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

ASIAN AMERICANS ADVANCING JUSTICE-ATLANTA, *et al.*, *Plaintiffs*, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State, *et al.*, *Defendants*.	CIVIL ACTION FILE NO. 1:21-CV-01333-JPB

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

INTRODUCTION

According to Plaintiffs, SB 202 is "squarely in the lineage" of practices ranging from "poll taxes to 'white primaries' to literacy tests." [Doc. 27, ¶ 3]. And not only is it akin to these Jim Crow practices, it "is an obvious attempt to roll back the clock to the racially-restrictive voting practices of Georgia's discredited past." *Id*. at ¶ 13. Plaintiffs even invoke the horrific massacre of eight individuals at spas in Atlanta as part of their case. *Id*. at ¶ 8. Despite framing these charges so seriously, Plaintiffs challenge only six practices related to absentee ballots that are also the law in a number of other states.

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Plaintiffs have previously challenged some of the provisions they now apparently want to keep as part of Georgia election law. In 2018, Asian Americans Advancing Justice – Atlanta sued the then-Secretary of State, alleging that Asian-Americans were adversely affected by the use of signature matching on absentee ballots.[1] Despite this history, they now allege that there was *no reason* to reform the verification process for absentee ballots. [Doc. 27, ¶ 112]; *see also* Ex. A[2] at 4:73-75.

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[1] *Ga. Muslim Voter Project et al. v. Kemp et al.*, Case No. 1:18-cv-04789-LMM, Doc. 1, ¶ 13 (N.D. Ga. Oct. 18, 2018) (stating that AAAJ was responding "to a recent news article indicating higher rates of rejection [based on signature mismatches] in Gwinnett County especially among Asian Americans").

[2] A copy of the enacted version of SB 202 is attached as Ex. A.

Plaintiffs ultimately have a policy disagreement with how the State has chosen to structure its elections, but "States—not federal courts—are in charge of setting those rules." *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1284 (11th Cir. 2020); *see also Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight").

As discussed below, this Court should dismiss this case. Plaintiffs do not have standing. But even if they did, they have failed to state a claim for relief. 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*, No. 1:20-CV-01587-WMR, 2020 U.S. Dist. LEXIS 211736, at *4 (N.D. Ga. Oct. 5, 2020) ("*GALEO*"), and on that basis dismiss this case in its entirety.

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ARGUMENT AND CITATION OF AUTHORITY

Plaintiffs ask this Court to nullify six components of SB 202 as violations of the Voting Rights Act, as intentionally discriminatory, and as undue burdens on the right to vote. *See generally* [Doc. 27]. Because Plaintiffs challenge a variety of practices, this brief first considers standing, explains the legal standards, and then considers the challenged practices.

The pertinent legal standards are clear: 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, 677 (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 consider any matters appropriate for judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 322 (2007). Application of these settled standards requires dismissal.

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I. Plaintiffs do not have standing.

The fundamental doctrine underlying the standing requirement is that "[f]ederal 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)). Thus, "[t]o have a case or controversy, a litigant must establish that he has standing." *Jacobson v. Fla. Sec. of State*, 974 F.3d 1236, 1245 (11th Cir. 2020).

To demonstrate standing at the pleading stage, Plaintiffs 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." *Jacobson*, 974 F.3d at 1245. The party invoking federal jurisdiction bears the burden of establishing standing at the beginning and at each phase. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 570 n.5 (1992); *see also Johnson v. Bd. of Regents*, 263 F.3d 1234, 1267 (11th Cir. 2001). Plaintiffs, moreover, must 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 alleged injury must be "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013).

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Even assuming at least one of the individual Plaintiffs can show injury or the Plaintiff organization can establish an injury either by (1) showing they diverted resources in response to the purportedly illegal acts of State Defendants, or through (2) "stepping in the shoes" of its members, Plaintiffs still cannot show the alleged injury prompting that diversion or affecting members is "certainly impending" or substantially likely to occur. Thus, even

accepting the allegations in the Amended Complaint as true, none of the Plaintiffs has standing.

A. Individual Plaintiffs have not alleged any injury-in-fact.

The injury-in-fact prong of standing requires, among other things, that plaintiffs show the alleged injury is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical…" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 180-181 (2000). Courts must weigh the allegations of a complaint as the plaintiffs have framed them, and "should not speculate concerning the existence of standing, nor should [they] imagine or piece together an injury sufficient to give plaintiff standing when it has demonstrated none." *Bochese v. Town of Ponce Inlet,* 405 F. 3d 964, 976 (11th Cir. 2005).

