UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ANDREW W. BELL, Plaintiff, v. BRAD RAFFENSPERGER, Secretary of State of the State of Georgia, and CHRIS HARVEY, Director of Elections for the State of Georgia, Defendants.	CIVIL ACTION NO. 1:21-CV-02486-SEG

ORDER

This case is before the Court on Defendants' Motion to Dismiss (Doc. 16) and Defendants' Motion to Strike Bell's "Third Amendment to the Original Petition" (Doc. 25). Having carefully considered the parties' positions and applicable law, the Court enters the following order.

I. Factual Background

This case is about Plaintiff Andrew Bell's unsuccessful attempt to have his name placed on the ballot as an independent candidate for the 2020 Georgia House of Representatives District 85 general election. With this lawsuit, Plaintiff, proceeding *pro se*, asks the Court to "set aside" state court orders rejecting his petition to be placed on the ballot, order a new election for House

District 85, and strike down as unconstitutional certain Georgia code provisions relating to the state's ballot-access process for independent candidates. Defendants have moved to dismiss Plaintiff's claims.

A. Relevant Events

The following allegations are derived from Plaintiff's amended "Petition for Writ of Mandamus" (Doc. 7), which the Court construes as Plaintiff's amended complaint, as well as from the attachments to Plaintiff's original "Petition for Writ of Mandamus" (Doc. 3).[1] In 2020, Plaintiff sought to run as an independent candidate for Georgia House of Representatives District 85. (Doc. 7 at 6.) To have his name placed on the ballot, Plaintiff was required to submit to the Georgia Secretary of State's office a nomination petition with valid signatures from 1,255 voters who were eligible to vote in the last House District 85 election.[2] (Doc. 3-1 at 35.) The deadline to submit nomination

[1] For purposes of this order, the Court considers the exhibits attached to the original complaint (Doc. 3). *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000). Although Plaintiff did not attach these exhibits to his amended complaint (Doc. 7), Plaintiff refers to the exhibits throughout the amended complaint, as though they were appended to it.

[2] Ordinarily, a person seeking to have his name placed on the ballot as a third-party candidate in a non-statewide election must obtain valid signatures from at least 5% of voters who were eligible to vote in the district's last election, which would have been 1,793 signatures in Plaintiff's case. O.C.G.A. § 21-2-170(b). Due to the COVID-19 pandemic, however, this Court

petitions was August 14, 2020. (*Id.*) The August 14 deadline was 31 days later than it otherwise would have been because the Secretary of State extended the original deadline of July 14 due to the COVID-19 pandemic. (*Id.* at 40.) On August 13, 2020, the day before the extended deadline, Plaintiff submitted his nomination petition with 2,200 signatures. (*Id.* at 74.)

On September 4, 2020, 22 days after submission of the nomination petition, Plaintiff received a letter from the Secretary of State's office notifying him that his petition to appear on the ballot was denied because only 827 signatures in his nomination petition were valid, thus putting him below the minimum signature requirement.[3] (*Id.* at 35.) This letter was incorrectly dated August 28, 2018, and it was issued on the letterhead of former Secretary of State Brian Kemp. (*Id.*) The Secretary of State's office notified Plaintiff of its decision at 4:56 p.m. on September 4, 2020, which was the Friday before the Labor Day holiday weekend. (Doc. 7 at 6.) The delay in reviewing Plaintiff's

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issued an injunction that reduced by 30% the signature requirement for the 2020 election. *Cooper v. Raffensperger*, 472 F. Supp.3d 1282 (N.D. Ga. 2020).

[3] A separate letter provided to Bell indicated that of the submitted signatures, only 827 were valid and verified; the rest were out of district, duplicates, lacked verified signatures, lacked any signatures, were signed by persons not registered to vote, or were signed by persons whose registration status could not be determined. (Doc. 3-1 at 7.)

petition was significant because the State's deadline to have all ballots finalized for printing was September 11, 2020.[4] (Doc. 3-1 at 69.)

On September 8, 2020, Plaintiff filed a "Petition and Emergency Application for Writ of Mandamus and Injunction Relief" in Fulton County Superior Court, seeking review of his nomination-petition denial and an expedited hearing on the matter. (*Id.* at 20.) He sought (1) a temporary restraining order prohibiting the Secretary from printing any ballots without Bell's name in advance of a hearing; (2) an injunction either prohibiting the Secretary from printing the ballot without Bell's name or requiring the Secretary to place him on the ballot; and (3) a writ of mandamus ordering the Secretary to validate Bell's signature petition and place him on the ballot. (*Id.* at 32.)

On September 15, 2020, after the state had finalized ballots for the general election, Plaintiff had a hearing on his petition for mandamus relief. [5]

[4] The delay was caused by the fact that an attorney in the Secretary's office was "on a work trip" while Plaintiff's nomination petition was pending. (Doc. 3-1 at 47, 82.) Judge Kimberly Esmond Adams, who presided over Plaintiff's state court mandamus petition, referred to the delay as "inexcusable" and a "dereliction in providing timely notice" to Plaintiff. (*Id.* at 100.)

[5] The Superior Court scheduled a hearing for the earliest possible date in accordance with the State's right to five days of advance notice. O.C.G.A. § 9-10-2.

(*Id.* at 73.) At the hearing, the Superior Court denied Plaintiff's petition, finding that he failed to demonstrate that the rejected signatures were, in fact, valid and should have been counted. (*Id.* at 75.) On September 17, 2020, two days later, the Superior Court entered an order to that effect. (*Id.* at 73-75.)

On September 22, 2020, Plaintiff timely filed an "Emergency Application for Appellate Review" with the Supreme Court of Georgia. (*Id.* at 171); *Bell v. Raffensperger*, 858 S.E.2d 48, 50 (Ga. 2021). On May 3, 2021, the Supreme Court of Georgia dismissed Plaintiff's appeal as moot because the 2020 general election had already taken place.[6] (Doc. 3-1 at 176); *Bell*, 858 S.E.2d at 51.

