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,

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Intervenor-Defendants.

CIVIL ACTION

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

STATE DEFENDANTS' RESPONSE TO
THE UNITED STATES' STATEMENT OF INTEREST

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

The State of Georgia, which has the constitutional responsibility to regulate the "time, place, and manner" of its elections, U.S. CONST. art. I, § 4, cl. 1, adopted election laws that—as recently amended by SB 202—are reasonable, non-discriminatory, and well within the mainstream of other state election laws. Yet the Department of Justice (DOJ) seems determined to prevent Georgia's elected officials from enacting or enforcing those commonsense provisions. Not content to file its own lawsuit against Georgia, DOJ now inserts itself into other lawsuits challenging SB 202. But DOJ's statement of interest [Doc. 55] does not offer any unique argument or context. In fact, it only introduces confusion, as DOJ weighs in on many claims it chose not to include in its own lawsuit. Moreover, DOJ's statement merely restates the arguments Plaintiffs already make. And on point after point, the statement simply ignores controlling decisions from the Supreme Court and the Eleventh Circuit—often without even acknowledging those decisions' key holdings.

More specifically, as State Defendants have already demonstrated, *see* [Doc. 42], Plaintiffs' amended complaint fails to state a plausible Section 2 claim. And like Plaintiffs, DOJ has not plausibly alleged the necessary discriminatory *result*, in part because DOJ ignores the "totality of circumstances" present in Georgia's election system. Like Plaintiffs, DOJ also

fails to allege facts plausibly showing a discriminatory purpose, relying instead on hyperbole, innuendo, mischaracterizations, and other considerations foreclosed by controlling precedent. Finally, like Plaintiffs, DOJ's attempt to state a claim under Section 101 of the Civil Rights Act fails because SB 202 allows a voter to cure any absentee ballot that is rejected for failure to include an accurate date of birth.

At each turn, SB 202 affords voters greater access to the ballot box, while also taking proactive measures to protect the voting process. The Court should reject DOJ's attempt to distort and overturn these measures.

ARGUMENT

I. The statement of interest is another improper intrusion into Georgia's constitutional authority to regulate elections.

DOJ seems to be on a politicized mission to overrule the considered judgment of Georgia's elected officials. There is no other explanation for DOJ's statement of interest. To be sure, 28 U.S.C. § 517 permits the Attorney General to "attend to the interests of the United States in a suit pending in a court of the United States." But such statements should be "useful" or "otherwise necessary to the administration of justice." *Creedle v. Gimenez*, No. 17-cv-22477, 2017 WL 5159602, at *2 (S.D. Fla. Nov. 7, 2017). A statement of interest also should not be "redundant." *Ferrand v. Schedler*, No. 2:11-cv-0926, 2012

WL 1247215, at *2 (E.D. La. Apr. 13, 2012). As the Justice Manual explains, statements of interest may be appropriate in cases where "a special federal interest is clear and is not likely to be well-served by private litigants." U.S. Dep't of Justice, Justice Manual § 8-2.170(A). But this is not such a case.

DOJ's statement, in short, is neither useful nor necessary. But it *is* redundant: Three motions to dismiss have already been filed in this case, and Plaintiffs have responded to each one. *See* [Docs. 42, 52, 53, 56, 57, 58]. In those responses, Plaintiffs advance the same arguments that DOJ now reiterates in its statement. *Compare* [Doc. 56 at 10-17], *with* [Doc. 55 at 11-21]. Moreover, as DOJ notes [Doc. 55 at 2 n.1], this is just one of many cases challenging SB 202. The State Defendants have also filed motions to dismiss those other cases. DOJ does not explain how it adds any arguments or perspective not otherwise advanced by the parties to these cases.

DOJ, moreover, has also filed its *own* (meritless) lawsuit in this Court against the State of Georgia alleging Section 2 violations. *See United States v. Georgia*, No. 1:21-cv-02575-JPB (N.D. Ga.). DOJ expressly limits its statement of interest to the same claims. *See* [Doc. 55 at 1-2]. Accordingly, there are no unique "interests of the United States" in this case. 28 U.S.C. § 517; *see also* Justice Manual § 8-2.170(A). Those interests are fully addressed in the lawsuit DOJ filed. And if they are not, DOJ (not Georgia) should bear the brunt of its

failure to represent the federal government's interests in its own lawsuit.

