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

THE CONCERNED BLACK CLERGY OF METROPOLITAN ATLANTA, INC., *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-01728-JPB

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT

"States—not federal courts—are in charge of setting [the] rules" for the electoral process. *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1284 (11th Cir. 2020) (*NGP I*). Yet Plaintiffs ask this Court to interfere with the reasonable election rules that Georgia established in SB 202 and to enact Plaintiffs' preferred policy goals instead. This Court should dismiss Plaintiffs' Complaint because they lack standing and have failed to state a claim.

Plaintiffs try to distract from these shortcomings with hyperbole, alleging that SB 202 is an assault on Georgia voters. *See* [Doc. 1 ¶ 1]. But that rhetoric does not stand up to the facts. SB 202 was passed after various complaints about Georgia elections—including from challengers in recent cases—and it expands access to voting in many ways. Far from waging a "war," Georgia's election laws were recently rated as among the least restrictive in the country for absentee and early voting accessibility.[1] Accordingly, the Court should "follow the law as written and leave the policy decisions for others." *Ga. Ass'n of Latino Elected Officials v. Gwinnett Cty. Bd. of Registrations & Elections*, 499 F. Supp. 3d 1231, 1235 (N.D. Ga. 2020).

I. Plaintiffs lack standing.

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

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

Constitution and laws." *Wood v. Raffensperger*, 981 F.3d 1307, 1313 (11th Cir. 2020) (cleaned up). As the Eleventh Circuit has made clear, "[t]o have a case or controversy, a litigant must establish that he has standing." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020). Standing is "[p]erhaps the most important of the Article III doctrines grounded in the case-or-controversy requirement[.]" *Woodson v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1273 (11th Cir. 2001).

The party invoking federal jurisdiction bears the burden of establishing standing at the start of the lawsuit and at each phase of the litigation. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 570 n.5 (1992). 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." *Id*. at 560. A "plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1647 (2017) (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008)).

Plaintiffs fail to identify an injury in fact, which requires that they show "an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). The imminence prong demands that there

be either a substantial risk of an alleged future injury or that such injury is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013). On that point, Plaintiffs' allegations are insufficient.

A. Organizational standing

Plaintiffs claim they are harmed because they will need to divert resources internally at some point in the future because of SB 202. *See*, *e.g.*, [Doc. 1 ¶¶ 21, 26]. To have standing under a diversion of resources theory, Plaintiffs must demonstrate that Defendants' "illegal acts impair [their] ability to engage in [their] own projects by forcing the organization[s] to divert resources in response." *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014). To do so, Plaintiffs must identify the "activities [they] would divert resources away *from* in order to spend additional resources on combatting" SB 202's supposed impact. *Jacobson*, 974 F.3d at 1250. As the Seventh Circuit explained, an organization's activities are not "impair[ed]" by allegedly diverting resources to "work [Plaintiffs] are already doing." *Common Cause Ind. v. Lawson*, 937 F.3d 944, 955 (7th Cir. 2019). Otherwise, one could always "convert ordinary program costs into an injury in fact." *Id.*

Plaintiffs have not carried their burden. Instead, they rely exclusively on vague descriptions of activities from which they might divert resources. In fact, nearly all Plaintiffs rely on the same boilerplate allegation that they will "be

forced to divert resources from [their] day-to-day activities in order to combat the suppressive effects of SB 202[.]" [Doc. 1 ¶¶ 21, 26, 32, 41, 49, 52, 62, 65]. The only exceptions are Plaintiffs Mijente, Georgia Latino Alliance for Human Rights, and Faith in Action, which add more words (but little more substance), alleging that they will "divert scarce resources away from [their] traditional voter education and turnout programs toward efforts to ensure that voters . . . can navigate the restrictions to their voting options imposed by SB 202." [Doc. 1 ¶¶ 38, 55, 59].

