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 of the Secretary of State for the State of Georgia, *et al.*, Defendants, REPUBLICAN NATIONAL COMMITTEE, et al., Intervenor-Defendants.	)	Civil Action Case No. 1:21-cv-1259-JPB

PLAINTIFFS' MEMORANDUM OF LAW IN RESPONSE TO THE MOTIONS TO DISMISS OF THE STATE DEFENDANTS

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PRELIMINARY STATEMENT

The First Amended Complaint ("FAC") alleges that the Georgia General Assembly, in order to stave off the growing political power of Black voters and other voters of color enacted SB 202, specifically targeting these voters from a number of directions and in a number of ways—absentee ballots, drop boxes, early voting, mobile voting, voting in person, challenges to voters, threats to county election boards—in order to suppress their vote. This, viewed collectively and individually, the FAC repeatedly emphasizes, violates the Constitution and civil rights laws, most prominently as an act of intentional discrimination, furthered by the cumulative impact of the several challenged provisions.

Defendants' motion to dismiss ignores all of this, choosing to avoid the core allegations of cumulative impact by viewing each provision of SB 202 individually. But even there they fail, because they also ignore express allegations in the FAC supporting standing, the requisite factors of intentional discrimination, and the causal connection necessary for a Section 2 "results" claim, topping off their argument by violating the cardinal rule of motions to dismiss: that the facts alleged in the complaint are presumed to be true. Instead, Defendants largely attempt to argue the merits of Plaintiffs' claims. That is for another day. This motion should be denied.

LEGAL STANDARD

For purposes of a Rule 12(b)(6) motion, the complaint is adequately pled if it includes sufficient factual matter, which the Court must take as true and "draw all reasonable inferences in the plaintiff's favor," *PBT Real Estate, LLC v. Town of Palm Beach*, 988 F.3d 1274, 1286 (11th Cir. 2021), to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). These same standards apply to a facial motion under Rule 12(b)(1). *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008); *see, e.g.*, *Rose v. Raffensperger*, No. 1:20-CV-02921-SDG, 2021 WL 39578, at *6–7 (N.D. Ga. Jan. 5, 2021).

ARGUMENT

I. PLAINTIFFS HAVE STANDING

Article III standing requires (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. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Where injunctive and declaratory relief are sought, only one plaintiff need demonstrate standing. *Wilding v. DNC Services Corp.*, 941 F.3d 1116, 1124 (11th Cir. 2019), *cert. denied,* 140 S. Ct. 2828 (2020). Here, Defendants challenge only the first and second elements of standing.

A. Plaintiffs Have Suffered an Injury-in-Fact.

An organization may establish an injury-in-fact sufficient for standing based on either injuries to itself (i.e., organizational standing) or to its members (i.e., associational standing). *See, e.g.*, *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341–42 (11th Cir. 2014). To establish injury-in-fact at the pleading stage, a plaintiff need only "generally allege a redressable injury." *Miccosukee Tribe of Indians of Fla. v. Southern Everglades Restoration Alliance*, 304 F.3d 1076, 1081 (11th Cir. 2002).[1]

1. Plaintiffs Allege Injuries-in-Fact Sufficient to Establish Organizational Standing.

Organizational plaintiffs can establish standing by showing a defendant's conduct caused or threaten to cause "concrete and demonstrable injury" to their activities by, for example, leading to the diversion of resources from their other activities. *Arcia*, 772 F. 3d at 1342.

[1] Plaintiffs George State Conference of the NAACP (GA NAACP); Georgia Coalition for the People's Agenda (GCPA), League of Women Voters of Georgia (LEAGUE), COMMON CAUSE, Galeo Latino Community Development Fund (GALEO LCF), and Urban League of Greater Atlanta (ULGA) allege organizational standing due to the injuries caused by the challenged provisions of SB 202 to their respective organizations. GA NAACP, LEAGUE, and COMMON CAUSE allege both organizational and associational standing due to the injuries caused by SB 202 to the organizations and their members. Plaintiff Lower Muscogee Creek Tribe ("TRIBE") alleges associational standing due to the injuries caused to its members by SB 202.

