IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIA STATE CONFERENCE OF THE NAACP, *et al.,*

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his official capacity as the Secretary of State for the State of Georgia, *et al.,*

Defendants.

CIVIL ACTION

FILE NO. 1:21-CV-01259-JPB

BRIEF IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

INTRODUCTION

Plaintiffs chose to amend their Complaint by adding 30 pages, 74 paragraphs, a plaintiff, more than a dozen defendants, and two new topics—and there's still more to come, as Plaintiffs plan to add an NVRA claim later. *Compare* [Doc. 1] *with* [Doc. 35]. But they have not corrected their glaring Article III standing problems or managed to state a claim for relief.

Plaintiffs seek a policy goal—changes to Georgia election laws—and that purpose is made clear when their introductory statement of facts outlining their grievances includes a variety of Georgia election practices that have been upheld by courts against challenges from Plaintiffs and others. *See, e.g.,* [Doc. 35, ¶¶ 85-86] (photo ID, upheld by *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1345 (11th Cir. 2009) ("*Billups*")); [Doc. 35, ¶¶ 87, 89] (list maintenance and precinct closures, upheld by *Fair Fight Action v. Raffensperger*, Case No. 1:18-cv-05391-SCJ, Slip op. (Doc. 612) at 36-42); [Doc. 35, ¶ 90] (line length, upheld by *Anderson v. Raffensperger*, 497 F. Supp. 3d 1300 (N.D. Ga. 2020)).

With SB 202, the Georgia Legislature updated Georgia's reasonable, nondiscriminatory election rules in response to lessons learned in 2020. This Court should "follow the law as written and leave the policy decisions for others." *Ga. Ass'n of Latino Elected Officials, Inc. v. Gwinnett Cty. Bd. of Reg. & Elections*, 499 F. Supp. 3d 1231, 1231 (N.D. Ga. 2020) ("*GALEO*").

ARGUMENT AND CITATION OF AUTHORITY

Plaintiffs seek to enjoin eleven components of SB 202 as (1) intentionally discriminatory, (2) violations of Section 2 of the Voting Rights Act ("VRA"), (3) placing an undue burden on the right to vote, (4) violations of the First Amendment, and (5) violations of the Civil Rights Act. *See generally* [Doc. 35].

Where a motion to dismiss is brought pursuant to FRCP 12(b)(1), the Court is not limited to the four corners of the Complaint to adequately satisfy itself of jurisdiction over the matter. *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 732 n.9 (11th Cir. 1982). In evaluating a 12(b)(1) motion, "no presumptive truthfulness attaches to plaintiff's allegations." *Id*. And, to survive a motion to dismiss under FRCP 12(b)(6), a complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint must demonstrate "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). While this Court must assume the veracity of well-pleaded factual allegations, it is not required to accept legal conclusions "couched as [] factual allegation[s]." *Id*. at 678-79. This Court may also consider any matters appropriate for judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 322 (2007).

I. Plaintiffs lack Article III standing.

"Federal courts are not 'constituted as free-wheeling enforcers of the

Constitution and laws.'" *Wood v. Raffensperger*, 981 F.3d 1307, 1313 (11th Cir. 2020) (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006)). Instead, the Constitution requires that "a litigant must establish that he has standing" in order to avail himself of the federal courts. *Jacobson v. Fla. Sec. of State*, 974 F.3d 1236, 1245 (11th Cir. 2020).

Plaintiffs here must allege "(1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision." *Id.* Plaintiffs must also show a concrete and particularized injury. *Wood*, 981 F.3d at 1314 (citing *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 996 (11th Cir. 2020)). And there must be a substantial risk of injury or the injury must be "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013). Organizations can establish an injury either by (1) showing they diverted resources in response to the purportedly illegal acts of Defendants, or (2) "stepping in the shoes" of their members.

A. Plaintiffs do not adequately allege an injury.

1. Organizational standing.

A plaintiff claiming diversion of resources as an injury must show not only what the organization is diverting resources *to*, but also "what activities [the organization] would divert resources away *from* in order to spend additional resources on combatting" the impact of the law. *Jacobson*, 974 F.3d

at 1250. As another judge on this court stated, this requires more than evidence of an accounting transfer: there must be an "indication" that the organization "would in fact be diverting … resources *away from their core activities*." *GALEO*, 2020 U.S. Dist. LEXIS 211736, at *17 (emphasis added).[1] Or, as the Seventh Circuit explained, organizations cannot support a claim of standing "based solely on the baseline work they are already doing." *Common Cause Ind. v. Lawson*, 937 F.3d 944, 955 (7th Cir. 2019). Further, organizations "cannot convert ordinary program costs into an injury in fact" but "must show that the disruption is real and its response is warranted." *Id.* (cleaned up).