These generalized allegations fail to demonstrate standing for several reasons. Plaintiffs fail to explain what they are purportedly diverting resources *to* and *from* because of SB 202. *See Jacobson*, 974 F.3d at 1250. Bland references to "day-to-day activities" and "combat[ting] the suppressive effects" of SB 202 do not demonstrate that Plaintiffs' "ability to engage" in their current activities will be "impair[ed]." *Arcia*, 772 F.3d at 1341. Rather, Plaintiffs' allegations confirm that they will not be "impair[ed]" as they will continue spending resources on the same activities. For instance, Plaintiff Mijente's core mission includes "voter education," and they claim that SB 202 will require them to educate voters about "the restrictions to their voting options[.]" [Doc. 1 ¶ 38]. The same is true of Faith in Action. *See id.* ¶ 59. Such allegations (and the others like them) fail to show any impairment to Plaintiffs' activities.

Continuing to spend resources on core activities (*e.g.*, voter education) is not an "impair[ment]" of their "own projects." *Arcia*, 772 F.3d at 1341.

Plaintiffs' allegations also fail because they are too speculative. "When 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). Plaintiffs' alleged injuries are based solely on a "highly attenuated chain of possibilities." *Clapper*, 568 U.S. at 410. As noted, various Plaintiffs claim that SB 202 "will . . . force[ ] [them] to divert resources from [their] day-to-day activities[.]" *See*, *e.g.*, [Doc. 1 ¶¶ 21, 26, 32]. Allegations that Plaintiffs will at some point expend resources it allegedly would not have otherwise expended are insufficient. Rather, these allegations are similar to allegations of a mere "elevated risk" of a future event that the Eleventh Circuit rejected in *Tsao v. Captiva MVP Restaurant Partners*, 986 F.3d 1332, 1339 (11th Cir. 2021). Moreover, Plaintiffs have not shown that their resources have remained constant in the wake of SB 202. SB 202 has been a common bogeyman in fundraising efforts. It stands to reason that Plaintiffs' resources have only increased as a result of SB 202.

In sum, Plaintiffs' diversion of resources allegations fail to demonstrate standing because they are too vague and speculative, and because they do not demonstrate that any such diversions exist or will impair their other activities.

B. Associational standing

Plaintiffs also allege associational standing. *See, e.g.*, [Doc. 1 ¶¶ 21, 32, 41]. "To establish associational standing, an organization must prove that its members would otherwise have standing to sue in their own right." *Jacobson*, 974 F.3d at 1249 (quotation marks omitted). The organization must identify at least "one . . . member" who will suffer an injury. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009). Plaintiffs fail to do so, generically referencing "members" who will be "burdened" by SB 202 in undefined ways. *See, e.g.*, [Doc. 1 ¶¶ 21, 32, 41]. This theory of standing fails for the same reasons outlined above—Plaintiffs rely on vague and speculative allegations of injury.

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

Plaintiffs have also failed to plead any claim on which relief can be granted. Plaintiffs have not disputed Georgia's compelling interests in enacting SB 202. These 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. *Brnovich v. DNC*, No. 19-1257, 2021 WL 2690267, *13, *20 (U.S. July 1, 2021); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 992 F.3d 1299, 1319 (11th Cir. 2021) (*GBM*); *NGP I*, 976 F.3d at 1282; *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008)

(controlling opinion). The General Assembly also explained that it enacted SB 202 to improve "elector confidence" and reduce voters' as well as election officials' confusion. SB 202 at 5:102-106.[2] These compelling state interests must inform any analysis of SB 202's lawfulness.

Since the Constitution largely defers to Georgia to legislate in this space, surely "there must be a [lawful] means" for the State to do so. *Glossip v. Gross*, 576 U.S. 863, 869 (2015) (cleaned up). Facial challenges to election practices confront a high bar because they "must fail where [a] statute has a plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). None of Plaintiffs' claims should be allowed to proceed.

A. Section 2 of the Voting Rights Act (VRA)

Plaintiffs have not adequately pleaded a claim for discriminatory results under the VRA. As an initial matter, it is an open question whether "the [VRA] furnishes an implied cause of action under § 2." *Brnovich*, 2021 WL 2690267, *22 (Gorsuch, J., concurring). There is no support in Section 2's text or legislative history for Plaintiffs' cause of action, which must be found in the statute Congress enacted. *See Alexander v. Sandoval*, 532 U.S. 275, 286-91 (2001). Accordingly, this Court lacks jurisdiction over this claim.

