UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIA STATE CONFERENCE OF THE NAACP; et al., *Plaintiffs*, v. Brad RAFFENSPERGER, in his official capacity as the Georgia Secretary of State; et al., *Defendants*, REPUBLICAN NATIONAL COMMITTEE; et al., *Intervenor-Defendants*.	No. 1:21-cv-1259-JPB

INTERVENORS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

To avoid duplicative briefing, Intervenors will limit this reply to Plaintiffs' claims for results-based and intent-based discrimination under section 2 of the Voting Rights Act and the Fourteenth or Fifteenth Amendments. Replies are not "necessary" in this Court, L.R. 7.1(C), and Plaintiffs' other claims are addressed in Intervenors' opening briefs, the relevant parts of the State's briefs, and Intervenors' replies in the related cases. *See, e.g.*, Intvrs.' Reply in *AAAJ* (addressing *Anderson-Burdick*); Intvrs.' Reply in *AME* (addressing absentee voting); Intvrs.' Reply in *NGP* (addressing the First Amendment). Intervenors join and incorporate all those arguments. As for the claims of intent-based or results-based discrimination, Plaintiffs' attempts to rehabilitate these legally defective claims are unpersuasive. This Court should dismiss Counts I and II with prejudice (as well as Counts I and II in *AME*, Count II in *NGP*, Counts I and II in *AAAJ*, and Counts I-III in *CBC*).

ARGUMENT

I. Plaintiffs do not allege facts plausibly establishing results-based discrimination under §2.

As Intervenors explained, *see* Mot. (Doc. 53-1) 10-14, *Brnovich* compels dismissal of Plaintiffs' claim that SB 202 "results in" the denial of voting rights "on account of race or color." 52 U.S.C. §10301(a); *see* Am. Compl. (Doc. 35) ¶¶191-201 (Count II). *Brnovich* constitutes "the first time" that the Supreme Court "considered how §2 applies to generally applicable time, place, or manner voting rules." *Brnovich v. DNC*, 141 S. Ct. 2321, 2330, 2333 (2021). After a

"fresh look at the statutory text," *id.* at 2337, the Court declined to announce a hard-and-fast test for all §2 vote-denial claims, instead identifying critical statutory "guideposts," *id.* at 2336. Now, "the touchstone" of §2(b) "is the requirement that voting be 'equally open'" to both minority and non-minority groups, *id.* at 2338—a requirement that courts must assess under "'the totality of circumstances,'" *id.* (quoting 52 U.S.C. §10301(b)).

Within that realm, the Court further identified five nonexhaustive "important circumstances" relevant to whether a voting law is not equally open: the size of any burden on voting, any deviation from voting procedures that were common in 1982, the size of any racially disparate impact, the other ways a State allows voters to vote, and the strength of the State's interests. *Id.* at 2338-40. For those inquiries, five principles universally apply:

- First, complaints challenging only "the 'usual burdens of voting'" do not state a §2 results claim because "[m]ere inconvenience" never "demonstrates a violation of §2." *Id.* at 2338.
- Second, a rule's "long pedigree" and "widespread" prevalence in 1982 "must be taken into account." *Id.* at 2339.
- Third, when "assessing the size of any disparity," courts must use "a meaningful comparison" so as not to "artificially magnif[y]" "[w]hat are at bottom very small differences." *Id.*
- Fourth, courts "must consider" the State's "entire system of voting" and the "other" ways it allows voters to vote. *Id.*

- And finally, the State's interest behind the regulation "must be taken into account." *Id.* Preventing fraud, intimidation, and undue influence are strong, important interests—even if the State is acting only prophylactically. *Id.* at 2339-40, 2348.

In contrast, the *Gingles* factors—which some courts applied to §2 results claims before *Brnovich*—are either "plainly inapplicable" or "much less direct[ly]" "relevan[t]." *Id.* at 2340.