On June 28, 2021, Plaintiff, who alleges that he intends to run as an independent candidate in Georgia House District 85 again in the future, filed the instant lawsuit in this Court. (Doc. 3.)

B. Relevant Statutes

Georgia's third-party candidate signature requirements for ballot access are codified in O.C.G.A. § 21-2-170(b). This statute provides in relevant part:

> (b) A nomination petition of a candidate seeking an office which is voted upon state wide shall be signed by a number of voters equal to 1 percent of the total number of registered voters eligible to vote

[6] The Supreme Court of Georgia did not hear Plaintiff's case on an expedited schedule. The Supreme Court explained that Plaintiff "never invoked" his right to an expedited appeal because he did not file a motion for expedited appeal. *Bell v. Raffensperger*, 858 S.E.2d 48, 50 n.3 (Ga. 2021).

> in the last election for the filling of the office the candidate is seeking[.]
> . . .
>
> A nomination petition of a candidate for any other office shall be signed by a number of voters equal to 5 percent of the total number of registered voters eligible to vote in the last election for the filling of the office the candidate is seeking[.]

O.C.G.A. § 21-2-170(b).

A third-party candidate who seeks review of a decision by the Secretary of State to deny the candidate's nomination petition may invoke the review process in O.C.G.A. § 21-2-171(c). This statute states in relevant part:

> The decision of the officer denying a nomination petition may be reviewed by the superior court . . . . The application for such writ of mandamus shall be made within five days of the time when the petitioner is notified of such decision.
> . . .
>
> [A] judge of such court shall fix a time and place for hearing the matter in dispute as soon as practicable[.]
> . . .
>
> From any decision of the superior court an appeal may be taken within five days after the entry thereof. It shall be the duty of the appellate court to fix the hearing and to announce its decision within such period of time as will permit the name of the candidate affected by the court's decision to be printed on the ballot if the court should so determine.

O.C.G.A. § 21-2-171(c).

C. Procedural Background

On June 28, 2021, Plaintiff filed in this Court a "Petition for Writ of Mandamus" against Secretary of State Raffensperger and Chris Harvey, the former elections director for the Secretary of State's office. (Doc. 3.) This filing, which the Court construes as Plaintiff's original complaint, was never served on Defendants. On September 13, 2021, Plaintiff filed a second "Petition for Writ of Mandamus," which the Court construes as Plaintiff's amended complaint.[7] (Doc. 7.) Liberally construed, in his amended "Petition for Writ of Mandamus," Plaintiff appears to assert four claims: (1) a request for mandamus relief, in which Plaintiff asks the Court to (a) "set aside" the Superior Court order denying Plaintiff's state-court petition for mandamus relief and (b) order a new election with Plaintiff's name on the ballot; (2) a facial constitutional challenge to Georgia's signature requirements for nomination petitions (O.C.G.A. § 21-2-170(b)-(e)); (3) a facial constitutional challenge to the five-day period within which an independent candidate must seek review of a nomination-petition denial (O.C.G.A. § 21-2-171(c)); and (4) a

[7] *See Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1219 (11th Cir. 2007) ("[A]n amended complaint supersedes the initial complaint and becomes the operative pleading in the case.")

challenge under 42 U.S.C. § 1983 to the State's failure to provide him with a timely hearing on the denial of his nomination petition. (*Id.*)

Plaintiff served his amended "Petition for Writ of Mandamus" (Doc. 7) on Secretary Raffensperger on January 4, 2022.[8] (Doc. 11.) On January 25, 2022, Defendants moved to dismiss the amended complaint. (Doc. 16). Plaintiff filed a response (Doc. 19), and Defendants filed a reply (Doc. 22).

On March 17, 2022 (six months after Plaintiff filed the amended complaint (Doc. 7), and two months after Defendants filed their motion to dismiss (Doc. 16)), Plaintiff filed a "Third Amendment to the Original Petition." (Doc. 24). With this filing, Plaintiff seeks to add requests for compensatory and punitive damages. (Doc. 24-1 at 2-3.) Defendants filed a motion to strike Plaintiff's "amendment" (Doc. 25), arguing Plaintiff already filed an amended

[8] Defendants argue that Defendant Harvey has never been served in this case and should be dismissed. (Doc. 16-1 at 8-9.) Specifically, Defendants contend that Plaintiff's process server sought to serve Harvey at the Secretary of State's office on January 4, 2022, but Harvey has not worked there since July 2021. In response, Plaintiff states that he served Harvey "through an authorized agent" at his new place of employment on February 2, 2022. (*See* Doc. 18.) Defendants reply that this February 2 service was also inadequate because Fed. R. Civ. P. 4(e) generally requires personal service. The Court need not address the sufficiency of service on Harvey because, as explained below, Plaintiff does not state a claim upon which relief can be granted.

pleading and did not obtain the Court's leave. Defendants' motion to dismiss (Doc. 16) and motion to strike (Doc. 25) are ripe for review.

II. Defendants' Motion to Strike Plaintiff's Second Amended Pleading (Doc. 25)

After Defendants' motion to dismiss was fully briefed, Plaintiff filed a second amended pleading, without seeking leave to amend. The Court has reviewed the second amended complaint and determined that it is materially identical to the amended complaint with one exception. In the second amended complaint, Plaintiff adds claims for compensatory and punitive damages. (Doc. 24.) Fed. R. Civ. P. 15 governs amendments to pleadings. Fed. R. Civ. P. 15(a)(1)-(2) provides:

> (1) A party may amend its pleading once as a matter of course within:
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> (A) 21 days after serving it, or
>
> (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.
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> (2) In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Plaintiff has already amended his complaint once, and far more than 21 days have passed since Plaintiff was served with Defendants' Rule 12(b)(6)

motion to dismiss. As such, Rule 15 required Plaintiff either to seek Defendants' consent or the Court's leave before filing a second amended complaint. Fed. R. Civ. P. 15(a)(2). Plaintiff did neither.