As the statement consists entirely of arguments already addressed in this and other actions, the statement is unnecessary and redundant. Requiring Georgia to expend the resources to respond, while also attending to briefing in the other cases challenging SB 202, lays bare DOJ's apparent intent to harass the State of Georgia. The Court should wholly disregard DOJ's statement.

II. DOJ does not claim that SB 202 produces a discriminatory result.

Contrary to DOJ's suggestions [Doc. 55 at 11-17], SB 202 is based on the State's valid interests, including increasing voter confidence, reducing voter confusion, and increasing election integrity. In advancing those interests, SB 202 imposes at most "modest burdens" with any "disparate impact" being "small [in] size[.]" *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2346 (2021). As the Supreme Court recently reminded, those burdens do not violate Section 2: "[T]he mere fact there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote." *Id.* at 2339. And "[m]ere inconvenience," is insufficient to state a claim under Section 2. *Id.* at 2338.

1. DOJ nonetheless argues that Plaintiffs have plausibly alleged a Section 2 discriminatory results claim. [Doc. 55 at 11-17]. This is bewildering, as DOJ did not include such a claim in its own lawsuit challenging SB 202.

Surely if SB 202 produced discriminatory results, DOJ would have claimed as much in its own lawsuit—particularly because the failure to do so is fatal to DOJ's claim under binding Eleventh Circuit precedent. *See Johnson v. DeSoto Cty. Bd. of Comm'rs*, 72 F.3d 1556, 1561 (11th Cir. 1996) ("discriminatory intent alone is insufficient to establish a violation of Section 2"). DOJ did not do so, signaling to this Court that it did not believe SB 202 has a discriminatory result. The Court should disregard DOJ's attempt to suggest otherwise here.

Putting aside the obvious conflict between DOJ's positions, Plaintiffs have not plausibly claimed discriminatory results. Section 2 asks whether, under the "totality of circumstances," a voting procedure "results in" the denial of voting rights "on account of race or color." *Brnovich*, 141 S. Ct. at 2332. The "touchstone" for this analysis is whether voting is equally open to individuals of all races. *Id.* at 2338. Plaintiffs' allegations do not show that any voting method is not equally open. Rather, Plaintiffs' allegations focus on the "usual burdens of voting." *Id.* The same is true of DOJ's allegations.

When evaluating those burdens, moreover, courts defer to the governmental interests behind the challenged law, which include: "(1) deterring and detecting voter fraud;" "(2) improv[ing] … election procedures;" (3) managing voter rolls; "(4) safeguarding voter confidence;" and (5) running an efficient and orderly election. *Greater Birmingham Ministries*

v. Sec'y of State for Ala., 992 F.3d 1299, 1319 (11th Cir. 2021) (*GBM*). These compelling interests must inform any analysis of SB 202's effects. Plaintiffs' and DOJ's complaints about the "usual burdens of voting" cannot overcome these legitimate interests. *Brnovich*, 141 S. Ct. at 2338.

2. Instead, Plaintiffs and DOJ focus on isolated portions of SB 202 divorced from Georgia's entire election system. For instance, DOJ suggests that SB 202 "exacerbat[es] lines and delays[.]" [Doc. 55 at 12]. But DOJ overlooks the full context of SB 202, which addresses line length by requiring either reduction in precinct size or additional voting equipment for precincts where electors waited more than one hour before checking in to vote during the previous election. *See* SB 202 at 29:721-27. Similarly, Plaintiffs ignore that SB 202, for the first time, statutorily allows voters to use drop boxes. *Id.* at 5:113-18. Moreover, SB 202 requires counties to add a second Saturday of early voting, affording Georgians at least 17 days of early voting. Through these provisions, and others, SB 202 expands Georgians' ability to vote.

In arguing otherwise, DOJ cherry-picks portions of SB 202 out of context to suggest a discriminatory result. [Doc. 55 at 11-12]. But Section 2's discriminatory results test requires a review of the "totality of circumstances." *Brnovich*, 141 S. Ct. at 2332. Under that standard, neither Plaintiffs nor DOJ have plausibly stated a discriminatory results claim.