Plaintiffs' §2 results claim does not survive *Brnovich*. The voting provisions they challenge impose only the "'usual burdens'" of mail voting and early voting. Plaintiffs do not (1) allege whether Georgia allowed either option in 1982, (2) allege how widespread SB 202's requirements (or similar ones) are in other States, (3) try to quantify the size (or any meaningful comparison) of any racially disparate impacts from SB 202, (4) consider how all Georgians may vote given the entirety of Georgia's voting system after SB 202, or (5) acknowledge the State's strong, legitimate interests in prophylactically preventing fraud, intimidation, and undue influence. *See* Mot. 11-14. Put differently, Plaintiffs have failed to plausibly allege facts establishing any circumstance that *Brnovich* held bears on a §2 results claim.

*

No matter, Plaintiffs say. For in their view, *Brnovich* implicates only the merits stage and sheds no light on their pleading obligations. Indeed, Plaintiffs' principal response to *Brnovich* is trying to avoid it. *See* Opp. (Doc. 58) 11 (contending that Intervenors are "improperly arguing the merits of the

Plaintiffs' underlying claims"); Opp. 13 (*Brnovich* is "meant to be applied at the merits stage of a case, and not at a motion to dismiss stage"); Opp. 15 ("[t]he degree of inconvenience … is clearly something not to be decided at the pleading stage"); Opp. 16 ("nowhere did [*Brnovich*] rule that the precise disparities must be averred in the complaint"); Opp. 16 n.6 ("there is nothing in the *Brnovich* opinion which mandates that plaintiffs allege such data in the initial pleadings"); Opp. 17 (*Brnovich* "does not mean that the FAC should be dismissed at this stage"); Opp. 17 (contending that Intervenors "are arguing the merits, not the adequacy of the pleadings"); Opp. 18 ("The validity of the State's asserted interest will be a factor at the right time: the merits stage."). Plaintiffs' strategy of avoidance is understandable, since their amended complaint does not try to conform to *Brnovich*.

Even so, Plaintiffs' civil-procedure arguments miss the mark. *Brnovich* establishes the law governing a §2 results claim. That law does not change based on a case's procedural posture—"the essential elements of a claim remain constant through the life of a lawsuit." *Comcast Corp. v. Nat'l Ass'n of African-Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020). To be sure, "[w]hat a plaintiff must do to satisfy those elements may increase as a case progresses from complaint to trial, but the legal elements themselves do not change." *Id.* "So, to determine what the plaintiff must plausibly allege at the outset of a lawsuit, [courts] usually ask what the plaintiff must prove in the trial at its end." *Id.* Because *Brnovich* answers what Plaintiffs must prove at trial on their §2 results claim (as even Plaintiffs admit), *Brnovich* also "determine[s] what"

Plaintiffs "must plausibly allege" in their amended complaint. *Id.* Plaintiffs' suggested pleading/merits distinction is no distinction at all.

* *

To be fair, Plaintiffs press some fallback arguments about how some of their allegations satisfy parts of *Brnovich*. They try to identify allegations that purportedly show how SB 202 imposes more than the usual inconveniences and burdens of voting. Opp. 14. But their examples include mainly burdens arising from SB 202's rules about deadlines, polling locations, ballot-possession measures, and identification requirements inherent in modern voting regimes.

Brnovich confirmed that the burdens from those types of rules constitute ordinary inconveniences of the kind imposed by "every voting rule," which "cannot be enough to demonstrate a violation of §2." 141 S. Ct. at 2338; *see id.* at 2343-48; *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 198 (2008) (op. of Stevens, J.). And if any of Plaintiffs' claimed burdens survive *Brnovich*, they do not become unusual merely because Plaintiffs affix that label to them. "Under Rule 8, a complaint must allege sufficient underlying facts to make a claim plausible, and the mere formulaic recitation of elements or legal conclusions will not suffice." *Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1130 (11th Cir. 2019) (affirming the 12(b)(6) dismissal of a claim against the DNC that was implausibly pleaded). Plaintiffs have identified no specific allegations—beyond conclusory statements—plausibly establishing that their asserted burdens are unusual.