Plaintiff, however, is proceeding *pro se*. The Court construes Plaintiff's second amended pleading (Doc. 24) as a motion for leave to amend. *See Jackson v. Vaughan Regional Med. Ctr.*, No. 09-0203-WS-B, 2009 WL 3242082, at *3 (S.D. Ala. Oct. 6, 2009) (stating that "courts have continued to provide an opportunity for *pro se* plaintiffs . . . to correct pleading deficiencies via amendment *even where no request for leave to amend has been made*, so long as 'a more carefully drafted complaint might state a claim'") (emphasis added) (quoting *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991).

The Eleventh Circuit directs district courts to "generously allow amendments even when the plaintiff does not have the right to amend the complaint [as a matter of course]." *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1292 n.6 (11th Cir. 2007). In the Eleventh Circuit, a *pro se* plaintiff is typically entitled to at least one opportunity to amend his or her complaint "where a more carefully drafted complaint might state a claim." *Spear v. Nix*, 215 F. App'x 896, 902 (11th Cir. 2007). There is, however, a "futility" exception to that general rule. Under that exception, a district court need not allow amendment where the proposed amendment would be futile—

that is, where the "complaint as amended would still be properly dismissed." *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007); *see also Watkins v. Hudson*, 560 F. App'x 908, 911 (11th Cir. 2014) ("A court must therefore afford a plaintiff an opportunity to amend his *pro se* complaint before dismissing with prejudice unless . . . an amendment would be futile.")

Here, as discussed below, Plaintiff fails to state a claim upon which relief can be granted. The addition of damages as a form of relief would not alter the Court's analysis or change its conclusion because Plaintiff has not alleged sufficient factual matter, accepted as true, to show that Defendants violated his rights. The Court thus **DENIES** Plaintiff's construed motion for leave to amend (Doc. 24) on grounds of futility because the complaint as amended would still be properly dismissed. Defendants' Motion to Strike Plaintiff's Amended Pleading (Doc. 25) is **DENIED AS MOOT**.

III. Defendants' Motion to Dismiss (Doc. 16)

Plaintiff's amended complaint arguably asserts four claims and/or requests for relief: (1) a request to "set aside" the state court orders denying Plaintiff's request for injunctive and mandamus relief, (2) a facial challenge to O.C.G.A. § 21-2-170's nomination-petition signature requirements, (3) a facial challenge to the five-day period that O.C.G.A. § 21-2-171(c) provides independent candidates to seek judicial review of a nomination-petition denial;

and (4) a challenge to the State's failure to provide Plaintiff a timely hearing on the correctness of the Secretary's decision to deny him access to the ballot. Defendants moved to dismiss all claims.

A. Legal Standard

Federal Rule of Civil Procedure 8(a)(2) provides that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although detailed factual allegations are not required, the pleading must contain more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Importantly, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). For a complaint to be "plausible on its face," the facts alleged must "allo[w] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Wooten v. Quicken Loans, Inc.* 626 F.3d 1187, 1196 (11th Cir. 2010). While all well-pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff, *Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011), a court need not accept as true the plaintiff's legal conclusions, including those couched as factual allegations, *Iqbal*, 556 U.S. at 678.

Accordingly, evaluation of a motion to dismiss entails a two-pronged approach: (1) a court must identify any allegations in the pleading that are merely legal conclusions to which the "assumption of truth" should not apply, and (2) where there are remaining well-pleaded factual allegations, a court should "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679.

When a plaintiff is *pro se*, his complaint is "held to less stringent standards than formal pleadings drafted by lawyers" and must be "liberally construed." *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citation and quotation omitted); *see also Boxer X v. Harris*, 437 F.3d 1107, 1110 (11th Cir. 2006). At the same time, the Court "need not accept as true legal conclusions or unwarranted factual inferences" in complaints filed by *pro se* litigants. *Montgomery v. Huntington Bank*, 346 F.3d 693, 698 (6th Cir. 2006) (quotation and citation omitted). Further, *pro se* plaintiffs must comply with threshold requirements of the Federal Rules of Civil Procedure. *See Trawinski v. United Techs.*, 313 F.3d 1295, 1299 (11th Cir. 2002).

B. Discussion

1. Issue One: Plaintiff's Request to "Set Aside" State Court Orders

Plaintiff requests "mandamus" relief,[9] asking the Court to "set aside" the state courts' orders denying Plaintiff's mandamus petition and to order a new election for Georgia House District 85 with his name on the ballot. (Doc. 7 at 3.) Plaintiff contends the state court orders should be set aside because the superior court incorrectly concluded that his nomination petition did not have enough signatures to place him on the ballot. (*Id.*) Plaintiff's request for an order setting aside state court orders cannot succeed for two reasons. First, the *Rooker-Feldman* doctrine prohibits federal courts from reviewing the judgments of state courts. Second, to the extent Plaintiff seeks an injunction requiring his name to be on the ballot, Plaintiff's claim is moot.

[9] Mandamus is a form of relief, not a claim in itself. *Modrall v. Corker*, 654 F. App'x 1021, 1022 (11th Cir. 2016) (finding that plaintiff failed to state a claim for which mandamus relief could be granted); *Cash v. Barnhart*, 327 F.3d 1252, 1258 (11th Cir. 2003) (describing mandamus as a "legal remedy" controlled by equitable principles). Here, the Court understands Plaintiff's "mandamus" request as an attempt to appeal the state court orders in question to this federal court.

a. Plaintiff's Request for an Order Setting Aside State Court Judgments is Barred by the *Rooker-Feldman* Doctrine

The *Rooker-Feldman* doctrine derives from *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983). The doctrine is a jurisdictional rule that precludes a federal district court from reviewing final state-court judgments. *Nicholson v. Shafe,* 558 F.3d 1266, 1270 (11th Cir. 2009). The *Rooker-Feldman* doctrine is confined to cases of the kind from which the doctrine acquired its name: cases brought by unsuccessful state-court litigants "complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 544 U.S. 280, 284 (2005). In other words, "state court litigants do not have a right of appeal in the lower federal courts." *Behr v. Campbell*, 8 F.4th 1206, 1209-10 (11th Cir. 2021).