The FAC describes in detail how organizational plaintiffs will have to alter their activities and divert resources due to SB 202: GA NAACP (FAC ¶¶ 13–27); GCPA (FAC ¶¶ 28–40); LEAGUE (FAC ¶¶ 41–46); GALEO LCDF (FAC ¶¶ 47–52); COMMON CAUSE (FAC ¶¶ 53–58); and ULGA (FAC ¶¶ 61–70). These allegations establish injury-in-fact under binding Eleventh Circuit precedent. *CommonCause/Ga. v. Billups*, 554 F.3d 1340, 1350–51 (11th Cir. 2009) (diversion of resources from other activities to educate voters about voter ID law and help them obtain IDs); *Fla. State Conj. of the NAACP v. Browning*, 522 F.3d 1153, 1165–66 (11th Cir. 2008) (diversion of resources established where added cost is slight and not estimated; only minimal showing of injury is required); *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1267 (N.D. Ga. 2019) ("diversion of resources from general voting initiatives or other missions to programs designed to address the impact of the specific conduct" is sufficient); *Georgia Coal. for People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1258 (N.D. Ga. 2018) (finding organizational standing pursuant to similar allegations).

Ignoring this precedent, Defendants argue that the diversion of resources must be to the organization's work *outside* its core mission, citing *Common Cause Indiana v. Lawson*, 937 F.3d 944 (7th Cir. 2019). But *Lawson* actually flatly rejected this novel proposition. *See Lawson*, 937 F.3d at 954–55 (noting it is "a hard time

imagining . . . why it is that an organization would undertake any additional work if that work had nothing to do with its mission"). Nor does *Lawson* stand for some new standard of demonstrating "a [real] disruption in the organizations' operations." (Mot. 4.) The court in *Lawson* was merely emphasizing that standing cannot be based on resources expended to do what the organization was already doing. *Lawson*, 937 F.3d at 955. Here, as in *Lawson*, the FAC is replete with allegations that SB 202 will cause them to change their activities and use resources they would not otherwise expend.[2]

Additionally, Plaintiff organizations that participate in activities now prohibited by SB 202, including GA NAACP, GCPA, LEAGUE, COMMON CAUSE and ULGA, also suffer direct injury due to the law's chilling effect on their expressive and associational activities because of the threat of criminal penalties. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992); *see also Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1304 (11th Cir. 2017) (en banc); *Virginia v. Am.*

[2] Defendants also rely on the non-binding decision in *Ga. Ass'n of Latino Elected Officials, Inc. v. Gwinnett Cty. Bd. Of Reg. & Elections*, 499 F. Supp. 3d 1231 (N.D. Ga. 2020) ("*GALEO*"), for this argument. Even if *GALEO* could be construed as holding that the diversion of resources must be outside of the organization's core interests (as opposed to the equally wrong ruling that plaintiffs had not adequately pled standing under settled theories), it would be in direct conflict with the aforementioned binding precedent. *GALEO* is currently on appeal to the Eleventh Circuit. Docket No. 20-14540 (11th Cir.).

Booksellers Ass'n, Inc., 484 U.S. 383, 393 (1988) (finding threat of enforcement can cause an injury in the form of "self-censorship; a harm that can be realized even without an actual prosecution"). Here, the FAC alleges SB 202 includes criminal penalties and fines for non-compliance, threatening Plaintiffs with direct injury for handling completed absentee ballot applications, sending more than one absentee application to voters, and line-relief activities, all of which these plaintiffs allege they plan to do. (FAC ¶¶133-134, 166-167, 179.) *See Susan B. Anthony List v. Drieihaus,* 537 U.S. 149 (2014) (Plaintiffs do not have to wait to be arrested to challenge statute prohibiting activities they intend to undertake).

In this context, contrary to Defendants' argument, (Mot. 6–7), organizational plaintiffs' injury—either by way of diversion of resources or direct—need not be immediate, only "reasonably anticipated." *Billups*, *supra* at 1350. Where a new law mandates changes to voting procedures prior to the next scheduled election and plaintiffs allege that they intend to or will have to divert resources to address those changes, the alleged injuries are not speculative. *Id.* at 1350–51. As in *Browning*, the injuries caused by SB 202 are not uncertain—SB 202 is in effect—and its requirements and prohibitions do not depend upon speculation as to contingency upon contingency that underlay the decision in *Clapper v. Amnesty International USA*, 568 U.S. 398, 410 (2013), and the cases following it upon which Defendants

rely. This is so as to all of the challenged provisions of SB 202, including those dealing with increased opportunity to the making of voter challenges and the State Board of Elections takeover of "dysfunctional" county boards (Mot. 22–23), insofar as they are part of Plaintiffs' intentional discrimination claims, (FAC ¶¶163–165), because "[a]n official action . . . taken for the purpose of discriminating . . . on account of . . . race has no legitimacy at all." *City of Richmond v. United States*, 422 U.S. 358, 378 (1975).