[2] A copy of SB 202 is attached as Exhibit A.

On the merits, Plaintiffs allege, implausibly, that several SB 202 provisions violate Section 2 by imposing disproportionately adverse effects on voters of color: (1) requiring, with limited exceptions, stationary polling places for advance voting and election day; (2) ID requirements for absentee voting; (3) drop boxes; (4) early voting during runoff elections; (5) handing out food and drink to voters while they are in line to vote; (6) State Election Board (SEB) authority; and (7) requiring voters to vote in their correct precinct on Election Day. *See* [Doc. 1 ¶¶ 173–78]. None of these allegations is sufficient.

To state a valid vote-denial claim, a plaintiff must establish: (1) proof of disparate impact (a denial or abridgement) resulting from the law or policy in question; and (2) that the disparate impact is caused by racial bias. *See GBM,* 992 F.3d at 1328-30. When a state law is based on valid governmental interests but imposes "modest burdens" and its "disparate impact" is "small [in] size," it conforms to Section 2. *Brnovich*, 2021 WL 2690267, *18. With respect to ***mobile voting units***, ***drop boxes***, and ***SEB authority***, Plaintiffs do not allege any racially disparate impact traceable to SB 202. The closest Plaintiffs come is stating that "[m]obile voting units with [4] to [8] voting stations were provided in the general election by Fulton County," [Doc. 1 ¶ 136], and that "[i]n the 2020 election, two Fulton County mobile voting units made stops at [24] locations, including several Black churches," *id.* ¶ 134; *see also id.* ¶ 126

(discussing drop boxes in Fulton, Cobb, DeKalb, and Gwinnett counties). Geography alone cannot prove adverse effects for people of color, and those figures say nothing about other counties across Georgia. And regarding SEB authority, Plaintiffs do not remotely allege anything racially infected. *See* [Doc. 1 ¶¶ 166-72].

On these grounds, Plaintiffs have not sufficiently pleaded any racially caused disparity in access to voting. *See GBM,* 992 F.3d at 1329-31. Plaintiffs cannot even "clear the hurdle of demonstrating that minority voters are less likely than white voters" to be able to vote due to these provisions. *Id.* at 1329. Finally, Plaintiffs incorrectly look to the 2020 Presidential elections as a baseline. *See* [Doc. 1 ¶¶ 123-26, 133-36]. But those elections took place under COVID-19's temporary emergency rules, rather than the pre-SB 202 statutory regime, which did not allow outdoor drop boxes. In fact, SB 202's drop box and mobile-voting unit provisions *expand* Georgians' statutory ability to vote under ordinary, non-emergency circumstances. SB 202 at 5:113-118; Ga. Comp. R. & Regs. 183-1-14-0.8 to .14; 183-1-14-0.10 to .16; O.C.G.A. § 50-13-4(b).

With respect to the ***ID requirements for absentee voting***, ***early voting during runoff elections***, ***giving food and drink to voters in line***, and ***requiring voters to vote in their correct precinct***, Plaintiffs again fail to offer allegations of a racially disparate impact. Rather, for the ID

requirements, Plaintiffs baldly allege that "as many as 25% of Black voters do not have a current and valid form of government-issued photo ID, compared to 11% of voters of all races." [Doc. 1 ¶ 118]. But that is not the same as alleging, as Plaintiffs must, any racially caused disparity. *See Brnovich*, 2021 WL 2690267, *13, *18-21. Furthermore, SB 202's usage of an identification number for absentee-ballot applications and ballots streamlines the process, making it more objective than the prior signature-matching process. *See* SB 202 at 4:73-75.[3] This diminishes even further the prospect of racially infected disparities.

