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,

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Intervenor-Defendants.

CIVIL ACTION

FILE NO. 1:21-CV-01728-JPB

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REPLY BRIEF IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

ARGUMENT 1

I. Plaintiffs fail to demonstrate standing. 1

II. Plaintiffs fail to state a claim on which relief can be granted. 5

A. Plaintiffs' Voting Rights Act (VRA) claim fails. 6

B. Plaintiffs fail to state a claim of intentional racial discrimination under the Fourteenth Amendment. 8

C. Plaintiffs fail to state a claim of undue burden on the right to vote under the First and Fourteenth Amendments. 10

D. Plaintiffs' freedom of speech and expression claim fails. 12

E. Plaintiffs' ADA claim fails. 14

CONCLUSION 15

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES

Cases

Abbott v. Perez,
138 S. Ct. 2305 (2018) 9

Anderson v. Celebrezze,
460 U.S. 780 (1983) 11

Arcia v. Fla. Sec'y of State,
772 F.3d 1335 (11th Cir. 2014) 2, 3, 4

Brnovich v. Democratic Nat'l Comm.,
141 S. Ct. 2321 (2021) .... *passim*

Brockett v. Spokane Arcades, Inc.,
472 U.S. 491 (1985) 10

Burdick v. Takushi,
504 U.S. 428 (1992) 5, 11

Butts v. City of New York,
779 F.2d 141 (2d Cir. 1985) 10

Clapper v. Amnesty Int'l,
568 U.S. 398 (2013) 4

Common Cause Ind. v. Lawson,
937 F.3d 944 (7th Cir. 2019) 3

Common Cause/Georgia v. Billups,
554 F.3d 1340 (11th Cir. 2009) 3, 13

Crawford v. Marion Cty. Election Bd.,
553 U.S. 181 (2008) 9, 11

Fla. State Conf. of N.A.A.C.P. v. Browning,
522 F.3d 1153 (11th Cir. 2008) 4

Greater Birmingham Ministries v. Sec'y of State for Ala.,
992 F.3d 1299 (11th Cir. 2021) ....*passim*

Jacobson v. Fla. Sec'y of State,
974 F.3d 1236 (11th Cir. 2020) 1, 5

Minn. Voters All. v. Mansky,
138 S. Ct. 1876 (2018) 12

New Ga. Project v. Raffensperger,
976 F.3d 1278 (11th Cir. 2020) 1, 5, 10

New York v. Ferber,
458 U.S. 747 (1982) 13

Nw. Austin Municipal Util. Dist. No. One v. Holder,
557 U.S. 193 (2009) 8

Shelby Cty., Ala. v. Holder,
570 U.S. 529 (2013) 8

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Shotz v. Cates,
256 F.3d 1077 (11th Cir. 2001) 14

Spokeo, Inc. v. Robins,
136 S. Ct. 1540 (2016) 14

Tennessee v. Lane,
541 U.S. 509 (2004) 15

Timmons v. Twin Cities Area New Party,
520 U.S. 351 (1997) 11, 12

Tsao v. Captiva MVP Rest. Partners,
986 F.3d 1332 (11th Cir. 2021) 2

United States v. Williams,
553 U.S. 285 (2008) 10, 13

Village of Arlington Heights v. Metropolitan Housing Development Corp.,
429 U.S. 252 (1977) 8, 10

Wash. State Grange v. Wash. State Republican Party,
552 U.S. 442 (2008) 6, 10, 13

Woodson v. Bd. of Regents of Univ. Sys. of Ga.,
247 F.3d 1262 (11th Cir. 2001) 1

Statutes

MONT. CODE ANN. § 13-35-211 13

N.Y. ELEC. LAW § 17-140 13

O.C.G.A. § 21-2-31 14

O.C.G.A. § 50-13-4 7

SB 202 .... *passim*

RETRIEVED FROM DEMOCRACYDOCKET.COM

Regulations

Ga. Comp. R. & Regs. 183-1-14 7

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As the Eleventh Circuit has often held, "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). Yet Plaintiffs ask this Court to interfere with the reasonable election rules established by the State of Georgia. The Court should dismiss the complaint because Plaintiffs lack standing and have failed to state a claim.

ARGUMENT

I. Plaintiffs fail to demonstrate standing.

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Although standing is "[p]erhaps the most important of the Article III doctrines grounded in the case-or-controversy requirement[,]" Plaintiffs rely on vague and speculative allegations. *Woodson v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1273 (11th Cir. 2001). More is required for Plaintiffs to satisfy their burden.

First, Plaintiffs' organizational standing allegations fail because they are vague. Plaintiffs have not sufficiently alleged facts showing "what activities [they] would divert resources away *from* in order to spend additional resources on combatting" SB 202's supposed impact. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1250 (11th Cir. 2020). Instead, most Plaintiffs opaquely reference "day-to-day activities" from which they will allegedly divert resources. [Doc. 1 ¶¶ 21, 26, 41, 49]. Others generically reference "voter education and turnout

programs[.]" *Id.* ¶¶ 38, 55, 59. Such vague allegations will not do, as Plaintiffs have not identified any actual activity from which they will be required to divert resources. *See Tsao v. Captiva MVP Rest. Partners*, 986 F.3d 1332, 1343 (11th Cir. 2021) (vague allegations "are not enough to confer standing").