2. Plaintiffs Adequately Plead Associational Standing.

A plaintiff has associational standing when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Adv. Com'n*, 432 U.S. 333, 343 (1977). "[O]rganizational plaintiffs need not establish that all of their members are in danger of suffering an injury. Rather, the rule in this Circuit is that organizational plaintiffs need only establish that 'at least one member faces a realistic danger' of suffering an injury." *Arcia*, 772 F.3d at 1342.

Defendants challenge the existence of members with standing, arguing first that Plaintiffs' initial pleading must "name names" of specific members who will be

harmed. (Mot. at 7.) They cite no authority to support this proposition, because there is none. *See, e.g.*, *Hancock Cty. Bd. of Sup'rs v. Ruhr*, 487 F. App'x 189, 198 (5th Cir. 2012) (Court unaware of precedent holding an organizational plaintiff alleging associational standing must name a particular member in its complaint in order to survive a Rule 12(b)(1) motion); *Bldg. & Const. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 144–45 (2d Cir. 2006) (Rejecting contention that an organizational plaintiff alleging associational standing must identify person actually injured at the pleading stage); *cf. Browning*, 522 F.3d at 1163–64 (Organizational plaintiffs were not required to name injured member to establish standing at preliminary injunction stage).[3] Defendants' argument that the members' injuries are too speculative fails for the same reasons as they fail as to the organizational plaintiffs. (Mot. 7.)

B. Plaintiffs' Injuries Are Traceable to Defendants.

"To satisfy the causation requirement of standing, a plaintiff's injury must be 'fairly traceable to the challenged action of the defendants, and not the result of the

[3] The only authorities cited by Defendants in support of their argument are decisions reviewing *final merits* determinations. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (organization lacked associational standing where one member settled matter and no other members threatened with injury identified at merits stage); *Republican Party v. SEC*, 888 F.3d 1198, 1203–05 (11th Cir. 2018) (insufficient evidence of injury to members in merits review of administrative regulation).

independent action of some third party not before the court.'" *Jacobson v. Fla. Sec. of State*, 974 F.3d 1236, 1253 (11th Cir. 2020) (quoting *Lujan*, 504 U.S. at 560–61). The FAC sufficiently alleges traceability as to each Defendant with respect to each challenged provision of SB 202. For example, State Defendants are explicitly responsible for making available Georgia's absentee ballot application form, on which SB 202 now requires the voter to provide certain information. SB 202, §§ 25, 27, and 28. More broadly, as the Secretary of State is Georgia's "chief election official" and responsible for, among other duties, certifying the results of Georgia's elections, the injuries arising from each of the challenged provisions are fairly traceable to (and redressable by) State Defendants. *See* O.C.G.A. § 21-2-50.

State Defendants argue that Plaintiffs' challenge to SB 202's encouragement of the submission of "unlimited" voter challenges does not properly allege traceability because the relevant county parties are "absent." (Mot. 8). First, this has nothing to do with traceability to these Defendants, who are specifically tasked under SB with enforcing compliance with these voter challenge provisions. SB 202 §§ 15 & 16; (*see also* FAC ¶¶ 71–73). And, in any event, the FAC does name some county-level boards of election.

Finally, Defendants' argue that injury pertaining to the line relief claim is not traceable to them, because they are not responsible for "long lines." (Mot. at 9.)

Plaintiffs do not allege that SB 202 creates long lines, but that Defendants' enforcement and implementation of the challenged line relief provisions of SB 202 will exacerbate existing problems with long lines, particularly in communities with large percentages of voters of color where numerous polling locations have closed, consolidated or moved since 2013. (*See, e.g.,* FAC ¶¶ 5, 89–90, 109, 150.)