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Further, "[w]hen a plaintiff seeks prospective relief to prevent a future injury, it must establish that the threatened injury is certainly impending." *Indep. Party of Fla. v. Sec'y, State of Fla.*, 967 F.3d 1277, 1280 (11th Cir. 2020). "[A]llegations of *possible* future injury are not sufficient." *Clapper*, 568 U.S. at 409 (emphasis in original). "Nor is a 'realistic threat,' *Summers v. Earth Island Inst.*, 555 U.S. 488, 499– 500 (2009), [or] an 'objectively reasonable likelihood' of harm," *Anderson v. Raffensperger*, 497 F. Supp. 3d 1300, 1309 (N.D. Ga.

2020) (quoting *Clapper*, 568 U.S. at 410). And, while "the Supreme Court has said that literal certainty is not uniformly required," "[t]he required showing is ultimately a matter of degree." *Id.* (cleaned up). In the end, "[h]ow likely is enough is necessarily a qualitative judgment." *Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F. 3d 1153, 1161 (11th Cir. 2008).

Surprisingly, none of the Individual Plaintiffs has alleged an injury of any kind in the Amended Complaint. Plaintiff Steven Paik, for example, has described his voting experience in 2020, but made no mention of how or even *whether* he intended to vote in any upcoming election. [Doc. 27, ¶ 24]. The Court is left only to guess at the injury he may or may not be implying, which as noted earlier, it cannot do. *Bochese,* 405 F. 3d at 976. These deficiencies, which bar Paik's claims here, are manifest in each of the other Individual Plaintiffs: Plaintiff Deepum Patel only recounts his experience in 2020, noting that he voted by drop box, which he clearly preferred. [Doc. 27, ¶ 25]. But he states no claim of future injury, much less alleges something is likely to occur. Plaintiff Nora Aquino tracks a similar course, *id.* at ¶ 26, as do the allegations related to Plaintiff Thuy Hang Tran, *id.* at ¶ 27; Plaintiff Thao Tran, *id.* at ¶ 28; and Plaintiff Anjuli Enjeti-Sydow, *id.* at ¶ 29.

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While the Amended Complaint states generally that "SB 202 will harm the [individual] Plaintiffs … by further restricting their ability to apply for,

receive, and cast mail-in ballots, including using drop boxes," *id.* at ¶ 30, this generalized allegation lacks the "concrete and particularized" allegations of harm necessary to accord standing under Article III. *Friends of the Earth, Inc.,* 528 U.S. at 180-181. Indeed, the Amended Complaint does not even state whether any of the Individual Plaintiffs are even intending to vote in an upcoming election, let alone the manner in which they intend to vote.

While some courts might be willing to infer an injury from the prior voting experiences alleged by the Individual Plaintiffs that they would prefer to vote in a manner that they claim SB 202 possibly denies them, "somebody's *preference* for a particular voting method says little about the method they *intend* to use." *Anderson,* 497 F. Supp. 3d at 1321. And in any event, the Individual Plaintiffs simply have not alleged that SB 202 creates a certainly impending risk that they will be unable to vote using their intended method in the next election in which they choose to vote. In other words, it is precisely the kind of "hypothetical" or "conjectural" injury barred by *Clapper*.

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For these reasons, the Court should dismiss the claims of the Individual Plaintiffs.

B. The Organizational Plaintiff does not have standing.

1. *Like the Individual Plaintiffs, the Organizational Plaintiff's alleged injuries are too speculative.*

As previously discussed, "[w]hen a plaintiff seeks prospective relief to prevent a future injury, it must establish that the threatened injury is certainly impending." *Indep. Party of Fla.,* 967 F.3d at 1280. In this instance, Plaintiffs' Amended Complaint fails to establish standing because any potential injury faced by the organization or its members is based solely on a "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410. Indeed, even when Plaintiffs amended their Complaint and added new parties, they failed to adequately allege any certainly impending injury. The sole Organizational Plaintiff only claims it is necessary to take measures at some point in the future to ameliorate a *possible* future injury. But these claims rest on assumptions that have not yet, and may never, occur.