Here, Plaintiff argues he had enough valid signatures to qualify as an independent candidate in the 2020 Georgia House District 85 election, despite the Fulton County Superior Court's finding to the contrary. Plaintiff asks the Court to "set aside" the Superior Court order denying Plaintiff's request for mandamus relief and the state Supreme Court's decision affirming the Superior Court. Stated differently, Plaintiff asks the Court to review and

invalidate the orders entered by the Georgia state courts. This the Court cannot do, as the *Rooker-Feldman* doctrine forbids it.

Plaintiff does not dispute that the *Rooker-Feldman* doctrine typically bars federal court adjudication of claims like the one he brings here. He argues, however, that the fraud-on-the-court exception to the *Rooker-Feldman* doctrine applies. This exception allows a federal court to "entertain a collateral attack on a state court judgment which is alleged to have been procured through fraud, deception, accident, or mistake." *In re Sun Valley Foods Co.*, 801 F.2d 186, 189 (6th Cir. 1986). Plaintiff argues that the state-court judgments rejecting Plaintiff's attempt to appear on the ballot were procured by fraud, purportedly as evidenced by the incorrect date and out-of-date letterhead on Plaintiff's petition-denial notice. (Doc. 3-1 at 35.)

The facts, as alleged, are insufficient to permit an inference that the notice's incorrect date and letterhead constituted fraud-on-the-court, rather than mere clerical oversight. But even if that were not the case, the Eleventh Circuit has declined to recognize the fraud-on-the-court exception to the *Rooker-Feldman* doctrine. *See, e.g., Velazquez v. S. Fla. Fed. Credit Union*, 546 F. App'x 854, 859 (11th Cir. 2013) (noting that the Eleventh Circuit has not recognized a "fraud-on-the-court" exception to the *Rooker-Feldman* doctrine); *Rice v. Grubbs*, 158 F. App'x 163, 165 (11th Cir. 2005) ("We have not recognized

a fraud exception to the *Rooker-Feldman* doctrine."). Because the *Rooker-Feldman* doctrine applies to Plaintiff's request to "set aside" the state courts' rulings on his nomination petition, and because the fraud-on-the-court exception to the *Rooker-Feldman* is not recognized in this circuit, the Court cannot grant Plaintiff the relief he seeks.

b. Plaintiff's Request for Mandamus Relief is Moot

In addition to the jurisdictional bar discussed above, Plaintiff's request for a court order requiring his name to be placed on the Georgia House District 85 election ballot cannot succeed because it has been mooted by the passage of time. "The doctrine of mootness derives directly from the [Article III] case-or-controversy limitation because 'an action that is moot cannot be characterized as an active case or controversy.'" *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1335 (11th Cir. 2001) (per curiam) (quoting *Adler v. Duval Cnty. Sch. Bd.*, 112 F.3d 1475, 1477 (11th Cir. 1997)). "[A] case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Id.* at 1336 (quoting *Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health and Rehab. Servs.*, 225 F.3d 1208, 1216-17 (11th Cir. 2000)). "If events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give the plaintiff or appellant meaningful relief, then the case is moot and must be dismissed." *Id.*

There is an exception to the mootness doctrine for cases that are "capable of repetition, yet evading review." *Hall v. Sec'y, Ala.*, 902 F.3d 1294, 1297 (11th Cir. 2018) (citing *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911)). In the context of election cases, a claim is "capable of repetition" when there is a "reasonable expectation that [the plaintiff] will run again and be subjected to the same or similar restrictions." *Id.* at 1305 n.9 (11th Cir. 2018). But even if a claim is capable of repetition, it is nevertheless moot when the plaintiff's requested relief requires the court to "turn back the clock and create a world in which" that relief is still available. *Wood v. Raffensperger*, 981 F.3d 1307, 1317 (11th Cir. 2020) (quoting *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015)); *see also De La Fuente v. Kemp*, 679 F. App'x 932, 933 (11th Cir. 2017) (deeming moot a request to enjoin enforcement of a law that prevented plaintiff's name from appearing on the ballot for an election that had already passed because "[t]his Court cannot prevent what has already occurred.").

Here, Plaintiff alleges that he intends to run for Georgia House District 85 as an independent candidate again in the future and thus will face the same restrictions to ballot access he faced in the lead-up to the 2020 election. (Doc. 6-1 at 3.) Accepting as true the allegation that Plaintiff intends to run again, however, the amended complaint does not sufficiently allege that Plaintiff will

be subject to the same unique circumstances as he faced in 2020. Those circumstances included an extended deadline for submitting nomination petitions (occasioned by the COVID-19 pandemic); a consequently shortened period between the petition deadline and the ballot printing deadline; and a delay in the review of his nomination petition occasioned by a Secretary of State staff member being out of town.

Additionally, even if Plaintiff's mandamus request was warranted under the law (which it is not, under the *Rooker-Feldman* doctrine, and for other reasons), this Court is practically unable to provide the extraordinary relief Plaintiff seeks—a new election with his name on the ballot. As the Supreme Court of Georgia explained in deciding Plaintiff's state-court appeal, "Bell seeks to stop the printing of ballots that have already been printed, cast, and counted, and he seeks to compel the Secretary to place his name on a ballot that no longer exists for an election that has already occurred. This Court is no longer capable of granting the type of relief Bell requests, so this appeal is moot." *Bell*, 858 S.E.2d at 51. Similar reasoning applies here. Capable of repetition or not, Plaintiff asks this Court to grant relief with respect to an election that has already happened. The request for injunctive relief is moot.