II. THE FAC STATES PLAUSIBLE CLAIMS FOR RELIEF

A. Count I States a Plausible Discriminatory Intent Claims.

While Plaintiffs have challenged individual provisions of SB 202, the core of the FAC is that SB 202 as a whole—i.e., all of the provisions challenged in this litigation viewed collectively and cumulatively—was enacted with discriminatory intent. (FAC ¶¶2-7, 113–117, 179–183.) The FAC alleges that SB 202, as a whole, was the "culmination of a concerted effort to suppress" the participation of voters of color in Georgia's electoral process, spurred on by the demographic changes that showed not only the growing population of voters of color, but also that they usually voted cohesively to support Democratic candidates. (*Id.* ¶ 2.) This came to a head in the 2020 and 2021 elections that saw Democrats winning the race for President and two Senatorial contests." (*Id.*) "Republican legislators' immediate response was a legislative attempt to suppress the vote of Black voters and other voters of color in order to maintain the tenuous hold that the Republican Party has in Georgia." (*Id.*)

The eleven of changes enacted in SB 202 challenged by Plaintiffs were specifically chosen "to target and limit the means of voting that have been increasingly used by Black voters and other voters of color, (*Id*. ¶ 4), or to "encroach[] on and threaten[] to eviscerate the power of county boards" who are responsible for protecting the right of voters of color to participate equally in the political process. (*Id*. ¶ 6.) As the Fourth Circuit ruled in reversing a trial court' merits judgment against plaintiffs who had claimed that North Carolina's omnibus voting bill had been enacted with discriminatory intent, "[u]sing race as a proxy for party may be an effective way to win an election. But intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose." *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016). But nowhere do Defendants confront this essential issue. Rather, they attempt only to pick apart—unsuccessfully—challenges to individual provisions of SB 202. As the Fourth Circuit explained, even after a merits trial, this is insufficient:

> Given a state's interest in the fair administration of its elections, a rational justification can be imagined for many election laws, including some of the challenged provisions here. But a court must be mindful of the number, character, and scope of the modifications enacted together in a single challenged law like SL 2013–381. Only then can a court determine whether a legislature would have enacted that law regardless of its impact on African American voters.

Id. at 234. For this reason alone, Defendants' motion to dismiss Count I should be denied.

But, whether viewing the claims against SB 202 as a whole or piecemeal, Count I pleads a plausible intentional discrimination claim. Discriminatory intent may be established where the decisionmakers used race as a motivating factor in the enactment of the law. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). In the Eleventh Circuit, whether a law was enacted with discriminatory intent in violation of the 14th and 15th Amendments or Section 2 of the Voting Rights Act is based on the *Arlington Heights* factors as well as additional factors considered by the Eleventh Circuit: (1) the impact of the challenged law; (2) the historical background; (3) specific sequence of events leading up to the law's passage; (4) procedural and substantive departures; (5) the contemporary statements and actions of key legislators; (6) the foreseeability of the disparate impact; (7) knowledge of that impact; and (8) the availability of less discriminatory alternatives. *Greater Birmingham Ministries v. Sec'y of State of Ala.*, 992 F.3d 1299, 1321-32 (11th Cir. 2021) ("*GBM*").[4]

Defendants' primary argument is that "Plaintiffs have not sufficiently alleged

[4] The Supreme Court reaffirmed in *Brnovich v. Democratic National Committee*, --U.S.--, 141 S. Ct. 2321, 2349 (2021) that Section 2 discriminatory intent claims are analyzed by applying the *Arlington Heights* factors.

the factors in *Arlington Heights*." (Mot. 12–14, 16–19, 25.) Defendants' argument is belied by the actual language of the FAC. Plaintiffs have clearly pled allegations addressing these factors: FAC ¶¶2-8; 80-102; 111-132 (Georgia's history of voting discrimination, including recent history; and legislative history of SB 202 in this context); FAC ¶¶ 117-132;183 (deviation from procedural norms in the legislative history of the bill); FAC ¶ 2-3; 92-116, 117-132; 180-186 (sequence of events surrounding the passage of SB 202); FAC ¶ 186-187 (facts showing decisionmakers were on notice of foreseeability of discriminatory racial impact and existence of less discriminatory alternatives). The FAC also alleges SB 202's discriminatory effect on the organizational Plaintiffs and voters of color. (FAC ¶¶ 2-8; 99-201.)