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Advancing Justice-Atlanta claims SB 202 "***will impair*** [its] ability to engage in its projects…" [Doc. 27, ¶ 21] (emphasis added). It then speculates it will divert resources "to counteract and stem the negative impact that SB 2020 ***will have*** on AAPI voters…" *id.* (emphasis added). *See also, id.* at ¶¶ 22–23 ("Advancing Justice-Atlanta ***will also need to help*** AAPI and other LEP voters navigate or resolve higher voting hurdles … Advancing Justice-Atlanta

will need to identify and assist voters whose absentee ballot applications are rejected …[and a]ll of these efforts ***will require*** Advancing Justice-Atlanta to divert significance financial and organizational resources to minimize the harmful effects of SB 202…") (emphasis added).

Allegations that the Organizational Plaintiff will at some point expend some resources it otherwise would not have expended are not sufficient to afford Article III standing. But even if Advancing Justice–Atlanta had already incurred the purported future expenses it claims it will incur, it cannot use its subjective fears of future injury as a means to manufacture standing. "[I]f the hypothetical harm is not 'certainly impending,' or there is not a substantial risk of the harm, a plaintiff cannot conjure standing by inflicting some direct harm on itself to mitigate a perceived risk." *Tsao v. Captiva MVP Rest. Partners, LLC*, 986 F. 3d 1332, 1339 (11th Cir. 2021) (quoting *Clapper*, 568 U.S. at 416).

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2. The Organizational Plaintiff has not adequately alleged a diversion of resources.

A plaintiff claiming diversion of resources as an injury must demonstrate that "a defendant's illegal acts impair the organization's ability to engage in its own projects by forcing the organization to divert resources in response." *Arcia v. Sec'y of Fla.*, 772 F.3d 1335, 1341 (11th Cir. 2014). This requires the

plaintiff to 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 (emphasis added). As another judge on this court held, 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). Or, as the Seventh Circuit recently 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. The question is what additional or new burdens are created by the law the organization is challenging. It must show that the disruption is real and its response is warranted." *Id*. (cleaned up). Organizations must demonstrate that the challenged law's effect "goes far beyond 'business as usual'" through evidence of a disruption in their operations or the likelihood of significant changes to their activities. *Id*.

In *GALEO*, for example, the plaintiff alleged it had standing because 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

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navigate the mail voting process… as well as other aspects of the electoral 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 by continuing to educate and inform Latino voters." *Id*. And allegations of ostensibly new or additional efforts were "precisely of the same nature as those that GALEO engaged in before…" Id.

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The same is true here. As an initial matter, Advancing Justice–Atlanta has failed to identify what activities—if any—it "would divert resources away from" in order to respond to SB 202. *Jacobson*, 974 F.3d at 1250. That alone is dispositive. But even if it had satisfied this requirement, 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 Organizational Plaintiff here states it has standing because SB 202 will force it to "divert resources and undertake significant efforts to counteract and stem the negative impact that SB 202 will have on AAPI voters and LEP voters' ability to vote absentee-by-mail." [Doc. 27, ¶ 21]. The Amended Complaint then lists a number of the efforts these resources will purportedly be diverted *to*, such as "educating voters on new

restrictions related to voting by mail…" *id.*, and "help[ing] AAPI and other LEP voters navigate or resolve higher voting hurdles… identify[ing] and assist[ing] voters whose absentee ballot applications are rejected for failure to submit ID documents…" *id.* at ¶ 22, among other related projects. But the Organizational Plaintiff's mission is expressly stated in the Amended Complaint, and it aligns precisely with the efforts encompassing its purported diversion of resources: "Advancing Justice–Atlanta is dedicated to protecting the civil rights of AAPIs and other immigrant communities in Georgia through policy advocacy, *civic engagement and organizing*, legal services, and litigation." [Doc. 27, ¶ 20] (emphasis added). It also "engages in voter registration, get out the vote ('GOTV'), and election protection activities in local, state, and federal elections…" *Id.*

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Therefore, the allegations contained in the Amended Complaint of new or added efforts are "precisely of the same nature as those that [the Organizational Plaintiff] engaged in before . . ." *GALEO*, 2020 U.S. Dist. LEXIS 211736 at *17. While Advancing Justice–Atlanta clearly disagrees with SB 202, more is required to invoke the jurisdiction of this Court. And any alleged efforts it plans to make are, by its own description, in line with the kinds of efforts it engages in every day. For that reason, although the Organizational Plaintiff alleges it is *spending* resources as a result of SB 202, there is no

sufficient allegation that it is *diverting* resources for purposes of Article III standing. As a result, the Amended Complaint should be dismissed.