In *GALEO*, the plaintiff alleged it was forced to divert resources "from getting out the vote and voter education to 'reach out to and educate [limited English proficiency voters] about how to navigate the mail voting process…" *GALEO*, 2020 U.S. Dist. LEXIS 211736 at *17. But GALEO's mission included "organizing voter education, civic engagement, [and] voter empowerment." *Id.* The district court dismissed the case and found "there is no indication that GALEO would in fact be diverting any resources away from the core activities it already engages in . . . ." *Id.* And allegations of new or additional efforts were "precisely of the same nature as those that GALEO engaged in before…" *Id.*

[1] Plaintiffs appealed this dismissal and it is pending at the Eleventh Circuit.

The same is true here, even with the addition of the Urban League of Greater Atlanta, Inc. ("ULGA") as a new Plaintiff. Taking the allegations in the Amended Complaint as true, there is no "indication" that the alleged actions thus far undertaken—or those they claim will be taken later—are different in nature from what Plaintiffs already engaged in before SB 202. The Georgia NAACP, for example, will simply continue to offer messaging to voters of color, as well as dedicate resources "to educate and assist eligible voters." [Doc. 35, ¶ 24]. The Georgia NAACP frames this as a change from their normal mission, but it is directly in line with how they describe their current activities: "The Georgia NAACP works to protect voting rights through litigation…. voter registration, voter education, GOTV efforts…" *Id.* at ¶ 14.

This is true for the remaining Plaintiffs. Georgia Coalition for the People's Agenda ("GCPA") states that it "provide[s] outreach and support to voters and prospective voters of color and underserved communities…" *Id.* at ¶ 29. It claims it will "divert a portion of its financial and other organizational resources to educating voters about [changes in SB 202]." *Id.* at ¶ 39. But this is in line with their mission of providing "outreach and support to voters."

The League of Women Voters of Georgia ("LWVG") broadly states its mission as "empowering voters and defending democracy." *Id.* at ¶ 41. And the LWVG claims it is having to divert resources because it will need to "update

standard training materials and informational booklets" to reflect changes brought on by SB 202. *Id.* at ¶ 45. But updating existing program materials does not constitute a diversion of resources sufficient to afford standing.

GALEO Latino Community Development Fund, Inc. ("GALEO LCDF") describes itself has "one of the oldest, largest, and most significant organizations promoting and protecting the civil rights of Georgia's Latinx community." *Id.* at ¶ 47. It alleges its work includes "organizing voter education, civic engagement, voter empowerment and get out the vote events…" *Id.* at ¶ 48. But its alleged diversion is simply "assist[ing] voters . . . in being able to navigate the many changes and challenges of SB 202 . . ." *Id.* at ¶ 52. This in no way deviates from the stated mission of GALEO LCDF. *Id.*

Common Cause only claims to have "increased its efforts in the areas of election protection, voter education, and grassroots mobilization around voting rights," as a result of SB 202. *Id.* at ¶ 54. But a mere increase in efforts does not create standing. *See, e.g.*, *Lawson,* 937 F.3d at 955.

The addition of ULGA does not save the Amended Complaint from dismissal. Although Plaintiffs claim that ULGA's purported diversion of resources deviates from their traditional mission of "help[ing] citizens work toward economic stability through programs in education, entreprensuership, jobs and training, housing, and community support…" [Doc. 35, ¶ 62], the

alleged injuries do not satisfy the immediacy requirements of Article III standing because they rely too greatly on a "highly attenuated chain of events." *See generally id.* at ¶¶ 67–69 (alleged diversions "will require" or "possibly" require); *Whitmore v. Arkansas,* 495 U.S. 149, 158 (1990). By their own admission, any possible injury will only occur at some unknown point, and only if other events occur. But "[a] threatened injury must be certainly impending to constitute injury in fact." *Id.* Plaintiffs' purely speculative injuries do not measure up to create standing.

