necessarily a generalized grievance.

The Ninth Circuit’s decision in *Jewel* is relevant and instructive in this case for three reasons. In that case, where Amici are counsel, the Ninth Circuit found Article III standing for the constitutional and statutory claims of AT&T customers individually harmed by widespread government surveillance, reversing a district court finding that their harms were merely a generalized grievance. 673 F.3d at 913.

First, the *Jewel* court straightforwardly affirmed that the “invasion of a personal constitutional right” is a concrete harm. *Id.* at 909. Just like the *Jewel* plaintiff’s First and Fourth Amendment allegations arising from the surveillance of their personal communications, Plaintiffs’ voting claims here are personal to them.

Second, as noted above, the *Jewel* court reiterated that a widely shared harm can also be particularized, depending on the nature of the claim at issue. In addition to looking to *Akins* (discussed above), the court also rested that determination in *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010), an Establishment Clause challenge to the inscription “In God We Trust” on coins and currency. 673 F.3d at 910. In that case, “even though the experience at the root of [the plaintiff’s] complaint was shared by virtually every American,” *id.*, the court there determined that the “spiritual harm resulting from unwelcome direct contact

with an allegedly offensive religious (or anti-religious) symbol” is sufficiently personal injury to be particularized, 598 F.3d at 642. *See supra Section 1.a.* The crucial point here is that when the nature of a harm is personalized, that meets the particularity requirement regardless of who else is also simultaneously harmed.

Third, this Court should replicate the *Jewel* court’s emphasis on the way in which the plaintiff’s allegations were specific to herself. In the court’s view, it was “significant[]” that certain facts allowed the plaintiff to allege “with particularity that *her* communications were part of the dragnet.” 673 F.3d at 909. In distinguishing an earlier case from the D.C. Circuit which the *Jewel* court characterized as a “‘generalized challenge’ to ‘the constitutionality of the entire national intelligence-gathering system,’” the *Jewel* court emphasized that the case before it alleged the “actual impact of a specific program or protocol” on the plaintiff. *Id.* at 911 (quoting *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1381 (D.C. Cir. 1984)). Indeed, just as the *Jewel* plaintiff based her allegations on the interception of her own communications, Plaintiffs’ claims in this case are similar in that they are seeking to vindicate their own right to vote and to have their votes counted.

II. The Serious, Known, and Mitigatable Security and Reliability Problems Raised by Plaintiffs are Neither Inherent to Technology Shifts nor a Mere “Glitch.”

Appellants, as well as Justices Brasher and Lagoa in their concurrence in the

Denial of the Stay on Appeal (Filed 4/1/2021), mistakenly equate the systemic issues with the reliability and security of Georgia’s voting systems found by the District Court with mere “glitch[es],” or “innocent irregularities” similar to a snowstorm or traffic jam on election day. Appellants’ Br. 45–46; *Curling v. Raffensperger*, No. 20-13730 (11th Cir. Apr. 1, 2021) (Brasher & Lagoa, JJ., concurring). Both also assert that *Wexler* provides significant guidance in evaluating the burden that Appellants must meet under the *Anderson/Burdick* standard. See *Anderson v. Celebrezze*, 460 U.S. 780 (1983), *Burdick v. Takushi*, 504 U.S. 428 (1992). Appellants then argue that *Wexler* points this Court toward the “important regulatory interest” standard rather than the severe burden standard. Appellants’ Br. 46–47; *Curling v. Raffensperger*, No. 20-13730 (11th Cir. Apr. 1, 2021) (Brasher & Lagoa, JJ., concurring). Neither is correct.

In *Wexler*, this Court determined that the mere addition of a new voting technology that functioned differently and thus was subject to different recount procedures, was not, in itself, a violation of due process or equal protection. 452 F.3d at 1232–34. The Court recognized the benefits of the new technologies, especially for disabled voters, noted that the specific nature of the technologies themselves were the basis for the differences, and weighed those against the small burdens caused by the different recount processes, holding that those differences satisfied the burden of meeting the lower “important regulatory interests” standard

for nonserious burdens. *Id.* at 1233.

Here, unlike *Wexler*, Plaintiffs are not relying merely on the differences between the procedures governing voting on old technology and new. Instead, they presented a wealth of admissible facts, evidence and expert analysis of real and systemic problems with Georgia’s voting technologies that have significantly burdened and even blocked their ability to vote and to ensure their votes are counted.

Put bluntly, while some issues with voting technologies can be fairly characterized as “glitches” – the chance that a system will become unplugged or have to be rebooted, that a hard drive will fail, or that a scanner will jam – the problems demonstrated here should not be so summarily dismissed. The vernacular term “glitch” generally refers to a “usually minor malfunction,” *Glitch*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/glitch> (last visited June 6, 2021) or “a small and fleeting error in a system that occurs due to unknown causes,” *What is a Glitch?*, Techopedia, <https://www.techopedia.com/definition/7415/glitch> (last visited June 5, 2021).