Similarly, Plaintiffs contend that they have plausibly alleged how "the challenged provisions of SB 202 disproportionately burden" minority voters. Opp. 16. But the more than 30 pages of the amended complaint they block-cite to support their contention, *see* Opp. 16 (citing Am. Compl. ¶¶89-169), are replete with allegations about preexisting disparities in employment, wealth, and education—circumstances that are not attributable to the State and thus do not establish a §2 claim, *see Brnovich*, 141 S. Ct. at 2339. More to the point, "a meaningful comparison is essential" to "assessing the size of any disparity," *id.*, and Plaintiffs do not identify any paragraph in the amended complaint that plausibly quantifies or compares the size of any SB 202–created disparity on minority voters.

Plaintiffs also insist that their complaint "discuss[es] much of Georgia's entire system of voting, because SB 202 adversely impacted that entire system, the essence of Plaintiffs' claims." Opp. 17. That too falls short. Under *Brnovich*, Plaintiffs must allege that the challenged provisions create disparate results *even after* "taking into account the other available means" a State provides to vote. 141 S. Ct. at 2349. Looking at a law's burdens in isolation will not do. Yet the amended complaint nowhere plausibly alleges that, after SB 202, any Georgian—minority or not—will be unable to vote using one of the methods that Georgia provides: mail voting, early voting, or in-person voting on election day.

To their credit, Plaintiffs admit that their amended complaint lacks allegations about some of the key circumstances that *Brnovich* identified. Most prominently, Plaintiffs admit that the amended complaint "fail[s] to

specifically mention" the "extent to which" SB 202's challenged provisions "were in effect in 1982." Opp. 15. And without those allegations, the Court cannot identify "the degree to which a challenged rule has a long pedigree or is in widespread use in the United States," a "circumstance that must be taken into account." *Brnovich* 141 S. Ct. at 2339.

Plaintiffs also admit that the amended complaint discusses the State's strong, legitimate interests in preventing fraud, intimidation, and undue influence only as "pretextual justifications," preferring to save questions about those interests' "validity" for "the merits stage." Opp. 18. But that circumstance, no less than *Brnovich*'s others, is something Plaintiffs "must prove in the trial"—and thus something that they "must plausibly allege at the outset of [their] lawsuit" too. *Comcast Corp.*, 140 S. Ct. at 1014.

Finally, consider Plaintiffs' pleas that "the degree of inconvenience" SB 202 causes, and "the precise disparities" SB 202 creates, are "clearly something not to be decided at the pleading stage" or "averred in the complaint." Opp. 15-16. Again, not so. *See Comcast Corp.*, 140 S. Ct. at 1014. In any case, had Plaintiffs alleged facts plausibly establishing either circumstance, presumably they would have identified the paragraphs containing those allegations. Instead, they strive to defer those showings until later—a tacit admission that the amended complaint lacks the relevant allegations now.

* * *

A few more points are worth mentioning. Intervenors agree with Plaintiffs that "nothing in the *Brnovich* opinion … changed the standards by which

a court determines whether a complaint states a sufficient claim for relief." Opp. 11. What *Brnovich* clarified was the *types of facts* that §2 plaintiffs must plead to satisfy Rule 8's "demand[]" for "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). After *Brnovich*, §2 results claims supported by only "'labels and conclusions"—or "'naked assertion[s]' devoid of 'further factual development'"—about the size of any burden on voting, any deviation from voting procedures common in 1982, the size of any racially disparate impact, a State's other available ways to vote, and the strength of the State's interests "stop[] short of the line between possibility and plausibility of entitlement to relief." *Id.* (cleaned up; quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007)).