2. Associational standing.

Lower Muskogee Creek Tribe alleges standing only on behalf of its members, but its associational-standing allegation fails. [Doc. 35, ¶¶ 59-60]. To establish associational standing, "plaintiff-organizations [must] make specific allegations establishing that at least one *identified* member [has] suffered or [will] suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (emphasis added)*; Republican Party v. SEC*, 888 F.3d 1198, 1203-05 (11th Cir. 2018). No such allegation is made here.

Further, any potential injury faced by its members is too speculative to support standing here because any injury is not concrete and particularized. *See Tsao v. Captiva MVP Rest. Partners, LLC.*, 986 F.3d 1332, 1339 (11th Cir. 2021); *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 931 (11th Cir. 2020)

(en banc). Any injury to a member is based solely on a "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, and cannot establish standing on an associational basis because the members do not have standing to sue in their own right, *see United Food & Commer. Workers Union Local 751 v. Brown Grp.*, 517 U.S. 544, 553 (1996); *Wood*, 981 F.3d at 1314 (no concrete injury to individual voter); *Bognet v. Sec'y Pa.*, 980 F.3d 336, 356 (3d Cir. 2020) (same).

B. Plaintiffs have not alleged traceable harms.

Even if Plaintiffs can establish an injury, many of their claims should be dismissed because they are not traceable to State Defendants. An injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court," *Lujan*, 504 U.S. at 560, and State Defendants have no role in several challenged practices.

For example, Plaintiffs challenge language in SB 202 that "[e]ncourag[es] the submission of 'unlimited' numbers of voter challenges" to voters' registration status. [Doc. 35, ¶¶ 3(9), 179(9)]. But those challenges are brought and heard at the county level. *See, e.g.*, O.C.G.A. § 21-2-229, *et seq*. A ruling from this Court that alters the processes *counties* use in determining challenges would be ineffectual because "it must be *the effect of the court's judgment on the defendant*—not an absent third party—that redresses the plaintiff's injury." *Lewis v. Gov. of Ala.*, 944 F.3d 1287, 1301 (11th Cir. 2019)

(en banc) (cleaned up). Likewise, Plaintiffs' claims about changes to votes on the State Election Board ("SEB"), [Doc. 35, ¶ 3(8), 179(8)]; challenges to "long lines" (despite SB 202 including provisions to shorten lines), *id.* at ¶ 5; and giving officials "unfettered discretion to limit early voting" (which is wrong), *id.* at ¶ 3(5), 149, are not traceable to State Defendants and, thus, are beyond this Court's capacity to redress, *see Anderson*, 497 F. Supp. 3d at 1328.

II. Plaintiffs fail to state a claim on which relief can be granted.

A. Relevant legal standards.

1. Intentional racial discrimination (Count I).

Plaintiffs bring a single count of intentional racial discrimination under the Constitution (the Equal Protection Clause of the 14th Amendment and the 15th Amendment) and Section 2 of the VRA. [Doc. 35, ¶¶ 170-190]. To prevail, Plaintiffs must allege first that "the State's decision or act had a discriminatory purpose and effect. . . . If Plaintiffs are unable to establish both intent *and* effect, their constitutional claims fail." *Greater Birmingham Min. v. Sec'y of Ala.*, 992 F.3d 1299, 1321 (11th Cir. 2021) ("*GBM*") (cleaned up). Only if Plaintiffs establish that the act had a discriminatory intent or effect does "the burden shift[] to the law's defenders to demonstrate that the law would have been enacted without this [racial-discrimination] factor." *Id.* (cleaned up); *see also Johnson v. Governor of Fla.*, 405 F.3d 1214, 1222 (11th Cir. 2005). Courts

use the approach of *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977), to assess intent and effect. *See GBM*, 992 F.3d at 1322.

2. Section 2 of the Voting Rights Act (Count II).

Section 2 prohibits jurisdictions from "impos[ing] or appl[ying]" any "standard, practice or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color[.]" 52 U.S.C. § 10301(a). "This analysis turns on whether, based on the totality of the circumstances, the challenged law violates Section 2(a) because it deprives minority voters of an equal opportunity to participate in the electoral process *and* to elect representatives of their choice." *GBM*, 992 F.3d at 1329 (emphasis in original). To make out a valid vote-denial[2] claim, the Eleventh Circuit requires proof (1) of disparate impact (a law results in a denial or abridgement) and (2) that the disparate impact is *caused* by racial bias. *Id.*; *see also Northeast Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 626-27 (6th Cir. 2016); *Dem. Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1012 (9th Cir. 2020); *Veasey*, 830 F.3d at 243-45.