2. Issue Two: Constitutional Challenge to O.C.G.A. § 21-2-170(b)-(e) (Nomination-Petition Signature Requirement)

Plaintiff asks the Court to strike down Georgia's third-party ballot access law, O.C.G.A. § 21-2-170(b)-(e), as facially unconstitutional under the First and Fourteenth Amendments.[10] The challenged provision provides that, in order to appear on the ballot, an independent candidate for non-statewide office must first obtain signatures from 5% of voters eligible to vote in the district in which the candidate is running, whereas an independent candidate for statewide office need only obtain signatures from 1% of eligible statewide voters. O.C.G.A. § 21-2-170(b). Construed liberally, Plaintiff's amended complaint contains two arguments as to why the ballot-access law is unconstitutional: (1) the statute's nomination-petition requirements (particularly, the 5% signature requirement) place severe burdens on persons seeking to run as independent candidates, and (2) section 21-2-170(b)'s different treatment of statewide and non-statewide independent candidates violates the Equal Protection Clause.

[10] Plaintiff's complaint appears to assert a facial challenge to O.C.G.A. § 21-2-170(b)-(e), not an as-applied challenge. That is, Plaintiff alleges that "'no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

The Eleventh Circuit was presented with these exact arguments in *Cowen v. Secretary of State of Georgia*, 22 F.4th 1227 (11th Cir. 2022). In that case, the Libertarian Party of Georgia brought a facial challenge against Georgia's third-party ballot access laws, just as Plaintiff does here. *Id.* at 1230. In *Cowen*, the Libertarian Party asserted two constitutional claims: "*First,* it argue[d] that the requirements for prospective Libertarian candidates for U.S. Representative cumulatively impose an unconstitutional burden on associational and voting rights protected by the First and Fourteenth Amendments. *Second*, it contend[ed] that Georgia law draws an unjustified classification between prospective Libertarian candidates for statewide office and those for non-statewide office." *Id.* at 1230-31 (emphasis in original). The Eleventh Circuit rejected both claims.

To evaluate the Libertarian Party's first ("severe burden") claim, the Eleventh Circuit performed an *Anderson-Burdick* analysis. *Id.* at 1232-34. The *Anderson-Burdick* test, named for the framework outlined by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and refined in *Burdick v. Takushi*, 504 U.S. 428 (1992), is used to assess First and Fourteenth Amendment claims in the ballot-access context. Under this test, a court must weigh the "character and magnitude of the burden the state's rule imposes" on the right to ballot access "against the interests the State contends justify that

burden, and consider the extent to which the State's concerns make the burden necessary." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (internal quotation marks omitted). If a state's rule imposes a "severe burden" on the right to ballot access, then the rule may survive only if it is "narrowly tailored" and advances a "compelling interest." *Id.* But if the rule imposes only "reasonable, nondiscriminatory restrictions," then "a State's important regulatory interests will usually be enough" to justify it. *Id.* (internal quotation marks omitted).

In *Cowen*, the Eleventh Circuit first assessed Georgia's 5% ballot-access signature requirement. The Court explained that the Supreme Court previously upheld Georgia's 5% signature requirement in *Jenness v. Fortson*, 403 U.S. 431 (1971), and *Jenness* was still good law. Following *Jenness*, the Eleventh Circuit concluded that "Georgia's ballot-access laws were and are quite open in numerous respects" and do not severely burden candidates' First and Fourteenth Amendment rights. *Cowen*, 22 F.4th at 1232-33.

Because there was no severe burden, Georgia's ballot-access laws needed only to be justified by an "important regulatory interest." *Id.* at 1234. The Court found sufficiently important regulatory interests "in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot, in maintaining the

orderly administration of elections, and in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Id.* (internal quotation marks omitted). As a result, the Eleventh Circuit found that Georgia's ballot-access laws satisfied the *Anderson-Burdick* test and were thus constitutional under the First and Fourteenth Amendments. *Id.*

The Court then analyzed the second question raised by the Libertarian Party—whether the discrepancy between statewide and non-statewide signature requirements for third-party candidates violated the Equal Protection Clause. The Court again applied the *Anderson-Burdick* test and concluded that there was no equal protection violation. There was no "severe burden" because the magnitude of the inequality was "only as substantial as the severity of the burden of meeting the 5% signature requirement," and as the Court concluded in its first *Anderson-Burdick* analysis, "that burden is not severe." *Id.* at 1235. Further, the State had a sufficiently important regulatory interest in maintaining different signature requirements for statewide versus non-statewide candidates because the more demanding signature requirement for non-statewide candidates ensures that those candidates have "a significant modicum of support within the congressional district they seek to represent." *Id.* As a result, the state's disparate treatment of statewide and non-statewide

independent candidates satisfied the *Anderson-Burdick* test and did not violate the Equal Protection Clause.

Here, Plaintiff's First and Fourteenth Amendment challenges to O.C.G.A. § 2-21-170 do not state a claim for relief because they are foreclosed by the Eleventh Circuit's decision in *Cowen*. Plaintiff does not dispute that his claims mirror those adjudicated by the Eleventh Circuit in *Cowen*. Instead, he argues that, in deciding *Cowen*, the Eleventh Circuit failed to consider "the political environment along with the racial dynamics and social influences" in the case. (Doc. 19 at 6.) Plaintiff, in other words, asks this Court to find that *Cowen* was wrongly decided. This the Court cannot do. Under the doctrine of stare decisis, "a circuit court's decision binds the district courts sitting within its jurisdiction." *McGinley v. Houston*, 361 F.3d 1328, 1331 (11th Cir. 2004). The Court of Appeals has upheld the 5% requirement in section 21-2-170(b), as well as section 21-2-170(b)'s different treatment of statewide and non-statewide candidates. Accordingly, Plaintiff's facial challenge to the signature requirements in O.C.G.A. § 21-2-170(b)-(e) must be dismissed.