Ignoring all of this, Defendants are reduced to arguing the merits of Plaintiffs' claim—based upon disputed facts and conclusory statements—not appropriate at this stage of the case, such as that the "alleged impact is minimal at best," that "the history relied on is far distant," that "the legislation went through normal channels" (Mot. 12–13, incorporated by reference at 14–25). Again, Defendants' failure to address the cumulative impact of all of the challenged provisions of SB 202 is fatal to their motion and belies their unsubstantiated prediction of "minimal" impact. As the Fourth Circuit observed in its ruling finding intentional discrimination—after a full trial—in the enactment of North Carolina's similar omnibus voting Law:

> Moreover, the district court also clearly erred in finding that the cumulative impact of the challenged provisions of SL 2013–381 does not bear more heavily on African Americans. . . . For example, the photo ID requirement inevitably increases the steps required to vote, and so slows the process. The early voting provision reduced the number of days in which citizens can vote, resulting in more voters voting on Election Day. Together, these produce longer lines at the polls on Election Day, and absent out-of-precinct voting, prospective Election Day voters may wait in these longer lines only to discover that they have gone to the wrong precinct and are unable to travel to their correct precincts. Thus, cumulatively, the panoply of restrictions results in greater disenfranchisement than any of the law's provisions individually.

North Carolina State Conference of NAACP v. McCrory, 831 F.3d at 231.

Further, Defendants' reliance on SB 202's preamble as demonstrating lack of discriminatory purpose, (Mot. 3), ignores that the very purpose of the *Arlington Heights* factors is to draw inferences of an invidious purpose from facially neutral laws. 429 U.S. at 266. Such inferences must be drawn in Plaintiffs favor on this motion, and support a plausible claim that Georgia's General Assembly enacted SB 202 with a discriminatory intent to suppress the vote of Black voters and other voters of color by this panoply of restrictions: making it more difficult to vote absentee (FAC ¶¶ 134–47); making it more difficult to register to vote and to vote in-person for runoff elections (FAC ¶ 148); capping the hours for early voting periods and for the accessing of drop boxes (FAC ¶¶ 149–58); disenfranchising out of precinct voters (FAC ¶¶ 159–61); giving the General Assembly the ability to take control

over county boards of election in counties with large percentages of voters of color (FAC ¶¶ 162–63); encouraging unlimited voter challenges with only three days' notice by mail to voters being challenged (FAC ¶¶ 164–65); criminalizing line-relief for voters faced with long lines at polls (FAC ¶¶ 166–67); and prohibiting the use of mobile voting units to help reduce long lines at polls except in emergencies declared by the Governor. (FAC ¶¶ 168–69).

B. Count II States a Plausible Discriminatory Results Claim.

A discriminatory results claim under Section 2 of the VRA examines whether, under the totality of the circumstances, voting is not equally open to the applicable minority groups in that their members have less opportunity than others to participate in the political process and to elect representatives of their choice. 52 U.S.C. § 10301; *see Brnovich v. Democratic National Committee,* 141 S. Ct. 2321, 2337–2338; *GBM*, 992 F.3d at 1329.[5] Plaintiffs must allege that the law caused the denial

[5] Anticipating that Defendants will address *Brnovich* in their reply, we note here simply that the factual "guideposts" discussed in that opinion, 141 S. Ct. at 2336, have no bearing on this motion, as they were formulated in the context of, and intended to be applied, at the merits stage. *Brnovich* did not purport to change the essential elements for Section 2 claims. To the contrary, the Court expressly stated it was not creating a test for all Section 2 challenges to "time, place or manner" voting laws. *Id*. at 2336. The Court also reaffirmed that any evidence that has "logical bearing" on the claims is admissible in a Section 2 "results" case and that all Section 2 cases, whether based upon a discriminatory intent or discriminatory results claim, must be reviewed under the fact-intensive "totality of the

or abridgement of the right to vote on account of race. *GBM,* 992 F.3d at 1330. The requisite causal connection can be established where a history of discrimination, such as "racial bias in the relevant community," interacts with the challenged law to cause a racial inequality in opportunity to participate in elections and elect candidates of choice. *Id.* at 1330 (citation omitted).