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

A. Relevant legal standards.

1. Section 2 of the Voting Rights Act (Count I).

Section 2 of the Voting Rights Act prohibits jurisdictions from "impos[ing] or appl[ying]" any "voting qualification or prerequisite to voting or 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 to elect representatives of their choice." *Greater Birmingham Min. v. Sec'y of Ala.*, 992 F.3d 1299, 1329 (11th Cir. 2021) (cleaned up). To make out a valid vote-denial[3] 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*

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[3] Vote-denial claims challenge specific election practices. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 239 (4th Cir. 2014); *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016).

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 243-245; *League of Women Voters*, 769 F.3d at 240.

2. Intentional racial discrimination (Counts I and II).

Plaintiffs bring general claims of intentional racial discrimination under the Constitution (the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment) and Section 2 of the Voting Rights Act. [Doc. 27, ¶¶ 118-131]. 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.*, 992 F.3d at 1321 (cleaned up and emphasis in original). Only if Plaintiffs establish that the State's act had a discriminatory intent and 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*. quoting *Hunter v. Underwood*, 471 U.S. 222, 228 (1985); *see also Johnson v. Governor of Fla.*, 405 F.3d 1214, 1222 (11th Cir. 2005). Courts use the multi-factor[4] approach of *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977), to assess intent and effect.

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[4] The Eleventh Circuit summarized these factors in *Greater Birmingham Min.*, 992 F.3d at 1322.

3. Fundamental right to vote (Count III).

Plaintiffs challenge five practices as facially unconstitutional. [Doc. 27, ¶¶ 136]. 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. Lesser burdens, however, trigger less exacting review, and 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). Although there is no "litmus test," courts distinguish severe burdens from non-severe ones and workaday burdens such as photo identification laws "aris[e] from life's vagaries" and thus fall into the latter category. *Crawford*, 553 U.S. at 191, 197-98. Significantly, lesser burdens impose no burden of proof or evidentiary

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showing on states. *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009); *see also Munro*, 479 U.S. at 195.

B. Application to particular challenged practices.

Georgia's compelling interests in enacting S.B. 202 include: (1) "deterring and detecting voter fraud;" (2) "participating in a nationwide effort to improve . . . election procedures;" (3) "safeguarding voter confidence;" (4) "conducting an efficient election;" and (5) "maintaining order." *New Ga. Project*, 976 F.3d at 1282; *Greater Birmingham Min.*, 992 F.3d at 1319. In light of those interests, each of Plaintiffs' challenges fails as a matter of law.

1. Timelines for requesting absentee ballots (Counts I and III).

Plaintiffs first challenge the changes to timelines for requesting and issuing absentee ballots. [Doc. 27, ¶¶ 82-91, 120, 134]. 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 led to problems for voters. As the legislature explained, "many absentee ballots issued in the last few days before the election were not successfully voted or were returned late." Ex. A at 5:110-112. The State's policy of 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,

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including Rhode Island's 21-day deadline.[5] Further, the legislature explained that, during the pandemic, the "lengthy absentee ballot process also led to elector confusion, including electors who were told they had already voted when they arrived to vote in person. Creating a definite period of absentee voting will assist electors in understanding the election process while also ensuring that opportunities to vote are not diminished." Ex. A at 5:107-110. Other states also have shorter timelines to request an absentee ballot, including Iowa, which returns applications to voters if received more than 70 days before an election. Iowa Code § 53.2(1)(b). Georgia is also well within the mainstream of other states in issuing absentee ballots. At least 14 states issue absentee ballots on the same or a tighter timeline than the one set by SB 202, including Colorado,[6] Hawaii, and Massachusetts.[7]

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[5] 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).

[6] Major League Baseball moved the site of the 2021 All-Star Game from Georgia to Colorado in response to SB 202. *See* MLB.com, *Rockies to host 2021 All-Star Game*, https://www.mlb.com/news/rockies-denver-to-host-2021-mlb-all-star-game (April 6, 2021).