Beyond that, Plaintiffs correctly note (Opp. 12) that *Brnovich* "d[id] not suggest … disregard[ing]" two of the *Gingles* factors—whether "minority groups suffered discrimination in the past (factor one) and that effects of discrimination persist (factor five)." 141 S. Ct. at 2340. But Plaintiffs fail to note that *Brnovich* emphasized that the "relevance" of those two factors for §2 results claims is "much less direct" than it is for vote-dilution claims governed by *Gingles*. *Id. Brnovich* also expressly said that many of the remaining *Gingles* factors "are plainly inapplicable in a case involving a challenge to a facially neutral time, place, or manner voting rule." *Id.*

Credit Plaintiffs, however, for at least striving to maintain that distinction. The Government stumbles on that front, erroneously contending that even after *Brnovich*, "[t]he essence of a results claim "'is that a certain electoral

law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities' of minority and non-minority voters to elect their preferred candidates."" U.S.-Br. (Doc. 55) 6 (quoting *Brnovich*, 141 S. Ct. at 2333). The part of *Brnovich* that the Government quotes for that assertion is the Court's recounting of §2's history and explaining how *Gingles* applied §2 in a "vote-dilution case." *Brnovich*, 141 S. Ct. at 2333. But the Court then pivoted from vote-dilution cases to the issue here—"consider[ing] how §2 applies to generally applicable time, place, or manner voting rules." *Id.* In this context, the Court declined to blindly "follow[] the path that *Gingles* charted," taking instead a "fresh look at [§2's] statutory text." *Id.* at 2337. After that fresh look, the Court expressly recognized what the Government does not, *see* U.S.-Br. 7—that for §2 results claims (rather than §2 vote-dilution claims), the *Gingles* factors are either "plainly inapplicable" or "much less direct[ly]" "relevant," 141 S. Ct. at 2340. The Government's repeated invocations of *Gingles* and Georgia's "social and historical conditions," *see* U.S.-Br. 9-10, 12, 16, thus cannot bear the weight that it tries to place upon them.

Finally, the Government echoes the Plaintiffs' contentions stated above that claims of racial discrimination under §2 "are generally ill-suited for resolution before trial" and "especially ill-suited for resolution on the pleadings." U.S.-Br. 11 n.4. That position would surprise the plaintiffs in *Iqbal* and the census litigation; their intentional-discrimination claims failed after the Government moved to dismiss them for failing to plead facts plausibly alleging the requisite intent. *Iqbal*, 556 U.S. at 680-83; *DHS v. Regents of the Univ. of Calif.*,

140 S. Ct. 1891, 1915-16 (2020). Rule 8's pleading standard cannot mean one thing when the Government is aimination defendant and another when it is a plaintiff (or aligned with the plaintiffs). Intentional-discrimination claims are either subject to dismissal under Rule 12(b)(6) or they are not. *Iqbal* and *DHS* confirm that they are.

II. Plaintiffs do not allege facts plausibly establishing intent-based discrimination.

Intervenors have also explained (Mot. 14-17) why Plaintiffs' intentional-discrimination claim fails. *See* Am. Compl. ¶¶170-190 (Count I). A generally applicable law like SB 202 does not violate §2 or the Fourteenth or Fifteenth Amendment unless a plaintiff plausibly alleges (and eventually proves) "racially discriminatory intent on the part of legislators" who "design[ed] or maintain[ed] the challenged [electoral] scheme." *Nipper v. Smith*, 39 F.3d 1494, 1520 (11th Cir. 1994) (en banc). "[P]urposeful discrimination requires more than 'intent as volition or intent as awareness of consequences.'" *Iqbal*, 556 U.S. at 676 (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). Rather, intentional discrimination occurs when a legislature passes a particular law "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *McClesky v. Kemp*, 481 U.S. 279, 298 (1987) (quoting *Feeney*, 442 U.S. at 279). A plaintiff can show that a facially neutral law was nonetheless motivated by discriminatory purpose by plausibly alleging facts establishing eight evidentiary factors. *See Greater Birmingham Ministries v. Sec'y of State of Ala.*, 992 F.3d 1299, 1321-22 (11th Cir. 2021) (citing *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266-68

(1977)). Even so, courts presume that a legislature acted in good faith—that is, without discriminatory intent—even if a court has found "past discrimination" in the State. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

Plaintiffs don't dispute any of those baseline legal rules. In fact, they acknowledge that SB 202 is facially neutral, such that their claim hinges on their ability to satisfy *Arlington Heights*. *See* Opp. 18, 20. And they claim that their allegations clear that bar. Opp. 19.