As was the case with their attack on Count I, Defendants again do not confront that Count II challenges the disproportionate impact of SB 202's provisions "individually and collectively," (FAC ¶¶ 195, 199; *see id*. ¶¶ 3–8 (describing the overall effect of SB 202)), and for that reason alone as more fully set forth in Plaintiffs' discussion of Count I, their motion should be denied as to Count II also. Even assessing the challenged provisions of SB 202 individually, Defendants' motion fails. Contrary to Defendants' rote incantation (Mot. 10–25), Plaintiffs have pled in detail the requisite causal connection as to each challenged provision. (*See* FAC ¶¶80–91 (describing Georgia's recent history of discrimination in voting), 92–102 (describing growing use by voters of color of different means of voting affected

circumstances" analysis, *id.* at 2338, which is unique to each case and obviously not an appropriate function for this Court to undertake at this stage. In the event the Court decides to dismiss all or part of the FAC for a failure to state a claim under F.R.Civ.P. 12(b)(6), Plaintiffs request leave to amend, particularly if the Court is inclined to dismiss on account of the Supreme Court's decision in *Brnovich* which was decided on July 1, 2021—after Plaintiffs filed their FAC on May 28, 2021.

by SB 202), 103–10 (linking economic circumstances of voters of color caused by historic discrimination to impacts caused by SB 202), 134–50 (explaining how the absentee ballot provisions of SB 202 will give voters of color less opportunity to participate in the political process), 151–52 (explaining likewise as to early voting provisions), 153–58 (drop box restrictions), 159–61 (out-of-precinct voting provisions), 166 (line relief provisions), 168–69 (mobile voting).) These factual averments are summarized in Count II of the FAC in strict accordance with each of the elements of a Section 2 violation. (*Id.* ¶¶ 191-201.)

C. Count III States a Plausible Right To Vote Claim.

A State may not place any burdens on the right to vote that are not adequately justified by the State's asserted interests. *See Anderson v. Celebrezze*, 460 U.S. 780, 899 (1983). When considering right to vote claims, courts must "weigh the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

The *Anderson-Burdick* framework is a "flexible" sliding scale, in which the "rigorousness of [the court's] inquiry" increases with the severity of the burden,

ranging from rational basis for "reasonable, nondiscriminatory restrictions" to strict scrutiny for "severe" burdens that "categorically" burden the ability of an identifiable class of voters to take actions necessary to vote successfully. *Burdick*, 504 U.S. at 434; *see Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019); *League of Women Voters of Fla.*, *Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1219 (N.D. Fla. 2018) (regulation failed the *Anderson-Burdick* test "because it disparately impose[d] significant burdens on Plaintiffs' rights weighted against imprecise, insufficiently weighty government interests"). That the burden impacts populations disparately is relevant to the inquiry. Even where the burden is not "severe" enough to warrant strict scrutiny, courts will look to the "precision" with which the state's interests are advanced by the burdensome regulation. *Burdick*, 504 U.S. at 434. Where plaintiffs have plausibly alleged the challenged practice imposes a burden on voters under these standards, the allegations are sufficient to survive a motion to dismiss. *See League of Women Voters of Fla., Inc. v. Detzner*, 354 F. Supp. 3d 1280, 1288 (N.D. Fla. 2018). Thus, in *Duke v. Cleland*, 5 F.3d 1399 (11th Cir. 1993), the Eleventh Circuit reversed the dismissal of plaintiffs' complaint because the court could not undertake a proper review under *Anderson-Burdick* at the pleading stage before the development of an evidentiary record. *Id.* at 1405-06.

The FAC clearly pleads a plausible claim in accordance with *Anderson/Burdick*, alleging how SB 202 significantly burdens Plaintiffs' rights (again, collectively as well as individually (FAC ¶ 210)—an overarching allegation that Defendants ignore), including by making absentee voting more difficult by imposing restrictions on assistance provided to voters by third parties such as Plaintiffs' organizations;[6] truncating deadlines for requesting absentee ballots through burdensome and arbitrary ID requirements that force voters to make multiple copies of ID documents even when they have a Georgia "free" voter ID and other acceptable ID documents for in-person voting if they do not have a Georgia drivers' license or state ID number (FAC ¶¶ 134–158); disenfranchising in-county out of precinct voters (FAC ¶¶ 159–161); allowing unlimited voter challenges with only three days' notice by mail to challenged voters (FAC ¶¶ 164–165); prohibiting line-relief for voters face with long lines at polls (FAC ¶¶166–167); and prohibiting mobile voting units to reduce long lines at polls except in emergencies declared by the Governor. (FAC ¶¶ 168–169), and that there is no state interest that can justify these burdens (again, collectively or individually). At this stage of the proceedings,

[6] Contrary to Defendants' contention, SB 202 does not allow third parties to distribute "as many absentee ballot applications to as many voters as they like" (Mot. 14) until they vote. Rather, it speaks in the disjunctive, and the prohibits distribution to any voter until the voter "requests" or "receives" or "votes." (Mot., Ex. A at 41:1025–1029.)

that is more than sufficient to withstand this motion.