Concerning early voting during runoff elections, Plaintiffs allege that this provision dissuades African American voters from going to the polls. *See* [Doc. 1 ¶ 141]. Regarding line-warming, Plaintiffs blanketly allege, with vague datapoints, that "the more voters in a precinct who are non-white, the longer the wait times." *Id.* ¶¶ 149, 151. And as for out-of-precinct provisional ballots, Plaintiffs allege that "Black voters in Georgia disproportionately live in neighborhoods with much higher rates of in-county moves." *Id.* ¶ 161.

Again, Plaintiffs have not pleaded any allegations that these provisions

[3] In fact, "the concept of voter identification has become broadly popular" with Democrats like U.S. Senators Warnock and Manchin, as well as former gubernatorial candidate Stacey Abrams. *See* Jonathan Weisman & Nick Corasaniti, *Why Democrats Are Reluctantly Making Voter ID Laws a Bargaining Chip*, N.Y. TIMES (June 23, 2021) (retrieved from https://www.nytimes.com/2021/).

"*caused* the denial or abridgement of the right to vote" due to race, as *GBM* requires. 992 F.3d at 1330. Simply put, Plaintiffs do not allege that any of these provisions "actually makes voting harder for African Americans," *id*. (cleaned up), or that any disparity stemming from generic demographic concerns would substantially affect voting. Nor do they allege that these provisions cause "a 'denial' of anything by [Georgia], as § 2(a) requires," or that SB 202 "makes [voting] needlessly hard" for any segment of voters. *Id*. (cleaned up). Moreover, Plaintiffs' challenge to the out-of-precinct provision is precluded by *Brnovich*, where the Supreme Court upheld Arizona's materially indistinguishable out-of-precinct provision. 2021 WL 2690267, *18. The burdens imposed by SB 202 are, at most, "modest" and any disparate impact "is small"—and both are amply justified by the State's interests. *Id*. Thus, SB 202 easily conforms to Section 2.

As a last-ditch attempt, Plaintiffs throw Georgia's racial past into the mix. [Doc. 1 ¶ 178]. But Plaintiffs still have not plausibly alleged that SB 202 affords any group "less opportunity than other members of the electorate to participate in the political process." *Chisom v. Roemer*, 501 U.S. 380, 388 (1991) (cleaned up). In any event, the State's history on a general topic is insufficient to show that a specific enactment grew out of the same evil. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *GBM,* 992 F.3d at 1328-31. Plaintiffs, therefore,

have not adequately pleaded their Section 2 claims.

B. Intentional Racial Discrimination Under the Fourteenth Amendment

In this facial challenge, Plaintiffs allege that SB 202, as a whole, "was purposefully enacted and operates to deny, abridge, or suppress the right to vote of otherwise eligible voter on account of race or color" in violation of the Fourteenth Amendment. [Doc. 1 ¶ 181]. They further allege that "SB 202 was enacted, at least in part, with a racially discriminatory intent to discriminate against Black voters and other voters of color." *Id.* ¶ 182. Plaintiffs do not explain which aspects of SB 202 they believe are intentionally discriminatory.

The Eleventh Circuit has held that "[a] successful equal protection claim under the Fourteenth Amendment requires proof of both an intent to discriminate and actual discriminatory effect." *GBM,* 992 F.3d at 1321. Plaintiffs must first show that the State's "decision or act had a discriminatory purpose and effect." *Burton v. City of Belle Glade*, 178 F.3d 1175, 1188–89 (11th Cir. 1999). After they do so, "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this [racial discrimination] factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985).

Plaintiffs have not sufficiently alleged that racial discrimination motivated SB 202's enactment or that SB 202 will have a racially

disproportionate impact. They begin with Governor Kemp's signing SB 202 into law: "surrounded by white men only, and sitting in front of a plantation portrait Governor Kemp signed into law [SB] 202," [Doc. 1 ¶ 1], as though that has anything to do with discrimination. Plaintiffs also allege that SB 202 "criminalizes traditional organizing methods used by Black and Latinx groups to encourage an inclusive and diverse democracy." *Id*. Once again, Plaintiffs merely turn their sights on Georgia's history. *See id*. ¶¶ 68-81. While incorrectly suggesting that SB 202 was enacted through a "rushed" process, Plaintiffs do not plausibly allege a connection to anything racial. *Id*. ¶¶ 88-109. They allege that the Speaker of the State House of Representatives did not want everyone to receive an absentee ballot, *see id*. ¶ 89, but they again fail to draw any connection to race. And Plaintiffs mention an offhand remark about absentee balloting in an op-ed, *see id*. ¶ 91, but it is difficult to see what that has to do with race.[4] Plaintiffs also allege, in a conclusory manner, that SB 202 unduly burdens the franchise of "Black voters and other voters of color." *Id*. ¶¶ 110-11. But that bare allegation is likewise inadequate.