In sharp contrast, the issues with the Georgia Voting System demonstrated by plaintiffs during lengthy, fact-intensive hearings are neither minor, fleeting, nor due to unknown causes. They are longstanding, serious, and systemic and, as the district court’s orders demonstrate, at least somewhat preventable or mitigatable

with some extra steps like paper backups for pollbooks. Plaintiffs have presented admissible evidence, including the careful analysis of nationally and internationally respected security researchers and academics, that the systems used as part of Georgia’s elections are placing undue burdens on their right to vote and failing to ensure that their votes are counted as cast.

The factual record makes this abundantly clear. The electronic pollbooks are systematically making voting either more difficult or otherwise effectively disenfranchising valid voters. In each of the elections since 2018 in Georgia, serious issues with electronic pollbooks have arisen. *See Appellants’ App. Vol. XXXV, Tab 918 at 24–48.* Issues with electronic pollbooks have repeatedly caused long lines on account of registration data failures and unnecessarily forced voters into casting provisional ballots that could go uncounted. *See id. at 31, 46.* Electronic pollbooks have erroneously led to poll workers to send voters on abortive missions to distant polling places costing these voters time, expense, and possibly the window to vote at all. *See id. at 41.* Additionally, properly registered voters have been turned away because electronic pollbooks failed to include their name or erroneously listed them as having already voted. *See id. at 24–48.*

These electronic pollbooks and voter registration databases are not only susceptible to breaches or intrusions; those have already happened. As the district court acknowledged, “[F]rom at least August 2016 until the present, the Secretary

and his agents – and from at least March 2017 all Defendants – knew or should have known that the Georgia voting software, data and voter information hosted on the ‘*elections.kennesaw.edu*’ server at KSU had been repeatedly compromised by unauthorized access.” *Curling v. Raffensperger*, No. 1:17-CV-2989-AT, 2020 WL 6065087, at *3 (N.D. Ga. Oct. 14, 2020) (quoting Coalition Pls.’ Third Am. Compl. ¶ 111, ECF No. 226). This danger that has been aggravated by Defendants’ ongoing failure to take basic security precautions, like avoiding the use of WiFi or forgoing secure passwords for access to the software that contains and displays the e-pollbooks. *See* Appellants’ App. Vol. XXXV, Tab 918 at 44.

Plaintiffs also demonstrate the widely-known the problems emerging from how Georgia scans mail-in absentee ballots. Defendant’s scanners use an intentionally low-resolution setting to produce scans that do not register voting marks that are clearly evident to the human eye. Once the poor-quality scan is run through the tabulation software, it is marked as a blank vote. *See* 493 F. Supp. 3d at 1326–27. Although the scanner and tabulation software and equipment could theoretically glitch like any other technology, the issue here has nothing to do with such incidental mechanical failures. Instead, the issue is with how the scanner settings and practices are intentionally designed to exclude plainly intelligible mail-in absentee ballot votes. *See id.* at 1318–21. The record contains samples of votes that were marked as blank where cursory visual inspection makes the votes

obvious. *See id.* at 1315–18. Check marks, “X” marks, and markings with red pen all clearly indicated voters’ intentions and could have been registered as votes by the scanning technology, yet the scanner’s settings effectively nullified these votes. *See id.* at 1318–21. The district court correctly concluded that errors like this are not “just ‘incidental’ or accidental ‘errors’ to the extent that the software operates to exclude voting marks that clearly manifest the intent of the voter and therefore must be considered as a vote under Georgia law.” *See id.* at 1337.

For *amici*, who have expertise and have long advised many others with expertise in computer systems and security, it strains credulity to dismiss these demonstrated, serious problems as mere “glitches.”

CONCLUSION

New technologies are critical to society if we are to move forward. EFF is supportive of, and often champions, using digital technologies to improve our lives. However, society does not benefit, and individual voters’ rights are not sufficiently protected, when governments blindly adopt and defend new technologies in the face of serious, known, and mitigable problems. With all of their benefits, new technologies in voting create new problems are not rightly dismissed as mere “glitches.” And when those problems burden or even prevent an individual voters’ right to cast their votes and have their votes counted, voters must have recourse to the federal courts to vindicate their rights.

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Respectfully submitted,

s/ Mitchell L. Stoltz

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1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 4,605 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
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 it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

s/ Mitchell L. Stoltz

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I hereby certify, that on June 9, 2021, I electronically filed the foregoing Brief of Amici Curiae Electronic Frontier Foundation and Free Speech For People was filed with the Clerk of the Court for the Eleventh Circuit Court of Appeals, using the CM/ECF system,

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Dated: June 9, 2021

s/ *Mitchell L. Stoltz*

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