3. Fundamental right to vote (Count III).

Plaintiffs next challenge the changes in SB 202 as facially

[2] Vote-denial claims challenge specific election practices. *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016).

unconstitutional. [Doc. 35, ¶¶ 202-215]. But facial challenges to election practices are disfavored because "the proper [judicial] remedy—even assuming [the law imposes] an unjustified burden on some voters—[is not] to invalidate the entire statute." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203 (2008) (controlling opinion) (cleaned up). Such challenges "must fail where the statute has a plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican* Party, 552 U.S. 442, 449 (2008). "Regulations imposing severe burdens on the plaintiffs' rights must be narrowly tailored and advance a compelling state interest," but "a state's 'important regulatory interests' will usually be enough to justify 'reasonable nondiscriminatory restrictions.'" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)); *see also Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Courts distinguish severe burdens from non-severe ones and incidental burdens "aris[e] from life's vagaries" and thus fall into the latter category. *Crawford*, 553 U.S. at 191, 197-98. Lesser burdens impose no burden of proof or evidentiary showing on states. *See Billups*, 554 F.3d at 1353; *see also Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986).

B. Application to particular challenged practices.

1. Absentee ID requirements.

Plaintiffs first take issue with the use of an identification number for

absentee-ballot applications.[3] [Doc. 35, ¶¶ 134-140, 179(1), 195, 209]. The prior method for verifying ballots by using signature-matching was subjective and challenged by both Democratic and Republican groups. Ex. A at 4:73-75. The SB 202 process is objective and includes safeguards for voters who lack identification. Ex. A at 38:949-39:956; 51:1297-52:1305. Plaintiffs allege a possible disproportionate impact on minority voters who do not have a photo ID. [Doc. 35, ¶ 140]. But the Supreme Court and the Eleventh Circuit have already determined there is no unconstitutional burden on the right to vote by requiring photo identification. *See Crawford*, 553 U.S. at 181; *GBM*, 992 F.3d at 1320. Thus, in light of governing precedent, even if there is a slight burden, it is more than justified by Georgia's regulatory interests.

Plaintiffs' mere allegation that minorities are less likely to possess identification is not a sufficient allegation of a discriminatory effect for their intentional-discrimination claim. *Compare* [Doc. 35, ¶ 140] *with GBM*, 992 F.3d at 1320. But even if it were, Plaintiffs have not sufficiently alleged the factors in *Arlington Heights*, 429 U.S. at 266. The alleged impact is minimal at best, the history relied on is far distant, *see Shelby County, Ala. v. Holder*, 570

[3] Also, at least six other states utilize identification numbers with absentee-ballot applications or ballots. *See* Code of Ala. § 17-9-30(b); A.C.A. § 7-5-412(a)(2)(B) (Arkansas); K.S.A. § 25-1122(c) (Kansas); Minn. Stat. Ann. § 203B.07(3); Ohio Rev. Code Ann. § 3509.03(B), .04(B); Wis. Stat. § 6.87(1).

U.S. 529, 552-53, 558 (2013); the legislation went through normal channels, *see Abbott v. Perez*, 138 S.Ct. 2305, 2324 n.17 (2018); and the legislature explained exactly what it was doing in the first pages of the bill—and none of the statements by the legislature were racially discriminatory. *Compare* [Doc. 35] and Ex. A, 4:69-7:148 *with GBM*, 992 F.3d at 1321-1328. Differential rates of identification is also not a sufficient causal connection for their Section 2 claim. [Doc. 35, ¶ 140]; *GBM*, 992 F.3d at 1329.

Finally, requiring identifying information with an absentee ballot, particularly a date of birth, does not violate the Civil Rights Act. [Doc. 35, ¶¶ 234-237]. While denying the right to vote based on nonmaterial[4] issues is prohibited, *see* 52 U.S.C. § 10101(a)(2)(B), SB 202 requires notice and an opportunity to cure if the election official is unable to identify a voter. Ex. A at 63:1599-1612. Further, the processing of absentee ballots is not carried out by State Defendants. *See also Ga. Republican Party, Inc. v. Ga. Sec'y of State*, No. 20-14741-RR, 2020 U.S. App. LEXIS 39969, at *6 (11th Cir. Dec. 20, 2020).