Applying the *Village of Arlington Heights v. Metropolitan Housing*

[4] *See also Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring in part and concurring in judgment) (noting the "unreality" of relying on isolated statements in legislative history).

Development Corp., 429 U.S. 252, 267-68 (1977), factors laid down by the Supreme Court, it is clear Plaintiffs' claims fail. On the first factor—*Impact of Challenged Law*—SB 202 does not have an impact or "pattern" that is "unexplainable on grounds other than race." *Id.* at 266. Indeed, SB 202 was enacted to advance the State's governmental interests, *see* Part II – Preamble, in minimizing fraud and election insecurity and optimizing voter confidence, orderliness, and the standards for election procedures. *Cf. Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006) (per curiam).

With respect to the second factor—*Contemporary Statements and Actions of Key Legislators and Historical Background*—the legislative record lacks any indication of a discriminatory intent. And Georgia's distant past does not render SB 202 racist. *See GBM,* 992 F.3d at 1328. Further, unless a legislator spoke or acted in a discriminatory manner "during the same [legislative] session" as the allegedly discriminatory bill, no such intent may plausibly be inferred. *Id.* at 1323. This very argument was raised by the *Brnovich* plaintiffs, and rejected. *See Brnovich*, 2021 WL 2690267, *21–22. Finally, racial motivations should not be confused with political ones. *See Crawford*, 553 U.S. at 204 (controlling opinion) ("[I]f a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one

motivation for the votes of individual legislators."). After all, "partisan motives are not the same as racial motives." *Brnovich*, 2021 WL 2690267, *22; *see also Ricci v. DeStefano*, 557 U.S. 557, 642 (2009) (Ginsburg, J., dissenting) ("That political officials would have politics in mind is hardly extraordinary, and there are many ways in which a politician can attempt to win over a constituency . . . without engaging in unlawful discrimination."). Therefore, Plaintiffs have not alleged legislative statements or behavior reflective of a discriminatory motivation underlying SB 202.

As to the third *Arlington Heights* factor—*Procedure Leading Up to SB 202's Passage*—Plaintiffs have not plausibly alleged the requisite quantum of irregularity that would raise concerns about SB 202's passage. They discuss aspects of public comments and testimony as well as the time allowed for the public to digest this bill, but nothing rises to alleging a plausible claim of racial discrimination. And Plaintiffs also concede that the House Special Committee on Election Integrity permitted guests invited by Committee members and staffers of both parties to provide remote public testimony. *See* [Doc. 1 ¶ 99]. Also, the State's "valid neutral justifications" for enacting SB 202 render this allegation implausible. *Crawford*, 553 U.S. at 204 (controlling opinion).

For the fourth factor—*Foreseeability and Knowledge of Disparate Impact*—Plaintiffs have pleaded nothing to indicate that the legislature could

reasonably have predicted or that it knew of a such an impact. Further, with respect to the final factor—*Availability of Less Discriminatory Alternatives*—unlike in *GBM*, where the losing plaintiffs laid out "the alternative option that [they] would have preferred," Plaintiffs have not even done so here. 992 F.3d at 1327. At any rate, the State reasonably believed that its compelling interests in enacting SB 202 could only be achieved by enacting SB 202. *See* Part II – Preamble. A State is entitled to considerable deference about managing its own elections and about deciding whether to proceed incrementally or in "one fell swoop" when tackling its problems. *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 449 (2015); *see NGP I*, 976 F.3d at 1284.