[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

The sole allegations of any disparate impact are (1) that AAPI voters tend to use absentee ballots more than voters of other racial groups, (2) that AAPI voters applied for more ballots during the ten days prior to the election, and (3) a generalized fear of going out in public due to potential violence. [Doc. 27, ¶ 57, 87, 89-90]. But a mere likelihood of using one method of voting is not a sufficient allegation of a discriminatory effect for a Section 2 claim, *see Greater Birmingham Min.*, 992 F.3d at 1329, and Plaintiffs do not allege the necessary causal connection between the use of one method of voting and a deprivation of an equal opportunity to participate in the political process. *Id.*

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In addition, 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." New Ga. Project, 976 F.3d at 1281. The deadlines are "reasonable nondiscriminatory restrictions" and therefore the state's "important regulatory interests" are more than enough to justify them—especially when they are similar to those in many other states—ending Plaintiffs' fundamental right to vote claim. *Timmons*, 520 U.S. at 358; *Burdick*, 504 U.S. at 434.

2. Drop boxes (Counts I and III)

Plaintiffs also challenge SB 202's provisions on outdoor drop boxes, including the number of boxes, their placement, and the number of hours they

are available. [Doc. 27, ¶¶ 97-99, 120(2), 136]. Drop boxes did not exist in Georgia law prior to SB 202 and were 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). Furthermore, that emergency rule authorizing drop boxes expired following the 2020 election cycle, so drop boxes would not have been available at all for the 2022 election cycle without SB 202.

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By contrast, SB 202 *requires*[8] every county to have at least one drop box and allows them to be moved outside during emergencies. Ex. A at 47:1172-1174, 1188-1191. The sole race-related challenge to that requirement is that AAPI voters will have fewer places in which to return their ballots.[9] [Doc. 27, ¶ 100]. But there is no right to vote in any particular manner, *Burdick*, 504 U.S. at 433, and a potential change[10] to some parts of voting access, while

[8] 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.

[9] Since every voter shares this same potential injury, it is only a generalized grievance that is not a valid basis for standing. *Wood*, 981 F.3d at 1314.

[10] Given the large number of locations to drop off mail, which is the primary option for returning absentee ballots, O.C.G.A. § 21-2-385(a) ("personally mail or personally deliver"), there is no elimination of any access in SB 202.

retaining others, is a minimal burden at best, *Ohio Democratic Party v. Husted*, 834 F.3d 620, 630 (6th Cir. 2016). And, where a voter can select from multiple options, the right to vote is not implicated at all. *See, e.g., New Ga. Project*, 976 F.3d at 1281. Plaintiffs fail to show how the State's first-ever statutory authorization of drop boxes places a *burden* on the right to vote. It clearly makes it easier. While SB 202 arguably may not be as expansive as the temporary emergency rule, it is still more than justified by the state's regulatory interests. *Common Cause*, 554 F.3d at 1354; *Gwinnett Cty. NAACP*, 446 F. Supp. 3d at 1124.

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Finally, Plaintiffs allege no causal connection between a reduced number of drop boxes from an emergency rule and any lack of opportunity to participate in the political process, dooming their Section 2 claim. *Greater Birmingham Min.*, 992 F.3d at 1329.

3. Prohibition on public officials mailing applications and limitations on private groups (Counts I and III).

SB 202 places several minor boundaries on the distribution of absentee-ballot applications after the legislature determined that "enthusiasm of some outside groups in sending multiple absentee ballot applications in 2020, often with incorrectly filled-in voter information, led to significant confusion by

electors." Ex. A at 5:103-105. Plaintiffs can send[11] as many absentee-ballot applications to as many voters as they like, up until the time that 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.*

There is no burden on the right to vote from these provisions under *Anderson/Burdick*. [Doc. 27, ¶¶ 104]. Georgia has numerous options for voters to cast their ballots and request absentee ballots. *New Ga. Project*, 976 F.3d at 1281. The State's regulatory interest in avoiding voter confusion by voters receiving additional absentee-ballot applications after requesting a ballot or voting more than outweighs any burden. *Common Cause*, 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).

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The only allegation[12] of any disparate impact is that AAPI voters are more likely to need more time because of their lack of familiarity with the

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[11] 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.

[12] Plaintiffs would prefer that the State would mail out absentee-ballot applications in order to help their operational budget. [Doc. 27, ¶ 105].

voting process. [Doc. 27, ¶¶ 103-104]. But Plaintiffs do not connect this lack of familiarity with any allegation that minority voters are deprived of "an equal opportunity to participate in the electoral process and to elect representatives of their choice." *Greater Birmingham Min.*, 992 F.3d at 1329 (cleaned up). This ends their Section 2 claim.