2. Prohibition on public officials mailing applications and limitations on private groups.

SB 202 places several minor limits on the distribution of absentee-ballot

[4] There are times when a date of birth *is* material—for example, when two voters share the same name and address.

applications after outside groups sending applications "often with incorrectly filled-in voter information, led to significant confusion by electors." Ex. A at 5:103-105. Plaintiffs can send[5] as many absentee-ballot applications to as many voters as they like, up until the voter returns a completed application—at that point, the voter cannot continue receiving additional applications. Ex. A at 41:1025-42:1036. SB 202 includes a safe harbor if the entity has checked the publicly available list within five business days of mailing applications. *Id.*

Plaintiffs have not pleaded any burden under *Anderson/Burdick*, because Georgia has numerous options for voters to cast their ballots and request absentee ballots. *See New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1281 (11th Cir. 2020) ("*NGP*"). The State's regulatory interest in avoiding voter confusion by voters receiving unsolicited absentee-ballot applications after requesting a ballot, or after they have already voted, more than outweighs any burden. *See Billups*, 554 F.3d at 1354; *Gwinnett Cty. NAACP v. Gwinnett Cty. Bd. of Registration & Elections*, 446 F. Supp. 3d 1111, 1124 (N.D. Ga. 2020).

Further, Plaintiffs have only alleged that voters of color are more likely to use absentee ballots. [Doc. 35, ¶¶ 145], but they do not allege that this is

[5] Plaintiffs' challenges to the limitations on government officials sending absentee-ballot applications are not a concrete and particularized injury to them for purposes of this Court's jurisdiction.

causally connected to racial discrimination, which is fatal to their Section 2 claims. *GBM*, 992 F.3d at 1329. And their intentional-discrimination claim fails for all the reasons outlined in Section B.1. above.

Finally, Plaintiffs' First Amendment claim (Count IV) also fails. First Amendment protections extend "only to conduct that is inherently expressive." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006); *see also Texas v. Johnson*, 491 U.S. 397, 406 (1989). The restrictions do not prevent Plaintiffs from "campaign[ing] for, endors[ing], and vot[ing] for their preferred candidate." *Timmons*, 520 U.S. at 363. Distributing absentee-ballot applications to voters who already requested them is not expressive conduct that implicates speech. *See Jacobson*, 974 F.3d at 1261; *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742, 773 (M.D. Tenn. 2020). Thus, the provisions Plaintiffs challenge do not implicate speech at all because they prohibit no expression and only prohibit a very limited category of activity related to applications. [Doc. 35, ¶ 219]; *Lichtenstein*, 489 F. Supp. 3d at 765.

3. Narrowing of time to request and submit absentee ballots.

Plaintiffs have now added a challenge to timelines for requesting and issuing absentee ballots. [Doc. 35, ¶¶ 146-147, 150, 152, 179(4)]. Before SB 202, Georgia voters could request absentee ballots up until the day before the election, O.C.G.A. § 21-2-381(a)(1)(A) (2020), but this often has led to problems

for voters. Ex. A at 5:110-112. Setting a deadline for applying for an absentee ballot before the election places Georgia well within the mainstream of other states' laws—at least eight other states have deadlines of 11 days or longer, including Rhode Island's 21-day deadline.[6] Other states also have shorter timelines to request an absentee ballot—Iowa returns applications to voters if received more than *70 days* before an election. Iowa Code § 53.2(1)(b). Georgia is likewise well within the mainstream of other states in issuance of absentee ballots. At least 14 states[7] issue absentee ballots on the same or a tighter timeline than the one set by SB 202, including Colorado and Massachusetts.

The sole allegations of any disparate impact relate to relative usage of absentee ballots, lines for in-person voting, and difficulty obtaining the necessary documentation to apply for an absentee ballot.[8] [Doc. 35, ¶ 150]. A mere likelihood of using one method of voting is not a sufficient allegation of a

[6] Ariz. Rev. Stat. § 16-542(E) (11 days); Idaho Code § 34-1002(7) (11 days); Ind. Code Ann. § 3-11-4-3(a)(4) (12 days); Iowa Code § 53.2(1)(b) (11 days); Mo. Rev. Stat. § 115.279(3) (second Wednesday before election); Neb. Rev. Stat. Ann § 32-941 (second Friday before election); Tex. Elec. Code § 84.007(c) (11 days); R.I. Gen. Laws Section 17-20-2.1(c) (21 days).

[7] NCSL, *Table 7: When States Mail Out Absentee Ballots* (Sept. 4, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-7-when-states-mail-out-absentee-ballots.aspx.