Since Plaintiffs have not plausibly alleged that race was a motivating factor in enacting SB 202 or that SB 202 has a racially disparate impact, there is no reason to shift the burden to the State. *See Burton*, 178 F.3d at 1195. But even if there were, the State can still show that it "would have made the same decision" regardless. *Id*. Finally, because SB 202 has a "plainly legitimate sweep," *Wash. State Grange*, 552 U.S. at 449, this claim cannot succeed as a facial attack on SB 202's constitutionality, *see United States v. Williams*, 553 U.S. 285, 303 (2008). Plaintiffs must wait to bring an as-applied challenge. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985). For all these reasons, this claim should be dismissed.

C. Intentional Racial Discrimination in Voting Under the Fifteenth Amendment

In the next facial challenge, Plaintiffs contend that "SB 202 violates the Fifteenth Amendment to the United States Constitution because Defendants intentionally enacted and operate the law to deny, abridge, or suppress the right to vote on account of race or color." [Doc. 1 ¶ 189]. "SB 202," they further allege, "embodies unjustifiable, irrelevant and illegitimate state interests." *Id*. This claim is not adequately pleaded, either.

As the Eleventh Circuit has noted, "the Supreme Court has long recognized that evidence of a racially discriminatory motivation," along with such effects, "is required for Plaintiffs to prevail on a Fifteenth Amendment claim" concerning the denial or abridgement of voting. *GBM*, 992 F.3d at 1321. In other words, "racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation." *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 62 (1980), *superseded by statute on other grounds as stated in Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). The test is functionally the same for the Fifteenth Amendment as it is for the Fourteenth Amendment, discussed above.

It is also for the same fundamental reasons that Plaintiffs' Fifteenth Amendment claim is meritless. *See supra*. Not only do Plaintiffs fail to plead a plausible discriminatory intent on the part of the legislators who enacted SB

202, they cannot plausibly allege a racially disparate impact. For the reasons discussed previously, Plaintiffs have failed to plead a sufficiently plausible causal connection between SB 202 and any race-based "denial or abridgement of the right to vote." *GBM*, 992 F.3d at 1330. To this end, Georgia's interests in enacting SB 202 are neutral and valid. *See Crawford*, 553 U.S. at 204.

Lastly, since SB 202 has a "plainly legitimate sweep," *Wash. State Grange*, 552 U.S. at 449, this claim cannot succeed as a facial challenge to SB 202's constitutionality, *see Williams*, 553 U.S. at 303. Plaintiffs must wait to bring an as-applied challenge. *See Brockett*, 472 U.S. at 504. Accordingly, Plaintiffs have failed to plead a plausible Fifteenth Amendment claim.

D. Undue Burden on the Right to Vote (Under the First and Fourteenth Amendments)

Launching yet another facial attack, Plaintiffs allege that "[t]he challenged provisions of SB 202 individually and collectively impose severe and, at a minimum, significant burdens on eligible Georgia voters' right to vote, including on Plaintiffs and members of Plaintiffs' organizations." [Doc. 1 ¶ 193]. But Plaintiffs do not explain *how*, *why*, or *which part* of SB 202 does so.

In any event, Plaintiffs overlook that only "[r]egulations imposing severe burdens on [the] rights" of election-statute challengers need "be narrowly tailored and advance a compelling state interest." *Timmons v. Twin Cities Area*

New Party, 520 U.S. 351, 358 (1997) (cleaned up). "Lesser burdens," by contrast, "trigger less exacting review, and a state's important regulatory interests will usually be enough to justify reasonable nondiscriminatory restrictions." *Id.* at 358 (cleaned up). This is often known as the *Anderson/Burdick* framework. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). And that doctrine holds that everyday limitations "arising from life's vagaries" count as such lesser burdens, *Crawford*, 553 U.S. at 197-98 (controlling opinion).

What is more, casting a secret ballot by nature cannot be expressive. *See Timmons*, 520 U.S. at 363 ("Ballots serve primarily to elect candidates, not as forums for political expression."). Nor is voting uniquely associative. Thus, as to both points, either the First Amendment is inapplicable or, at most, the *Anderson/Burdick* framework is appropriate.