Once again, ignoring that factual inferences must be drawn in Plaintiffs' favor at this stage, Defendants make conclusory assertions that the state's interests outweigh burdens caused by the challenged provisions of SB 202. (Mot. 11–25), relying on inapposite precedent arising out of review of judgments on the merits on a full evidentiary record and non-binding out of circuit cases. *See, e.g.*, *Crawford v. Marion County Election Bd.,* 553 U.S. 181 (2008); *GBM*, 992 F.3d at 1320 (both decided in the context of review of summary judgment motions). Indeed, the Eleventh Circuit in *GBM*, after a lengthy discussion of *Crawford*, expressly stated that it would "proceed with a full review of Plaintiffs' claims," even in the context of a full evidentiary record, "despite the analysis and result in *Crawford*," *GBM*, 992 F.3d at 1321, belying Defendants' argument that any voter ID law is constitutional as a matter of law. (Motion at 12.) For the same reasons, Defendants' reliance on cases reviewing preliminary injunctions are inapposite to this motion, because there the court determines whether the evidentiary record is sufficient to support a finding of probability of success on the merits. *See*, *e.g.*, *New Ga. Proj. v. Raffensperger*, 976 F.3d 1278, 1280 (11th Cir. 2020), cited by Defendants at Mot. 14.

All of Defendants' arguments are for another day, such as the weight to be given to other means of voting in assessing the burdens caused by SB 202 on

absentee voting or early voting or the use of drop boxes (Mot. 14, 18, 19–20), or how other states' treat out-of-precinct votes or deadlines for absentee ballots or line-relief (*id*. at 15–16, 22, 24), or the combined effect of expanding and limiting days and hours for early voting (*id*. at 17–18), or whether the increased ways of purging voters imposes a burden that is "minimal at best," (*id*. at 23), or whether the restrictions on line-relief are "reasonable" and "minimal." (*Id*. at 24).

Finally, Defendants reliance on the *concurring* opinion in *New Ga. Proj. v. Raffensperger*, 976 F. 3d at 1284–85, for the proposition that a right to vote claim cannot be based on burdens imposed on casting absentee ballots because there is no constitutional right to vote in a particular manner is misplaced. (Mot. 19.) That opinion is inconsistent with the Eleventh Circuit's earlier decision in *Democratic Exec. Comm. of Fla*., *supra*, and other decisions granting relief in cases challenging absentee ballot procedures. *See, e.g.*, *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017 (N.D. Fla. 2018) (granting preliminary injunction enjoining signature match protocol applicable to voters casting mail-in ballots); *People First of Alabama v. Merrill*, 487 F. Supp. 3d 1237 (N.D. Ala. 2020), *reconsideration denied*, 491 F. Supp. 3d 1076 (N.D. Ala. 2020), *appeal dismissed sub nom*. *People First of Alabama v. Sec. of State for Alabama*, 20-13695-GG, 2020 WL 7038817 (11th Cir. Nov. 13, 2020), and *appeal dismissed sub nom. People First of Alabama*

v. Sec. of State for State of Alabama, 20-13695-GG, 2020 WL 7028611 (11th Cir. Nov. 16, 2020) (granting preliminary injunction enjoining certain absentee ballot witness and ID requirements due to COVID-19 pandemic).

D. Count IV States a Plausible First Amendment Claim as to Section 25 of SB 202 Violates the First Amendment (Count IV).

Defendants' entire attack on Count IV is based on a single proposition, *i.e.*, that no First Amendment rights are implicated by Section 25's prohibition against the distribution of absentee ballots to voters who have not yet submitted their applications. (Mot. 15.) Defendants are wrong as a matter of law and ignore other significant allegations as to the unconstitutionality of Section 25.