4. Absentee ID requirements (Counts I and III).

Despite previously challenging the signature-match process, Plaintiffs now take issue with moving to the use of an objective identification number for absentee-ballot applications.[13] [Doc. 27, ¶¶ 109-112, 120(4), 136]. 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 by claiming that AAPI voters are less likely than white Americans to have state-issued licenses or ID cards. [Doc. 27, ¶ 110]. But the Eleventh Circuit and Supreme Court have already determined there is no unconstitutional burden on the right to vote by requiring photo identification. *Crawford*, 553 U.S. at 181; *Greater Birmingham Min.*, 992 F.3d at 1320. Thus, even if there were a slight burden—which there is not—it would be more than

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[13] At least six other states utilize identification 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).

justified by the state's regulatory interests. SB 202's verification requirement also closely matches the requirements of federal law for voters registering to vote by mail, a law that Plaintiffs do not challenge. *See* 52 U.S.C. § 21083(b)(2).

Even assuming Plaintiffs' claims of lower driver's license possession among AAPI population is true, Plaintiffs have not connected that lower rate to SB 202 "*caus[ing]* the denial or abridgement of the right to vote on account of race." *Greater Birmingham Min.*, 992 F.3d at 1330. This dooms their Section 2 claim.

5. Restrictions on handling absentee ballot applications (Counts I and III).

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Plaintiffs next challenge provisions of SB 202 prohibiting individuals other than authorized relatives from returning completed absentee-ballot applications. [Doc. 27, ¶¶ 113-117]. Even with the changes made by SB 202 to avoid some of the issues that arose in 2020, Georgia's absentee-ballot application laws are similar to other states. For example, Alabama and Oklahoma both have provisions requiring the voter—not a third party—to return completed absentee-ballot applications.[14] Plaintiffs cannot show any

[14] Ala. Code § 17-11-4; Okla. Stat. tit. 26, §§ 14-105, 115.1 (only incapacitated voter may designate an authorized agent for return of application). Other states likewise impose far-stricter requirements on applications than Georgia after SB 202, including prohibitions on third-party groups distributing any

burden on the right to vote by such provisions because Georgia has numerous options for voters to cast their ballots and request absentee ballots. *New Ga. Project*, 976 F.3d at 1281. The State's regulatory interest in protecting voters' private information and avoiding potential absentee-ballot fraud more than outweighs any burden. *Munro*, 479 U.S. at 195-96; *Crawford*, 553 U.S. at 194-197.

Further, the closest Plaintiffs get to any allegation of a disparate impact is the claim that "first-time or LEP voters" may have a harder time navigating the absentee-by-mail process. [Doc. 27, ¶ 115]. But, like their earlier claims, Plaintiffs do not connect this lack of familiarity with any allegation that minority voters are deprived of "an equal opportunity to participate in the electoral process and to elect representatives of their choice." *Greater Birmingham Min.*, 992 F.3d at 1329 (cleaned up). This ends their Section 2 claim.

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6. Cumulative discriminatory intent (Count II).

Finally, Plaintiffs throw in the claim that everything in SB 202 put together is discriminatory. [Doc. 27, ¶¶ 128-131]. But, like the plaintiffs in *Greater Birmingham Min.* whose proof was insufficient, even assuming

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applications at all. *See* S.C. Code Ann. § 7-15-330; Tenn. Code Ann. § 2-6-202(c)(3)-(4); Alaska Stat. § 15.20.081(a).

everything in the Complaint is true, they have not sufficiently alleged the factors in *Arlington Heights*, 429 U.S. at 266. The alleged disparate impacts are minimal at best, the history relied on is far distant, the legislation went through normal channels, and the legislature explained exactly what it was doing in the first pages of the bill—and none of the statements by the legislature itself were racially discriminatory. *Compare* [Doc. 27] and Ex. A, 4:69-7:148 *with Greater Birmingham Min.*, 992 F.3d at 1321-1328.

CONCLUSION

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Plaintiffs here have a history of suing when they disagree with Georgia election processes. But their Complaint does not adequately allege an injury and fails to state a claim. SB 202 is a reasonable regulation of election processes—a far cry from poll taxes, white primaries, and literacy tests. Georgia voters have more options to vote than in many states and SB 202 does not change that reality. 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 State 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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