Under the *Anderson/Burdick* framework, the challenged provisions advance compelling governmental interests, *see* Part II – Preamble, and are, at best, merely routine inconveniences arising from life's potential vagaries. For instance, the ***drop box*** and ***mobile-voting unit*** provisions, as well as the ***ID requirements for absentees***, help the State run elections in an orderly and organized fashion, keep track of voters, avert and deter fraud, instill greater voter confidence, reduce voters' confusion, and more. The

voter-challenge provision, similarly, helps manage the voter rolls and instill voter confidence in elections by weeding out ineligible persons. *See Crawford*, 553 U.S. at 191 (controlling opinion) (noting State's "valid interest in protecting the integrity and reliability of the electoral process") (cleaned up). In the same way, the provisions concerning ***early voting during runoff elections***, ***line-warming***, and the ***SEB*** help the State run efficient and orderly elections, avert fraud and various kinds of foul play, and structure the electoral apparatus effectively.

Finally, since SB 202 has a "plainly legitimate sweep," *Wash. State Grange*, 552 U.S. at 449, this claim cannot succeed as a facial challenge, *see Williams*, 553 U.S. at 303. Rather, Plaintiffs must wait to bring an as-applied challenge. *See Brockett*, 472 U.S. at 504. Thus, Plaintiffs' First and Fourteenth Amendment claim should be dismissed.

E. Freedom of Speech and Expression—Limitations on Approaching Voters in Line

Plaintiffs next plead that SB 202's proscriptions on "giv[ing], offer[ing] to give, or participat[ing] in the giving of . . . gifts, including, but not limited to, food and drink" are "overbroad," "unconstitutionally burden[some to] Plaintiffs' First Amendment rights of speech and expression," and unsupported "by any sufficient [ ]or compelling" interest. [Doc. 1 ¶ 196]. Here again, they

have failed to adequately plead a facial challenge.

Indeed, Plaintiffs' contention is repudiated by the legislative record as well as standard First Amendment principles. As a "lesser burden[ ]," *Timmons*, 520 U.S. at 358, under the *Anderson/Burdick* framework, this provision is amply supported by the State's interests in preserving election integrity and voter confidence. The legislative record provides additional support: When enacting this provision, the General Assembly recounted that "many groups" approached voters in line during the 2020 elections and determined that "[p]rotecting electors from improper interference, political pressure, or intimidation while waiting in line to vote," SB 202 at 6:126-129, was critical to maintaining electoral integrity.

This provision was a permissible legislative determination because States may restrict even campaign speech near polling locations and precincts. *See Minn. Voters All. v. Mansky*, 138 S. Ct. 1879, 1886 (2018). Indeed, this is common among States; New York, for instance, prohibits providing food or drink to voters standing in line. *See* N.Y. ELEC. LAW § 17-140. And most States have some form of a "buffer zone" in and around their voting precincts.[5] Many

[5] *Electioneering Prohibitions*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 1, 2021), https://www.ncsl.org/research/elections-and-campaigns/electioneering.aspx.

of those state laws also prohibit efforts to influence voters. *See*, *e.g.*, ARIZ. REV STAT. ANN. § 16-1018; CAL. ELEC. CODE § 319.5, 18370; COLO. REV. STAT. § 1-13-714; CONN. GEN. STAT. § 9-236; MICH. COMP. LAWS § 168.931(k); OR. REV. STAT. ANN. § 260.695; 25 PA. STAT. § 3060.

Under these circumstances, SB 202's preventative means are the only practical solution: Not only might handing objects over to voters standing in line be a pretext to defraud, intimidate, or pressure them, *see* SB 202 at 6:126-129, but enforcing the State's interests once the elector has already voted would be difficult. *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009). The damage would already be done. Georgia legitimately adopted the "most expeditious if not the only practical method of law enforcement" to combat this problem. *New York v. Ferber*, 458 U.S. 747, 759-60 (1982). Plaintiffs have pleaded no facts showing otherwise.