III. SB 202 advances legitimate, not discriminatory, purposes.

Contrary to DOJ's suggestions [Doc. 55 at 17-21], SB 202 was passed for legitimate, important, and non-discriminatory purposes. To show a discriminatory purpose, Plaintiffs must show that "the legislature as a whole" acted with such a purpose. *Brnovich*, 141 S. Ct. at 2350. But neither Plaintiffs nor DOJ has alleged *any* facts—let alone *plausible* facts—demonstrating such a purpose. Instead, Plaintiffs and DOJ rely only on hyperbole, innuendo, and mischaracterizations to distract from the lack of supporting factual allegations. *See, e.g.*, [Doc. 55 at 19] (discussing "the flagrant abuses of the Jim Crow era"); *id.* at 18 (mischaracterizing statements about absentee voting as discriminatory "contemporaneous statements").

In contrast, the legislative record includes clear evidence that SB 202 is supported by proper and compelling purposes. SB 202 implements lessons learned by state and local elections officials through the challenge of administering an election during a global pandemic. *See* SB 202 at 6:144-7:148. During the 2020 election cycle, the Georgia Secretary of State and State Election Board undertook temporary, emergency measures to protect the health and safety of voters. SB 202 makes permanent many of those measures that proved successful, while shoring up the security of the State's numerous and accessible methods of voting. *See id.* at 6:144-7:147. Additionally, when

compared to prior statutory law, SB 202 significantly *increased* voter access.

In the face of such facts, DOJ advances seven faulty arguments in an effort to bolster Plaintiffs' flagging discriminatory-purpose claim.

First, DOJ improperly focuses on Georgia's history, insultingly imputing to Georgians of 2021 the race-based views and actions of prior generations. [Doc. 55 at 19-20]. DOJ overlooks the Supreme Court's repeated rejection of this argument, *i.e.* – the Voting Rights Act, like the Constitution, is not "designed to punish for the past." *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 553 (2013); *see also Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) (noting that "[t]hings have changed in the South"). The Eleventh Circuit has also rejected this argument: a state's "racist history" is too remote to prevent it from "enacting otherwise constitutional laws about voting." *GBM*, 992 F.3d at 1325. DOJ fails to cite these controlling contrary authorities.[1]

DOJ's focus on Georgia's history also relies on the wrong context for assessing SB 202. According to DOJ, SB 202 was the product of "a present-day

[1] DOJ also suggests that Plaintiffs' historical allegations are "not limited to the distant past," but rather move from the "Jim Crow era" to "recent voting restrictions." [Doc. 55 at 19]. Not so. While Plaintiffs include allegations of the racist history of the Jim Crow era, their allegations about more recent events merely focus on election rules with which they disagree. [Doc. 35 ¶¶ 83-90]. Plaintiffs do not allege that any court found those rules to be discriminatory. *See id.* Plaintiffs simply disagree with them. But that does not make them part of a racist history leading up to SB 202.

backlash to unprecedented political success by voters of color, including the election of the State's first African-American senator." [Doc. 55 at 20]. Plaintiffs have not alleged any facts connecting SB 202 directly to Senator Warnock's election. *See* [Doc. 35 ¶¶ 115-17]. And DOJ does not explain how temporal proximity between that election and SB 202 demonstrates a discriminatory purpose. Rather, when viewed in the proper context, SB 202's purpose is clear: Georgia's election systems suffered from "a significant lack of confidence" "[f]ollowing the 2018 and 2020 elections." SB 202 at 4:70-72. Yet Plaintiffs and DOJ continue to ignore Georgia's 2018 elections, where a Democratic candidate attacked the State's election system. Additionally, SB 202 makes permanent many of the temporary measures put into place during the 2020 elections, while also reinforcing the security of the State's voting methods. That is the proper context for understanding SB 202, not history that both the Supreme Court and the Eleventh Circuit have rejected.

Second, DOJ claims that the Georgia Legislature was focused on preventing voter fraud, which DOJ erroneously argues is not a legitimate state interest. Indeed, here again DOJ fails to acknowledge the Supreme Court's recent admonition that, far from being a "pretextual" concern, fraud is a "strong and entirely legitimate" reason for enacting voting laws. *Brnovich*, 141 S. Ct. at 2340. And a State need not wait to "sustain some level of damage

before the legislature [can] take corrective action." *Id.* at 2348.