[8] Plaintiffs also claim a higher rate of rejected absentee ballots for Black and minority voters, [Doc. 35, ¶ 150], but absentee ballot processing is not traceable to State Defendants because it is a county function. *See Ga. Republican Party,* 2020 U.S. App. LEXIS 39969, at *6.

discriminatory effect for a Section 2 claim and Plaintiffs do not allege a causal connection from the use of one method of voting to a deprivation of an equal opportunity to participate in the political process. *See GBM*, 992 F.3d at 1329. The intentional-discrimination claim fails for the same reasons in Section B.1.

Deadlines involving absentee ballots "do[] not implicate the right to vote at all" because Georgia provides "numerous avenues to mitigate chances that voters will be unable to cast their ballots." *NGP*, 976 F.3d at 1281. Thus, the state's "important regulatory interests" are more than enough to justify them—especially when they are like other states—ending Plaintiffs' fundamental right to vote claim. *Timmons*, 520 U.S. at 358; *Burdick*, 504 U.S. at 434.

4. Discretion to county officials about setting early voting times.

Plaintiffs' challenge to county officials' discretion in setting voting times is equally misguided. [Doc. 35, ¶¶ 148-149, 151-152, 179(5)]. Prior to SB 202, early voting was "conducted during normal business hours on weekdays during [the early voting] period" and on one "Saturday . . . during the hours of 9:00 A.M. through 4:00 P.M." O.C.G.A. § 21-2-385(d)(1) (2020). Counties had general power to "extend the hours for voting beyond regular business hours," *id.*, which some counties used to implement Sunday voting. In contrast, SB 202 set a minimum number of voting hours, added a mandatory Saturday, and

specifically authorized voting on Sundays.[9] Ex. A at 59:1497-1503.

Plaintiffs' only allegations of a disparate impact for purposes of their intentional-discrimination claim is (1) that minority voters have jobs that will make it difficult to take time off to vote and (2) that minority voters use Sunday voting more often. [Doc. 35, ¶¶ 151-152]. But SB 202 *expanded* early-voting hours, adding a required Saturday and specifically authorizing Sunday voting. Ex. A at 59:1499-1500. Again, Plaintiffs have not sufficiently alleged the factors in *Arlington Heights*, 429 U.S. at 266. *See* Section B.1. above.

Plaintiffs' Section 2 claim is based on the same factual error of regarding limiting early voting on Sundays. [Doc. 35, ¶¶ 149, 151]. But SB 202 does not authorize State Defendants to impose limitations; rather, it does the opposite, expressly *allowing* county registrars to hold early voting on Sundays. Ex. A at 59:1497-1503. Even if the alleged harm was an accurate interpretation of the law—which is it not—it is not traceable to any decision by State Defendants and hence there is no causal connection for Section 2. *GBM*, 992 F.3d at 1329.

Georgia has numerous options for voters to cast their ballots early, in person, and through absentee ballots. *See NGP*, 976 F.3d at 1281. SB 202

[9] Before SB 202, if a county's "normal business hours" during a weekday were 9 AM to 2PM, early voting only had to be available at those times. Also, more than 100 Georgia counties have never offered Sunday voting. Ex. A at 4:86-87.

expanded those options and thus imposes no burden on the right to vote. Even if it did, the State's interests in providing more than one opportunity to vote on the weekend, Ex. A at 4:89-90, clearly outweigh any burden. *See Billups*, 554 F.3d at 1354; *Gwinnett Cty. NAACP*, 446 F. Supp. 3d at 1124.

5. Drop boxes.

Plaintiffs next challenge "limitations" on outdoor drop boxes, [Doc. 35, ¶¶ 155-158, 179(6)]—a voting method that did not exist in Georgia law prior to SB 202 and was only ever an *optional* mechanism in 2020 under an emergency rule designed as a temporary public-health measure due to COVID-19. Ex. A at 5:113-118; Ga. Comp. R. & Regs. r. 183-1-14-0.8-.14; 183-1-14-0.10-.16; 183-1-14-.08-.14; *see also* O.C.G.A. § 50-13-4(b). Those emergency rules expired following the 2020 election cycle. SB 202 builds on that emergency rule and *requires*[10] every county to have at least one drop box, and it allows them to be moved outside during emergencies. Ex. A at 47:1172-1174, 1188-1191. There is no right to vote in any particular manner, *see Burdick*, 504 U.S. at 433; *Celebrezze*, 460 U.S. at 788; *NGP*, 976 F.3d at 1284-85 (Lagoa, J., concurring), and changes to some parts of voting access, while retaining others, is a minimal