Moreover, since SB 202 has a "plainly legitimate sweep," *Wash. State Grange*, 552 U.S. at 449, this claim cannot succeed as a facial challenge, *see Williams*, 553 U.S. at 303. Instead, Plaintiffs must wait to bring an as-applied challenge. *See Brockett*, 472 U.S. at 504. Consequently, Plaintiffs' line-warming claim should be dismissed.

F. ADA Claims

As their final facial challenge, Plaintiffs allege that the State Election

Board (SEB) is subject to Title II of the ADA, 42 U.S.C. § 12132 *et seq*. *See* [Doc. 1 ¶ 202]. They also allege that "[v]oting . . . is a service, program, or activity provided by the" SEB, *id*. ¶ 203, and that SB 202 deprives disabled voters of "equal access and ability to vote" on the same terms "as [all other] Georgia voters." *Id*. ¶¶ 205-06. These claims must also be dismissed.

As an initial matter, Plaintiffs have no cognizable ADA claim against the SEB because it does not administer elections. The SEB's responsibilities include adopting rules and regulations to ensure uniformity in elections. *See* O.C.G.A. § 21-2-31. Elections are conducted by local election superintendents, *see id*. § 21-2-70, and those local entities are responsible for ADA compliance.

Even if Plaintiffs pleaded this claim against the correct defendant, it would fail. A plaintiff seeking to establish a Title II claim must show: "(1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of the plaintiff's disability." *Bircoll v. Miami-Dade Cty., Fla.*, 480 F.3d 1072, 1083 (11th Cir. 2007). And governing ADA regulations state that a public entity's services, programs, or activities, when viewed in their "entirety," must be "readily accessible" to disabled individuals. 28 C.F.R. § 35.150. But the

Eleventh Circuit has explained that, "if one facility is inaccessible, a public entity may comply with Title II by making its services, programs, and activities available at *another* facility that is accessible." *Shotz v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001) (emphasis added).

Because SB 202 leaves disabled voters with multiple accessible voting options, Plaintiffs have not plausibly alleged that, "when viewed in its entirety," SB 202 makes the franchise less than "readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150. Regarding ***drop boxes***, SB 202 required them by law for the first time, as opposed to optional usage during the pandemic-stricken 2020 elections. And it readily enables disabled voters to vote in precincts and by using absentee ballots. Of course, it also permits them to drop their ballots in drop boxes, which have not been so limited as to create an inconvenience. Nor could Plaintiffs plausibly allege that "one [drop box] per every 100,000 active registered voters in the county or one per advance voting location in the county" encumbers disabled voters. [Doc. 1 ¶ 125]. Essentially for the same reasons, SB 202's approach to ***mobile voting units*** does not make voting problematic for disabled voters either. Before the 2020 elections, Georgia's elections were conducted routinely without using mobile voting units. The same is true of the ***ID requirements for absentee voting***, documents that the disabled may obtain without difficulty.

As for ***early voting during runoff elections***, SB 202's modification of the time window—from 3 weeks to 1—does not interfere with access to voting because multiple options remain available. Similarly, SB 202's restrictions on ***approaching voters in line***—restrictions Georgia shares with most states—do not impair disabled persons' ready access to voting. They are still permitted to bring food, water, or medicine. If anything, this restriction protects such voters from undue pressure by third parties.

Finally, SB 202's position on ***out-of-precinct provisional ballots*** does not inconvenience disabled voters either because such voters are most likely to be near their own homes; and in any event, they may also cast absentee ballots, use drop boxes, and of course vote in their home precincts. Since, "when viewed in its entirety," SB 202 is not making voting less than "readily accessible to and usable by individuals with disabilities," § 35.150; *see also Shotz*, 256 F.3d at 1080, Plaintiffs' ADA claim should be dismissed.

CONCLUSION

By asking the Court to micromanage Georgia's elections, Plaintiffs overlook that "the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Burdick*, 504 U.S. at 441. Consequently, this Court should dismiss this case in its entirety, and with prejudice.

Respectfully submitted this 12th day of July, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing Brief in Support of Defendants' Motion to Dismiss Complaint 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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