Third, DOJ incorrectly attempts to diminish incontrovertible facts from the legislative record, suggesting the Court may not consider them "at this stage." [Doc. 55 at 18]. In other words, DOJ contends that Federal Rule of Civil Procedure 12(b)(6) requires a court to accept any allegation blindly and stripped of all context, no matter how implausible the allegation. But DOJ is mistaken. Rule 12(b)(6) allows and indeed requires courts to consider the context when evaluating the plausibility of an allegation. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Here, the context provided by the challenged law itself is particularly important as the Supreme Court has explained that "[t]here is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States v. Am. Truckers Ass'ns*, 310 U.S. 534, 543 (1940).

While SB 202 sets forth its legitimate purposes clearly, Plaintiffs' amended complaint notably fails to allege any discriminatory statement by a member of the General Assembly when SB 202 was under consideration. Rather, Plaintiffs and DOJ mischaracterize benign comments about absentee voting as "discriminatory." [Doc. 35 ¶¶ 132, 184-85]. Yet none addressed race. *See id.* Moreover, these concerns are hardly surprising, as "[f]raud is a real risk that accompanies mail-in voting[.]" *Brnovich*, 141 S. Ct. at 2348. And even if

the statements *had* addressed race, the Supreme Court has repeatedly cautioned against relying on isolated statements by legislators as indications of "the motivation behind official action." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (Rehnquist, J.);[2] *see also Epperson v. Arkansas*, 393 U.S. 97, 113 (1968) (Black, J., concurring) (same). Accordingly, the Court should reject DOJ's attempt to prevent the Court from considering the text of SB 202—the most "persuasive evidence." *Am. Truckers Ass'ns*, 310 U.S. at 543.

Fourth, DOJ suggests that election law cases are ill-suited for motions to dismiss. *See* [Doc. 55 at 11 n.5]. Rather, DOJ argues that election law cases should proceed to trial. *See id.* Not only is there no special pleading rule for election law cases in the Federal Rules of Civil Procedure, but many of the organizations challenging SB 202 endorsed motions to dismiss election law cases filed after the 2020 elections. Plaintiffs must still satisfy the pleading standards set forth in Rule 8, as interpreted in the Supreme Court's decisions in *Iqbal* and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). It is thus unsurprising that federal courts have repeatedly granted motions to dismiss

[2] DOJ's reliance on *Hunter* is misplaced. In *Hunter*, the Court concluded that "it was beyond peradventure that" "the purpose to discriminate against all blacks … was a 'but-for' motivation" behind the challenged law. 471 U.S. at 232. Plaintiffs have offered no such clear factual allegations of a discriminatory purpose that would overcome the law's legitimate purposes.

for failure to state a claim in election-law cases. *See, e.g.*, *Osburn v. Cox,* 369 F.3d 1283, 1289 (11th Cir. 2004); *Ga. Ass'n of Latino Elected Offs. v. Gwinnett Cty. Bd. of Registrations & Elections*, 499 F. Supp. 3d 1231, 1244 (N.D. Ga. 2020); *Anderson v. Raffensperger*, 497 F. Supp. 3d 1300, 1304 (N.D. Ga. 2020); *Thompson v. Kemp,* 309 F. Supp. 3d 1360, 1366 (N.D. Ga. 2018).

Fifth, DOJ argues that Plaintiffs plausibly alleged a "*foreseeability* of discriminatory consequences." [Doc. 55 at 19 (emphasis added)]. But here again, the amended complaint lacks such factual allegations. Moreover, the Eleventh Circuit has refused to infer "foreknowledge" of disparate impacts where the legislature's proffered justifications were legitimate. *GBM,* 992 F.3d at 1327. Similarly, "[t]he Supreme Court has … repeatedly cautioned against placing too much emphasis on the contemporaneous views of a bill's opponents" as "speculations and accusations of … opponents simply do not support an inference of the kind of racial animus discussed in … *Arlington Heights*." *Butts v. City of New York*, 779 F.2d 141, 147 (2d Cir. 1985).