3. Issue Three: Facial Constitutional Challenge to O.C.G.A. § 21-2-171(c) (Petition Review Process)

Plaintiff next brings a facial challenge to the constitutionality of part of the nomination-petition review process mandated by O.C.G.A. § 21-2-171(c). This statute sets forth the process by which an independent candidate may challenge a decision by the Secretary of State denying the candidate's request to put the candidate's name on the ballot. There are four key components to section 21-2-171(c)'s review process, which assigns duties to both the candidate seeking review and the state courts. First, when a nomination petition is denied and the candidate disagrees with the denial, the candidate has five days from when he is notified of the denial to apply for a writ of mandamus in superior court. O.C.G.A. § 21-2-171(c). Second, once the mandamus application is filed, the superior court judge "shall" set the application for a hearing "as soon as practicable." *Id.* Third, if the superior court denies the candidate's mandamus application, the candidate has five days from entry of the superior court order to file an appeal. *Id.* Fourth, "it shall be the duty of the appellate court" to set a hearing and announce its decision with enough time that will permit the name of the candidate to appear on the ballot if the court should rule in the candidate's favor. *Id.*

Although there are four parts to the statutory review process, Plaintiff challenges only *part one*—the five-day period within which a candidate must file a mandamus petition in superior court.[11] (Doc. 7 at 13.) Liberally construed, Plaintiff argues that O.C.G.A. § 21-2-171(c)'s five-day mandamus deadline violates an independent candidate's First and Fourteenth Amendment rights in two ways. First, Plaintiff argues the five-day period does not provide a candidate with enough time to consult an attorney before appealing a nomination-petition denial. Second, Plaintiff argues more generally that the five-day mandamus window does not provide candidates with enough time to seek judicial review of a nomination-petition denial.

[11] In his response to Defendants' motion to dismiss, Plaintiff seemingly attempts to broaden his facial challenge to include all four parts of O.C.G.A. § 21-2-171(c)'s review process. However, Plaintiff may not alter the scope of his complaint in a response brief. "[I]n making the necessary preliminary determination of what claims the plaintiff has actually raised . . . we are bound by the contents of the plaintiff's pleadings." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 976 (11th Cir. 2005) (emphasis omitted). This rule applies to all litigants, even *pro se* litigants. *See, e.g., Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004) (noting that a "plaintiff may not amend [his] complaint through argument in a brief. . ."); *see also Ohai v. Delta Cmty. Credit Union*, No. 1:20-CV-02220-SCJ-AJB, 2021 WL 2679067, at *6 (N.D. Ga. June 7, 2021) (rejecting *pro se* plaintiff's attempt to add new claims for the first time in a reply brief).

To assess Plaintiff's claim that O.C.G.A. § 21-2-171(c)'s five-day deadline period violates the United States Constitution, the Court must conduct an *Anderson-Burdick* analysis.[12] As explained above, the *Anderson-Burdick* test requires the Court to first "weigh the character and magnitude of the burden the State's rule imposes" to determine the appropriate level of scrutiny. *Curling v. Raffensperger*, 403 F. Supp.3d 1311, 1336 (N.D. Ga. 2019) (citing *Timmons*, 520 U.S. at 358, and *Burdick*, 504 U.S. at 434); *see also Stein v. Ala. Sec'y of State*, 774 F.3d 689, 694 (11th Cir. 2014) ("[T]he level of the scrutiny to which election laws are subject varies with the burden they impose on constitutionally protected rights — [l]esser burdens trigger less exacting review.") (internal quotation marks omitted). Second, if a law severely burdens the right to access the ballot, the Court must consider whether the law was narrowly drawn to serve a compelling state interest. *Burdick*, 504 U.S. at 434.

[12] Plaintiff bases his facial challenge, in part, on the notion that the five-day appeal period violates a candidate's procedural due process rights. Ordinarily, procedural due process claims are evaluated under the balancing test articulated by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). In the ballot-access and voting-rights contexts, however, the Eleventh Circuit has explained that due process challenges must be examined under the *Anderson-Burdick* approach. *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020) (finding district court erred when it applied due-process analysis, instead of an *Anderson-Burdick* analysis, to a challenge involving voting rights). Thus, *Anderson-Burdick* provides the analytical framework for evaluating Plaintiff's facial challenge.

But "reasonable, nondiscriminatory restrictions" that impose minimal burdens may be warranted by "the State's important regulatory interests." *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009) (citing *Anderson*, 460 U.S. at 788).

a. *Anderson-Burdick* Step One: The "Character and Magnitude of the Burden" on Constitutional Rights

The Court begins by addressing the significance of the burden on Plaintiff's rights. Plaintiff first contends that O.C.G.A. § 21-2-171(c)'s five-day window to challenge the Secretary of State's rejection of a candidate's nomination petition violates the Fourteenth Amendment because it does not provide candidates enough time to obtain counsel in appealing a nomination-petition denial. This argument cannot succeed because there is no constitutional right to counsel in such non-criminal, ballot-access proceedings. *See generally Bass v. Perrin*, 170 F.3d 1312, 1320 (11th Cir. 1999) ("A plaintiff in a civil case has no constitutional right to counsel."); *In the Interest of B.R.F.*, 788 S.E.2d 416, 419 (Ga. 2016) ("Civil litigants typically do not enjoy a constitutional right to counsel.").