[10] The emergency rules adopted by the State Election Board merely *permitted* a county to establish drop boxes but did not *require* that they have one.

burden at best,[11] *see Ohio Democratic Party v. Husted*, 834 F.3d 620, 630 (6th Cir. 2016). Where there are multiple options a voter can use to vote, the right to vote may not be implicated at all. *See, e.g., NGP*, 976 F.3d at 1281. Plaintiffs fail to show that the statutory authorization of drop boxes places any burden on the right to vote. Even if SB 202 is not be as expansive as an expired temporary rule, it is more than justified by the state's regulatory interests. *Gwinnett Cty. NAACP*, 446 F. Supp. 3d at 1124.

Plaintiffs' only allegation of a disparate impact for purposes of their intentional-discrimination claim is that minority voters hold jobs that lack flexibility to utilize early-voting or drop boxes. [Doc. 35, ¶¶ 155-157]. But Georgia also *expanded* early-voting hours in SB 202. Ex. A at 59:1499-1500. Plaintiffs have not sufficiently alleged the factors in *Arlington Heights*, 429 U.S. at 266. *See* Section B.1. Further, Plaintiffs have not alleged a causal connection sufficient for their Section 2 effect claim. *GBM*, 992 F.3d at 1329.

6. Out-of-precinct provisional ballots.

Plaintiffs challenge the limitations placed on out-of-precinct provisional ballots, [Doc. 35, ¶¶ 159-161, 179(7)], even though half the states do not count

[11] Given the number of locations to drop off mail, which is the primary way to return absentee ballots, O.C.G.A. § 21-2-385(a), SB 202 does not reduce access.

a provisional ballot cast out of precinct at all.[12] Voters who vote out of precinct "add to the burden on election officials and lines for other electors" due to the process required. Ex. A at 6:135-138. Still, SB 202 *permits* the counting of out-of-precinct ballots for voters who show up at the wrong precinct after 5:00 P.M. and cannot get to their home precinct before 7:00 P.M. *See id*. at 75:1914-1919.

Because SB 202's provisions on out-of-precinct voting are in the mainstream when compared to other states, Plaintiffs attempt to confuse the issue by citing polling place closures and voter confusion. [Doc. 35, ¶¶ 159, 179(7)]. Judges in this district have already ruled that polling-place closures are not traceable to State Defendants. *See Fair Fight Action*, slip op. (Doc. 612) at 36-42. And Plaintiffs ignore the myriad ways Georgia reduces potential voter confusion, including hosting a website where voters can look up their correct polling place and the increased notification requirements for changes to polling places in SB 202. Ex. A at 30:741-757, 60:1525-1558. Thus, Plaintiffs have not sufficiently alleged the factors in *Arlington Heights*, 429 U.S. at 266. *See* Section II, B. 1. Given all of the opportunities to vote ahead of Election Day and the "safety valve" of counting out-of-precinct votes if the voter arrives after 5:00 P.M., any burden is minimal at best and justified by the State's interests

[12] *Provisional Ballots*, NCSL (2020) https://www.ncsl.org/research/elections-and-campaigns/provisional-ballots.aspx#partial.

in minimizing burdens on election workers and lines at polling places. *See Ohio Democratic Party*, 834 F.3d at 630. And Plaintiffs have not alleged a sufficient causal connection for their Section 2 effect claim. *See GBM*, 992 F.3d at 1329. Thus, the intentional-discrimination, constitutional, and Section 2 claims fail.

7. Removal of voting powers from the Secretary on the SEB and providing accountability for county officials.

Plaintiffs claim that changes to the makeup of the State Election Board and the power to temporarily replace county election officials are intentionally discriminatory. [Doc. 35, ¶ 162-163, 179(8)]. But Plaintiffs cannot demonstrate that this statutory change, which was designed to allow state officials to address "long-term problems" in counties with "dysfunctional election systems," Ex. A at 5:96-101, is facially unconstitutional. *See Washington State Grange*, 552 U.S. at 449. Not only has the system not yet been used, but the sole alleged racial impact is that the SEB has the power to "target" jurisdictions with large populations of voters of color, [Doc. 35, ¶ 163], which is not a sufficient for an intentional-discrimination claim or a sufficient causal connection for an effect claim. *See GBM*, 992 F.3d at 1321-1328.

