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January 5, 2024

David J. Smith
Clerk of Court
U.S. Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

RE: Case No. 22-13396, *Graham, et. al v. Carr, et al.*

Dear Mr. Smith:

On December 19, 2023, the Court ordered the parties to submit letter briefs addressing whether this appeal is moot. It is. The completion of the 2022 election cycle renders preliminary injunctive relief no longer available and none of the exceptions to the mootness doctrine apply. The Court should therefore dismiss the appeal.

The election for Lieutenant Governor of Georgia was held on November 8, 2022. Republican candidate Burt Jones won the election; Appellant Ryan Graham received 2.18% of the vote.[1]

[1] *See* Certified Election Results from November 8, 2022 General/Special Election, available at https://results.enr.clarityelections.com/GA/115465/web.307039/#/summary

On January 5, 2023, Graham filed his December 31 Election Year Campaign Contribution Disclosure Report[2]. Graham reported that his campaign account had a net balance on hand of $889.73 and that his campaign was indebted to Graham for repayment of self-funded loans in the amount of $6431.07 ($687.07 for the primary election period and $5744.00 for the general election).

ARGUMENT

I. This appeal is moot.

Graham's claims are moot because Graham lost the primary election and is no longer a candidate for Lieutenant Governor. A case is moot when "'the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *De La Teja v. United States*, 321 F.3d 1357, 1362 (11th Cir. 2003) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). "[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed." *Djadju v. Vega*, 32 F.4th 1102, 1106 (11th Cir. 2022) (quoting *Brooks v. Ga. State Bd. of Elections*, 59 F.3d 1114,

[2] Graham's December 31, 2022 year-end report is publicly available and may be found by searching Graham's name upon the State Ethics Commission's website (www.ethics.ga.gov). The report may be viewed at the following hyperlink: https://efile.ethics.ga.gov/ReportsOutput/103/05077a6d-4da0-423f-8c95-467365e56a81.pdf

This Court may take judicial notice of this report as it is a publicly available state agency record and there is no reason for mistrust. *United States v. Howard,* 28 F.4th 180, 226 at n. 2 (11th Cir. 2022).

1118 (11th Cir. 1995)). "Indeed, dismissal is required because mootness is jurisdictional." *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001) (per curiam). With Graham's loss in the election for Lieutenant Governor, there is no longer a live controversy that this Court can address.

The gravamen of Graham's claim is that the Leadership Committee Statute placed him a disadvantage to his Republican and Democratic opponents in the 2022 election, and shortly before the election, he sought a preliminary injunction that would allow him to raise campaign funds in excess of the contribution limits set forth in O.C.G.A. § 21-5-41. But to the extent Graham ever had an Article III injury in this case, it was as a candidate in the same election for Lieutenant Governor as his opponent Burt Jones, who was able to form a leadership committee and receive unlimited campaign contributions thereto. *Graham v. Carr,* No. 1:22-CV-03613-MHC at p. 15 (N.D. Ga. Feb. 7, 2022). Now that Graham has lost the election, he is no longer a candidate for office and no longer has an active campaign.

Mootness concerns the availability of relief, and here there is no relief for any supposed injury. *Wood v. Raffensperger*, 981 F.3d 1307, 1317 (11th Cir. 2020). The relief at issue here—a preliminary injunction that would permit Graham to raise unlimited campaign contributions—is no longer available to Graham as he is no longer campaigning for office and can continue to accept campaign contributions only for repayment of campaign obligations incurred as a candidate in the prior election. *See* O.C.G.A. § 21-5-43(a)(1).

Accordingly, this Court lacks the ability to grant "any effectual relief whatever" to Graham or the Libertarian Party. *Brooks v. Georgia State Bd. of Elections*, 59 F.3d 1114, 1118 (11th Cir. 1995). "[T]his Court cannot prevent what has already occurred." *De La Fuente v. Kemp*, 679 Fed. Appx. 932, 933 (11th Cir. 2017). As such, there is no case or controversy remaining before the court, and the appeal must be dismissed as moot.

None of the exceptions to the mootness rule apply to this case. This case is not capable of repetition yet evading review; and the order appealed will have no collateral consequences. *Christian Coalition of Fla., Inc. v. United States,* 662 F.3d 1182, 1194–95. (11th Cir. 2011).

This Court has held that there is a "narrow exception for actions that are capable of repetition yet evading review … only in the exceptional circumstances in which the same controversy will recur and there will be inadequate time to litigate it prior to its [conclusion]." *Naijar v. Ashcroft*, 273 F.3d 1330, 1340 (11th Cir. 2001). This Court may apply this exception when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Wood v. Raffensperger,* 981 F.3d 1307 11th Cir. 2020). But this Court will not apply this exception if there is some alternative vehicle through which a particular policy may effectively be subject to complete review. *Bourgeois v. Peters*, 387 F.3d 1303, 1308 (11th Cir. 2004). As to repetition, a "mere physical or theoretical possibility" of repetition is not sufficient; the

record must reflect a "demonstrated probability" that the same controversy will recur involving the same complaining party. *Tucker v. J.P. Morgan Chase Bank, N.A.*, 743 Fed. Appx. 964 (11th Cir. 2018) (*citing Murphy v. Hunt,* 455 U.S. 478, 482 (1982)).