Second, Plaintiff's amended complaint suggests more generally that the five-day mandamus deadline violates a candidate's Fourteenth Amendment rights because the five-day window does not provide a candidate sufficient time

to appeal a nomination-petition denial. Thus, Plaintiff argues, the statute practically limits an independent candidate's ability to appear on the ballot. Unlike access to counsel in a civil, ballot-access matter, the right to appear on the ballot *is* a cognizable constitutional right under the First and Fourteenth Amendments. *See Anderson*, 460 U.S. at 787 (recognizing "the right of individuals to associate for the advancement of political beliefs" and "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively" as "'interwoven strands of 'liberty' affected by ballot access restrictions"). Federal courts take seriously the protection of independent candidates' access to the ballot because restrictions on "the opportunities of independent-minded voters to associate in the electoral arena" can "threaten to reduce diversity and competition in the marketplace of ideas." *Id.* at 794.

In determining the character and magnitude of the burden a state law imposes on ballot access, "[t]he inquiry is whether the challenged restriction unfairly or unnecessarily burdens 'the availability of political opportunity.'" *Anderson*, 460 U.S. at 793 (quoting *Clements v. Fashing*, 457 U.S. 957, 964 (1982)). There is no "litmus-paper test" for measuring the burden. *Id.* at 789. Instead, the analysis is context-specific and is "very much a matter of degree" that requires consideration of "the facts and circumstances behind the law."

Storer v. Brown, 415 U.S. 724, 730 (1974) (internal citations and punctuation omitted).

"The hallmark of a severe burden is exclusion or virtual exclusion from the ballot." *Cooper v. Raffensperger*, 472 F. Supp.3d 1282, 1293 (N.D. Ga. 2020) (quoting *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016)); *see also Lubin v. Panish*, 415 U.S. 709, 716 (1974) (striking $701.60 filing fee for ballot-access petition because it excluded indigent candidates from running for office with no reasonable alternative means of access). "Burdens are severe if they go beyond the merely inconvenient." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring). Further, a law that operates to preclude a person from appearing on the ballot does not necessarily impose a severe burden on that person's associational rights. *See Timmons*, 520 U.S. at 359 ("That a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's associational rights.").

"In recent years, the U.S. Supreme Court and courts in this Circuit have repeatedly rejected claims by other candidates and voters who have similarly asserted that a state's various procedural hurdles to accessing the ballot placed a severe burden on their constitutional rights." *Greene v. Raffensperger*, No. 22-CV-1294-AT, 2022 WL 1136729, at *20 (N.D. Ga. Apr. 18, 2022), *remanded*

on other grounds by 52 F.4th 907 (11th Cir. 2022). This Court recently explained:

> [I]n *Crawford v. Marion County Election Board*, the Supreme Court held that Indiana's requirement for voters to obtain a photo ID as a prerequisite for voting imposed "only a limited burden" on voters' access to the ballot. 553 U.S. 181, 202–03 (2008). The Eleventh Circuit followed suit the following year in *Common Cause/Georgia. v. Billups*, when it found Georgia's requirement that "every voter who casts a ballot in person [ ] produce an identification card with a photograph of the voter" did not pose a significant burden on voters who lack photo identification. 554 F.3d 1340, 1345, 1354 (11th Cir. 2009). More recently, in *Cowen v. Secretary of State of Georgia*, the Eleventh Circuit found Georgia's requirement that third party and independent candidates obtain petition signatures from "a number of voters equal to 5% of the total number of registered voters eligible to vote in the last election for the office" did not impose a severe burden for purposes of the *Anderson/Burdick* analysis. 22 F.4th 1227, 1230 (11th Cir. 2022). The court reached that conclusion even though the candidates at issue only had a 180-day period in which to collect signatures — which had to be supported by a notarized affidavit from the petition circulator — and the candidates were also required to submit either a filing fee or a pauper's affidavit. *Id.*

Id.

Considering the foregoing, here, the Court finds that O.C.G.A. § 21-2-171(c)'s five-day mandamus deadline imposes a reasonable, non-discriminatory burden on an independent candidate's First and Fourteenth Amendment rights. Although the five-day window to seek mandamus relief may pose difficulty and/or inconvenience, there is no indication that it

"virtually excludes" candidates from the ballot. *Cooper*, 472 F. Supp.3d at 1293 Indeed, Plaintiff himself was able to timely file his application for mandamus relief within the five-day window, and he has not alleged that the five-day mandamus deadline has prevented other candidates from appearing on the ballot.

In addition, as noted above, measuring the severity of a burden is a context-specific inquiry. Thus, the Court must consider that section 21-2-171(c)'s five-day mandamus deadline exists in the context of time-sensitive election appeals, which are due to be decided in advance of an impending ballot-printing deadline. While a five-day filing window could be unreasonably short in some contexts, other situations call for expediency. For example, the local rules for the Georgia Court of Appeals prescribe a five-day deadline for certain motions relating to Georgia's Parental Notification Act. *See* Ga. Ct. App. R. 45. In the election context, the Supreme Court of Georgia has given parties as little as one day to submit expedited briefing for an emergency request for mandamus relief. *See, e.g., Barrow v. Raffensperger*, 842 S.E.2d 884, 889 n.3 (Ga. 2020). Such deadlines may be inconvenient. But when considering the exigent circumstances that compel them, it cannot be said that they create "unfair" or "unnecessary" burdens. *Anderson*, 460 U.S. at 793. The same is true for section 21-2-171(c)'s

mandamus deadline, which exists to facilitate the efficient resolution of nomination petition review and to guard against lengthy appeal periods that might hamper ballot access. For these reasons, Plaintiff has not adequately alleged a severe burden on independent candidates' First and Fourteenth Amendment rights under *Anderson-Burdick*.

b. *Anderson-Burdick* Step Two: Whether the Burden is Warranted by the State's "Important Regulatory Interests"