8. Modifications to existing law on voter challenges.

Plaintiffs contest minor clarifications to Georgia's existing voter-challenge law. [Doc. 35, ¶¶ 164-165, 179(9)]. SB 202 clarified that (1) there was

no limit on challenges, which was a reasonable reading of existing law; and (2) that challenges must be resolved quickly. Ex. A at 23:575-24:581, 25:622-623. Neither of these requirements is facially unconstitutional—even Plaintiffs acknowledge that no injury can occur if challenges are not filed. [Doc. 35, ¶ 164-165]. And any burden on the right to vote is minimal at best, given the discretion for local officials to weed out the voluminous challenges that Plaintiffs fear, *see id.* at ¶ 164, especially when compared to the regulatory interest in up-to-date voter rolls. For a disparate impact, Plaintiffs only allege that *if* these challenges are filed and *if* those challenges are filed against certain voters, and *if* those voters have obligations, then *possibly* they *might* be disenfranchised. [Doc. 35, ¶ 165]. This is far too attenuated for *Clapper*, let alone to state a causal connection for intentional discrimination or Section 2.

9. Lines/line warming prohibition.

Plaintiffs next focus on the prohibition on third parties giving anything of value to voters in line, claiming disparate impact because they say lines are longer in minority areas. [Doc. 35, ¶¶ 166-167, 179(10)]. But the General Assembly explained that "many groups" approached voters in line during the 2020 elections and clarified the rules around electioneering within 150 feet of a polling place because of the importance of "[p]rotecting electors from improper interference, political pressure, or intimidation while waiting in line

to vote." Ex. A at 6:126-129. This is not unusual among states; and even campaign speech that is core political speech can be restricted near voting sites. *See Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885-86 (2018); *Burson v. Freeman,* 504 U.S. 191, 193-94 (1992). Because the precinct-based prohibition Plaintiffs challenge only applies in a specific location, the First Amendment claim must be evaluated based on the forum. *See Mansky*, 138 S. Ct. at 1885; *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U. S. 672, 678 (1992). On Election Day, a precinct is "a government-controlled property set aside for the sole purpose of voting." *Mansky*, 138 S. Ct. at 1886. And the provisions of SB 202 related to food and drink in line are "'reasonable in light of the purpose served by the forum': voting." *Id.* (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U. S. 788, 806 (1985)).

Further, the regulatory interests of the state amply justify the minimal burden of a voter not being approached with an offer of food or drink within 150 feet.[13] *See Billups*, 554 F.3d at 1354; *Gwinnett Cty. NAACP*, 446 F. Supp. 3d at 1124. This dispatches Plaintiffs' constitutional claim.

The sole allegation of a disparate racial impact related to this provision

[13] Voters can still receive water from a cooler stationed within the 150-feet buffer, receive unlimited food and water outside of 150 feet, and SB 202 specifically requires election officials to make changes to avoid long lines during in-person voting. Ex. A at 74:1887-1889; 29:721-734.

is that voters of color tend to wait in longer lines. [Doc. 35, ¶ 167]. But, as noted above, long lines are not an injury traceable to State Defendants. *Anderson*, 497 F. Supp. 3d at 1328. Without this causal connection, the Section 2 claim against the prohibition evaporates. *GBM*, 992 F.3d at 1329. The intentional-discrimination claim also fails for all the reasons in Section B.1.

10. Changes to mobile voting facilities.

Finally, Plaintiffs attack limitations on mobile-voting units, which were utilized by one county for the first time in the 2020 elections to mitigate the effects of the COVID-19 pandemic. [Doc. 35, ¶¶ 168-169, 179(11)]. These limitations are consistent with other provisions of the bill that require specific notice of the location of a precinct, not a bus traveling around the county. Ex. A at 30:741-757, 60:1525-1535. Other than a conclusory allegation that it will "disproportionately harm Black and Brown voters," (which insufficiently pleads a Section 2 violation or intentional discrimination), [Doc. 35, ¶ 169], Plaintiffs do not identify *any* burden imposed by limiting an *optional* system used once by one county, and thus the State does not even need to demonstrate SB 202 advances its regulatory interests. *See Billups*, 554 F.3d at 1354; *Gwinnett Cty. NAACP*, 446 F. Supp. 3d at 1124.

CONCLUSION

This Court should dismiss Plaintiffs' Complaint.

Respectfully submitted this 11th day of June, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing Brief in Support of Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

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