Plaintiffs' arguments hit trouble, however, because the *Arlington Heights* factors did not ossify at *Arlington Heights*. Caselaw since then has clarified what those factors require a plaintiff to plead and prove. In particular, though "determining the intent of the legislature is a problematic and near-impossible challenge," *Greater Birmingham*, 992 F.3d at 1324, *Brnovich* confirms that the relevant question is whether "the legislature as a whole"—not a bill's sponsor or loud individual members—"was imbued with racial motives," 141 S. Ct. at 2350. And when examining the whole legislature's intent, Plaintiffs and the Court must "look at the precise circumstances surrounding the passing of [SB 202]." *Greater Birmingham*, 992 F.3d at 1325. *Arlington Heights* "confine[s]" the inquiry "to an analysis of discriminatory intent *as it relates to*" SB 202. *Id.* at 1323 (emphasis added). "Surely, 'past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.'" *Id.* at 1325 (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980)). After all, *Arlington Heights* itself "focus[ed]" its "'historical background' analysis on the 'specific sequence of events leading up to the challenged decision' and

not on providing an unlimited look-back to past discrimination." *Id.* (quoting *Arlington Heights*, 429 U.S. at 267).

None of this should surprise Plaintiffs. Intervenors made all these points plainly in their motion to dismiss. *See* Mot. 14-17. Even so, Plaintiffs' opposition still fails to point to a specific paragraph in the amended complaint identifying "a single comment by any sitting [Georgia] legislator in reference to" SB 202 "to support their argument that" SB 202 "was intended to discriminate against" minority voters. *Greater Birmingham*, 992 F.3d at 1325. Beyond that, Plaintiffs identify no specific paragraphs in the amended complaint alleging "that the [Georgia] legislators who supported [SB 202] intended the law to have a discriminatory impact or believed that the law would have such an effect." *Id.* at 1326.

Nor do Plaintiffs identify allegations in the amended complaint rebutting the Georgia legislature's stated purposes for passing SB 202: to "boost voter confidence"; "streamline … elections" by "promoting uniformity"; "reduce the burden on election officials"; prevent "improper interference, political pressure, or intimidation"; and make it "hard to cheat." SB 202, §2, 2021 Georgia Laws Act 9. Those are all legitimate, strong state interests. *Brnovich*, 141 S. Ct. at 2340.

Given courts' "reluctance to speculate about a state legislature's intent," *Greater Birmingham*, 992 F.3d at 1324 n.37, it's incumbent on Plaintiffs to identify *some* plausible allegation in the amended complaint tending to rebut the presumption of legislative good faith, *id.* at 1325, and countering the "valid

neutral justifications (combatting voter fraud, increasing confidence in elections, and modernizing [Georgia's] elections procedures) for [SB 202's] passage," *id.* at 1327. In other words, Plaintiffs had to identify plausible allegations in the amended complaint that could allow a "reasonable fact-finder" to "find a discriminatory intent or purpose underlying [SB 202]." *Id.* at 1325. They have not done so. That failure requires dismissal of their intentional-discrimination claim.

CONCLUSION

This Court should dismiss Plaintiffs' amended complaint with prejudice.

Respectfully submitted,

Dated: August 9, 2021

/s/ *Tyler R. Green*

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with Local Rule 5.1(B) because it uses 13-point Century Schoolbook.

/s/ *Tyler R. Green*

CERTIFICATE OF SERVICE

On August 9, 2021, I e-filed this document on ECF, which will serve everyone requiring service.

/s/ *Tyler R. Green*