Where, as here, a law restricting a candidate's access to the ballot does not severely burden the candidate's First and Fourteenth Amendment rights, the law "need only be justified by 'the State's important regulatory interests.'" *Cowen*, 22 F.4th at 1233-34 (quoting *Anderson*, 460 U.S. at 788). Defendants allege that the burden imposed by the State's five-day mandamus deadline is justified by its regulatory interest in the prompt resolution of a candidate's challenge. Defendants argue that the prompt resolution of a candidate's appeal, in turn, serves three related interests: (1) meeting state and federal deadlines to finalize ballots for printing and sending to absentee voters, (2) conducting orderly elections, and (3) avoiding voter confusion by not altering ballots after the election has begun. The Eleventh Circuit has recognized similar state interests as sufficiently important to justify reasonable, nondiscriminatory restrictions on ballot access. *See, e.g., Cowen*, 22 F.4th at

1234 (finding "compelling" interests in "maintaining the orderly administration of elections" and "avoiding confusion, deception, and . . . frustration of the democratic process at the general election"); *New Ga. Project*, 976 F.3d at 1282 (finding the state's interests in "an efficient election" and "maintaining order" to "easily survive the *Anderson-Burdick* framework"). The Court likewise finds here that the interests articulated by Defendants are sufficiently important to justify the reasonable burden imposed by section 21-2-171(c)'s five-day mandamus deadline. Accordingly, O.C.G.A. § 21-2-171(c)'s five-day mandamus deadline is not facially unconstitutional under the *Anderson-Burdick* framework.

4. Issue Four: Alleged Delays Under O.C.G.A. § 21-2-171(c)

Construed liberally, Bell's amended complaint also challenges the constellation of circumstances that delayed his mandamus hearing until after the ballot-printing deadline. Those circumstances included the delay by the Secretary of State's office in reviewing Plaintiff's nomination petition, and the decision by the superior court to hold a hearing after the ballot-printing deadline. (*See, e.g.*, Doc. 7 at 11 ("The trial court process should have moved in a more expeditious manner").)[13]

[13] Notably, Bell does not challenge the Secretary's decision to extend, due to the COVID-19 pandemic, the deadline for candidates to file nomination

Mr. Bell is correct that he should have had a mandamus hearing before the ballot printing deadline. The statute contemplates a compressed timeline and expeditious review for independent candidates whose nomination petitions are denied. *See, e.g.,* O.C.G.A. § 21-2-171(b) (requiring a Secretary of State official to "begin expeditiously to examine the petition to determine if it complies with the law"); § 21-2-171(c) (requiring the superior court judge to set the mandamus hearing "as soon as practicable"). The statute further contemplates that the whole review process should conclude before the ballot printing deadline. *See id.* (stating that it shall be the "duty of the appellate court to fix the hearing and to announce its decision within such period of time as will permit the name of the candidate affected by the court's decision to be printed on the ballot if the court should so determine"). Certainly, that did not happen in this case. The delay in reviewing Bell's petition occasioned by an attorney in the Secretary's office being out of town (a circumstance that was unfortunate in the context of time-sensitive election work) in turn delayed the superior court hearing.

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petitions. He does not challenge it even though that extended deadline was an element – and arguably the most important element – contributing to the compressed timeline at issue in this case. Plaintiff, moreover, made use of the extended deadline, filing his nomination petition the day before the extended deadline expired.

While Plaintiff's critique of the delay by the Secretary of State is understandable, this Court cannot find that his allegations rise to the level of a constitutional violation. "*Anderson*, *Burdick*, and their progeny do not apply to accidental mistakes on the part of election officials during the administration of elections." *Fair Fight Action, Inc. v. Raffensperger*, No. 1:18-CV-5391-SCJ, 2022 WL 4725887, at *52-53 (N.D. Ga. Sept. 30, 2022) (declining to find that Secretary of State training materials violated the First and Fourteenth Amendments even though they contained incorrect information that may have burdened voters' rights). "Unlike systematic discriminatory laws, isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause." *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980). "If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute . . . [But] Section 1983 . . . did not authorize federal courts to be state election monitors." *Id*. at 453-454.

Here, Plaintiff argues that the Secretary of State and state court system failed to respect the strictures of O.C.G.A. § 21-2-171 by not moving quickly enough in reviewing his petition and scheduling his hearing. As such, "[w]hat Plaintiff[] [is] challenging is Defendants' failure to adequately enforce a Georgia statute . . . . " *Fair Fight Action, Inc.*, No. 1:18-CV-5391-

SCJ, 2022 WL 4725887, at *52-53. Plaintiff's challenge is thus "one of an election irregularity," which does not violate the First and Fourteenth Amendments. *See id.* "To hold otherwise would effectively transform any inadvertent error in the administration of state and local elections into a federal equal protection violation." *Lecky v. Va. State Bd. of Elections*, 285 F. Supp.3d 908, 919 (E.D. Va. 2018) (stating that in *Anderson*, *Burdick*, and related cases, "courts have considered the constitutionality of state statutes, regulations, or policies that burden the right to vote, not accidental mistakes on the part of election officials in administering an election.")

"[N]ot every state election dispute . . . implicates the Due Process Clause of the Fourteenth Amendment." *Roe v. State of Ala.*, 43 F.3d 574, 580 (11th Cir. 1995). The delay alleged by Plaintiff is the kind of "episodic election irregularity" that should be avoided in the future, but that did not deprive Plaintiff of his constitutional rights. *Gamza*, 619 F.2d at 454.

IV. Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss (Doc. 16) is **GRANTED**, and Plaintiff's "Petition for Writ of Mandamus" (Doc. 7) is **DENIED**. Plaintiff's construed motion for leave to amend (Doc. 24) is **DENIED**, and Defendants' Motion to Strike Plaintiff's Amended Pleading (Doc. 25) is **DENIED AS MOOT**. Plaintiff's Petition to Bring His Phone into

the Federal Courthouse (Doc. 20) is **DENIED AS MOOT**. The Clerk of Court is directed to close this case.

SO ORDERED this 6th day of December, 2022.

SARAH E. GERAGHTY
United States District Judge