First, Plaintiffs have adequately pled that the prohibition against their handling of completed absentee ballots for any reason and by sending more than one absentee ballot to a voter - even if the voter requests that assistance - with the threat of criminal or monetary penalties, is actionable. (*See* FAC ¶¶ 133–34, 216–22.) Courts have found that similar prohibitions are impermissible restrictions on expressive actions and violative of the First Amendment. *See, e.g.*, *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F Supp 3d 158, 224 (M.D.N.C. 2020), *reconsideration denied*, 1:20CV457, 2020 WL 6591396 (M.D.N.C. Sept. 30, 2020) ("The court therefore finds that assisting voters in filling out a request form for an

absentee ballot is 'expressive conduct' which implicates the First Amendment."). Defendants fail to address these allegations.

Further, Count IV of the FAC alleges Section 25's unreasonable requirements that non-governmental persons sending absentee official ballot applications to voters provide additional information on the face of the forms which includes (1) identifying the distributing person and (2) a specific (and confusing) disclaimer that the official absentee ballot application form is not being sent by a government entity. (FAC ¶ 144.) Such mandates are a "direct regulation of the content of speech" and a regulation of pure, core political speech. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995). This is particularly true here, where the required disclaimer cuts directly against Plaintiffs' intended message of encouraging the use of absentee ballots by forcing Plaintiffs to make a statement that is likely to lead voters to believe the official application form they were sent is somehow suspect.

Therefore, Defendants' motion to dismiss Count IV should be denied.

E. Count V Plausibly Pleads That Line Relief Violates The First Amendment.

Section 33 of SB 202 makes it unlawful for "any person [to] give, offer to give, or participate in the giving of . . . food and drink, to an elector" within certain geographic limits including "150 feet of the outer edge" of a polling place or "25 feet" from any voter standing in line. Defendants do not even debate that the

expressive speech and conduct of offering or providing food and drink clearly trigger First Amendment analysis. They express an "idea through activity," and convey "some sort of message." *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale,* 901 F.3d 1235, 1243 (11th Cir. 2018).

Worse, as alleged in the FAC, Section 33 limits only that expressive speech and conduct that support and encourage voting generally, but not any other topics or viewpoints. *Reed v. Town of Gilbert,* 576 U.S. 155 (2015). Moreover, Section 33 limits speech in a public forum. *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (Tennessee law barring electioneering within 100 feet of a polling place "bars speech in quintessential public forums"). Therefore, "strict scrutiny" applies, *Burke v. Augusta-Richmond Cty.,* 365 F.3d 1247, 1256 (11th Cir. 2004), requiring the law to be content-neutral, narrowly tailored and support a compelling government interest. *See Perry Education Assoc. v. Perry Local Educator's Assoc.*, 460 U.S. 37, 45 (1980). Whether Section 33 can survive this analysis is not properly adjudicated on a motion to dismiss, where there has been no sworn assertion of a governmental interest, let alone a complete evidentiary record.

F. Count VI Pleads a Plausible Claim for Violation of the Civil Rights Act.

The Civil Rights Act prohibits the disqualification of voters because of non-material errors or omissions relating to acts requisite to voting. 52 U.S.C.

§ 10101(a)(2)(B). Count VI of the FAC plausibly alleges a violation of this law because of the requirement in SB 202 that voters list their date of birth on their absentee ballot applications. Defendants do not dispute the immateriality of this requirement, arguing only that the provision of an opportunity to cure renders the claim not actionable. (Mot. 13.) The materiality requirement of the Civil Rights Act was intended to prevent "the practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters." *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003). The language of the Civil Rights Act is plain on its face and nowhere excuses compliance with its materiality requirement by provision of an opportunity to cure. If accepted, Defendants' argument would allow jurisdictions to establish immaterial requirements to vote, and then place the onus on voters to cure the immaterial requirements in order to vote. This is not the law, and Defendants' motion to dismiss Count VI should be denied.

CONCLUSION

For the foregoing reasons, State Defendants' motion to dismiss should be denied in its entirety.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND OF SERVICE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS has been prepared in Times New Roman 14, a font and type selection approved by the Court in L.R. 5.1(C), and that I provided notice and a copy of the foregoing using the CM/ECF system which will automatically send e-mail notification of such filing to all attorneys of record.

Respectfully submitted this 26th day of July, 2021.

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