The record does not demonstrate any probability that Graham or Appellant Libertarian Party have a reasonable expectation of being subjected to the same action again. As to Graham, the record is devoid of any evidence as to the likelihood that he may wish to campaign again in 2026 for one of the offices to which O.C.G.A. § 21-5-34.2 applies (and, if he does, whether or not he will receive the Libertarian Party's nomination for such office). The Libertarian Party is not subject to O.C.G.A. § 21-5-41's campaign contribution limits, and it has never suggested that it would wish to contribute more to Graham's campaign than the campaign contribution limits permit. In fact, during the 2022 election, the Libertarian Party contributed only $2,061.21 to Graham's campaign—far less than O.C.G.A. 21-5-41's campaign contribution limits permitted. Doc. 27 at 19.

Further, even if Graham were to experience a similar situation by campaigning for Lieutenant Governor in 2026 and receiving the Libertarian Party's nomination, there is ample time for the judiciary to adjudicate any dispute over O.C.G.A § 21-5-34.2. *See, e.g. Christian Coalition of Fla., Inc. v. United States,* 662 F.3d 1182, 1195 (11th Cir. 2011). Should Graham campaign for one of the offices subject to O.C.G.A. § 21-5-34.2 in some future election, the judiciary shall have adequate time to adjudicate any dispute

over his ability to form a leadership committee so long as he does not act with the same delay in filing a future lawsuit that he did in this one. *See Graham v. Carr,* 634 F.Supp.3d 1343, 1358 n.4 (N.D.Ga. 2022) (describing Graham's delay in seeking relief until long after he had declared candidacy and after his opponent formed a leadership committee). Therefore, the "capable of repetition yet evading review" exception to the mootness doctrine does not apply here.

There are also no collateral legal consequences. Graham and the Libertarian Party *failed* to obtain a preliminary injunction—that failure has no collateral consequences whatsoever, nor have they pointed to any. *B & B Chemical Co. v. United States EPA*, 806 F.2d 987, 991 (11th Cir. 1986). Examples of collateral consequences include the denial of civil rights such as the right to vote or be considered for jury duty following a criminal conviction. *See, e.g. Broughton v. State of N.C.*, 717 F.2d 147, 148-149 (4th Cir. 1983). It does not appear that this Circuit has ever applied this exception to mootness outside the criminal context.. This is not a case where anything the district court did (or did not do) will indirectly affect Graham (or the Libertarian Party) moving forward, and there does not appear to be any credible claim that there are any collateral consequences that could present an exception to the mootness doctrine. .

Because this appeal is now moot and none of the exceptions to the mootness doctrine apply, this Court should dismiss this appeal.

II. Even if this appeal were not technically moot, the equities overwhelmingly favor affirmance.

Even if the appeal were technically justiciable, Graham and the Libertarian Party cannot demonstrate that they are entitled to a preliminary injunction, "an extraordinary and drastic remedy not to be granted unless the movant clearly establishes the 'burden of persuasion.'" *All Care Nursing Serv., Inc. v. Bethesda Mem'l Hosp., Inc.*, 887 F.2d 1535, 1537 (11th Cir. 1989) (*citing United States v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir. 1988). Here, there is no doubt that Graham and the Libertarian Party fail to establish that the equities are in their favor.

Now that the 2022 election has been completed, there is no threat of irreparable injury—indeed it is not even clear what a preliminary injunction would *do*. An irreparable injury must be "neither remote nor speculative, but actual and imminent." *Northeastern Fla. Chapter of Ass'n of General Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285 (11th Cir. 1990). Any harm that Graham or the Libertarian Party supposedly suffered already happened, and it cannot form the basis for prospective injunctive relief. *See Church v. City of Huntsville,* 30 F.3d 1332, 1337 (11th Cir. 1994) (a prospective remedy will "provide no relief for an injury that is, and will likely remain, entirely in the past.").

Moreover, with regard to any future elections—assuming Graham decides to run in a future election, establishes standing to sue, and would otherwise be likely to succeed on the merits—Graham has *years* to file a lawsuit and make his case. There cannot possibly be a need for a preliminary

injunction in such circumstances. Graham and the Libertarian Party have not even purported to make any actual allegations about any injuries they expect to sustain with regard to the 2026 election cycle, and if they did, there would be plenty of time to litigate those issues without the need for extraordinary, preliminary relief. So even if this Court somehow has jurisdiction over this appeal, it should affirm the District Court's denial of preliminary injunctive relief.

CONCLUSION

For the foregoing reasons, this Court should dismiss this appeal as moot or, in the alternative, affirm.

Respectfully submitted,

/s/ Elizabeth T. Young
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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I hereby certify that the following persons and entities may have an interest in the outcome of this case, in addition to those listed in prior filings:

State Ethics Commission, formerly known as the Georgia Government Transparency and Campaign Finance Commission, Defendant/Appellee

Wise, Stan, Non-party Member of Defendant/Appellee State Ethics Commission, formerly known as the Georgia Government Transparency and Campaign Finance Commission

/s/ Elizabeth T. Young
Elizabeth T. Young

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and with the direction of the Court not to exceed ten (10) double-spaced pages.

/s/ Elizabeth T. Young
Elizabeth T. Young

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2024, I served this letter brief by electronically filing it with this Court's ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

/s/ Elizabeth T. Young
Elizabeth T. Young