The bottom line is that SB 202 sets forth its legitimate purpose. *See* SB 202 at 4:70-7:148. And sporadic comments from the bill's *detractors* [Doc. 35 ¶¶ 119-21] do not plausibly show a foreseeably discriminatory result.

Sixth, DOJ's focus on perceived "procedural deviations" is also misguided. [Doc. 55 at 20]. According to DOJ, Plaintiffs "have alleged a 'rushed

and irregular' process." *Id.* But DOJ overlooks the amended complaint's acknowledgement that SB 202 was the result of the legislature considering at least eleven different bills. [Doc. 35 ¶ 117]. The amended complaint also acknowledges that the bills were subject to hearings with testimony from "community members and organizations." *Id.* ¶ 119. Indeed, Plaintiffs base many of their allegations on this testimony. *See id.* ¶¶ 119-21. While Georgia's elected officials may have reached a different conclusion about the facts, that does not make the decision to vote for SB 202 insincere or discriminatory.

Seventh, DOJ emphasizes that SB 202 must be "considered in toto." [Doc. 55 at 19]. Defendants agree. When viewed in totality, the only plausible conclusion is that SB 202 has legitimate, non-discriminatory purposes. Most importantly, SB 202 significantly expanded Georgians' statutory ability to vote. And the Court must consider Georgia's "entire system," which shows that its election laws are among the least restrictive in the country for absentee and early voting accessibility.[3] Georgia uses automatic voter registration, allows multiple options for voting (early in-person, no-excuse absentee by mail, and election day), and provides multiple options for returning absentee ballots (by mail, drop box, or in-person at county election offices). Plaintiffs, like DOJ, ask

[3] Ctr. for Election Innovation & Research, *How Easy is it to Vote Early in Your State?*, https://electioninnovation.org/research/early-voting-availability-2022/.

the Court to review isolated provisions of SB 202 stripped of their context and the totality of circumstances. But the Supreme Court does not permit such analysis. *Brnovich*, 141 S. Ct. at 2339 ("any burden imposed on voters who choose one of the available options cannot be evaluated without also taking into account the other available means"). When viewed "in toto" [Doc. 55 at 19], Georgia's election laws provide ample ways to vote.

IV. DOJ does not claim that SB 202 violates Section 101 of the Civil Rights Act.

DOJ further suggests that "SB 202 violates Section 101 by requiring rejection of absentee ballot materials that contain an error or omission that is not material to a voter's qualifications." [Doc. 55 at 21]. Surprisingly, when DOJ crafted its own complaint, it did not make any similar allegation. DOJ must have concluded that the evidence could not support such a claim. Otherwise, why would DOJ forgo bringing a claim under a statute that it is charged with enforcing? *See Statutes Enforced by the Voting Section*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/crt/statutes-enforced-voting-section.

In any event, Plaintiffs' Section 101 claim fails. SB 202 provides a robust opportunity for a voter to cure his or her ballot if an election official is unable to confirm that the date of birth listed on an absentee ballot matches the voter's registration information. SB 202 at 63:1599-1612. This system replaced the

subjective signature-matching process with an objective process for identifying voters. *Id.* As DOJ acknowledges, a voter who "cures his or her ballot has not been denied the right to vote." [Doc. 55 at 22]. And for those voters who elect not to cure their ballots, that decision is not made by or traceable to Defendants. SB 202 reflects the reasoned determination that an absentee ballot should include identifying information to confirm that the ballot was voted by the voter to whom it was issued. SB 202 at 63:1599-1612. Neither Plaintiffs nor DOJ identifies any facts calling that conclusion into question.

CONCLUSION

Georgia is responsible for setting the rules for its electoral process. SB 202 represents a reasonable, non-discriminatory response to concerns raised about Georgia's election system. Moreover, SB 202 expands voter access, and places Georgia well within the mainstream of election laws across the country. Yet DOJ remains unwilling to allow Georgia's elected officials to enact and enforce such reasonable election laws despite allowing other states to enact more-restrictive laws. Instead, it seems determined to use every available litigation tactic to harass the State for political purposes. The Court should disregard this most recent attempt to undo the considered judgment of the legislators Georgians elected to set their election rules.

Respectfully submitted this 9th day of August, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing State Defendants' Response to the United States' Statement of Interest has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

/s/ Gene C. Schaerr
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