Plaintiffs' vague allegations fail for another reason—there is no mention of how the potential diversion will *impair* their functions. *See Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014) (the diversion must "impair the organization's ability to engage in its own projects"). Put simply, Plaintiffs' allegations must demonstrate that SB 202 prevents them from engaging in their "own projects." But Plaintiffs' complaint shows they cannot do so. Rather, Plaintiffs confirm they will continue spending resources on the same activities after SB 202's enactment. For instance, Plaintiff Mijente alleges that it will "divert scarce resources away from its traditional voter education and turnout programs toward efforts to ensure that voters . . . can navigate the restrictions" of SB 202. [Doc. 1 ¶ 38]; *see also* [Doc. 49 at 6] (arguing that Plaintiffs are "already expending resources to inform and *educate voters*") (emphasis added).[1] In other words, Mijente claims injury because it will need to educate voters

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[1] The complaint does not support Plaintiffs' argument that they are "*already* expending resources." *See* [Doc. 1 ¶¶ 21, 52] (alleging that Plaintiffs "*will* . . . be forced to divert resources") (emphasis added).

about SB 202. Yet educating voters about election laws *is* its mission and Mijente would undoubtedly spend resources on such activities irrespective of SB 202. *See id.* The same is true for the other Plaintiffs, each of which engages in voter education and turnout activities irrespective of SB 202. *See*, *e.g.*, *id.* ¶¶ 18, 29, 36. Thus, Plaintiffs' allegations do not show that SB 202 impairs their ability to "engage in [their] own projects." *Arcia*, 772 F.3d at 1341.

If anything, Plaintiffs' hyperbolic allegations here have likely increased their fundraising, thereby enhancing the resources available to fund their core activities. The Court should thus reject Plaintiffs' attempt to "convert [their] ordinary program costs into an injury in fact." *Common Cause Ind. v. Lawson*, 937 F.3d 944, 955 (7th Cir. 2019). Were an organization able to claim as an injury something that enables it to continue (and increase) its mission, Article III's injury-in-fact requirement would be meaningless.

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Plaintiffs' reliance on *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009), and *Arcia*, 772 F.3d at 1341, underscores their lack of standing. *See* [Doc. 49 at 4]. In both cases, the challenged laws required the plaintiffs to divert resources to entirely *new* activities. In *Common Cause/Georgia*, the NAACP claimed that it would divert resources from "getting [voters] to the polls" to "helping them obtain acceptable photo identification." 554 F.3d at 1350. Similarly, the *Arcia* plaintiffs challenged

Florida's "efforts to remove the names of ineligible voters from the State's voter rolls[.]" 772 F.3d at 1339. Those plaintiffs claimed that they would need to divert resources to "locating and assisting members who had been wrongly identified as non-citizens to ensure that they" were not removed from Florida's list of eligible voters. *Id*. Absent the challenged laws, the *Arcia* plaintiffs would not have diverted resources to locating such individuals. In contrast, Plaintiffs merely allege that they will continue their voter education activities, albeit now focused on educating voters about SB 202. Article III demands more.

Second, Plaintiffs' allegations are far too speculative. As noted, Plaintiffs rely on purported future injuries—a diversion of resources based on assumptions about SB 202's implementation. But Plaintiffs do not sufficiently allege an "imminent" or "certainly impending" injury from SB 202. *Clapper v. Amnesty Int'l*, 568 U.S. 398, 401 (2013); *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008). Rather, Plaintiffs rejoin that "SB 202 is already law" and thus its allegations are "hardly speculative." [Doc. 49 at 6]. In other words, Plaintiffs claim they need not identify a "certainly impending" injury because there is nothing "speculative" about SB 202. Plaintiffs misunderstand their burden. Although SB 202 is certainly law, Plaintiffs must nonetheless identify a non-speculative, "certainly impending" injury *to them*. *Clapper*, 568 U.S. at 401. They have not done so.

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Third, these vague and speculative assertions are also fatal to Plaintiffs' associational standing, which requires Plaintiffs to show that their members "would otherwise have standing to sue in their own right." *Jacobson*, 974 F.3d at 1249. Plaintiffs fail to do so because they rely on the same flawed allegations they offered in support of organizational standing. *See* [Doc. 49 at 6-7]. Baldly alleging that members' "right to vote will be burdened or denied as a result of SB 202" or that members have "expressed concern" about SB 202 is far too speculative and vague. *See* [Doc. 1 ¶¶ 21, 32, 40, 45, 49, 52]. These allegations fail to support Plaintiffs' associational standing for the same reasons they fail to support Plaintiffs' organizational standing.

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

Plaintiffs also fail to plead any claim on which relief can be granted. At the outset, Plaintiffs have not plausibly disputed Georgia's compelling interests in enacting SB 202: "(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*); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2340, 2343, 2348 (2021); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *New Ga. Project*, 976 F.3d at 1282. These compelling interests must underlie any analysis of

SB 202's lawfulness. And "a State may take action to prevent [an election-related problem] without waiting for it to occur and be detected within its own borders." *Brnovich*, 141 S. Ct. at 2348. Further, facial challenges to election practices face 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). Given these settled standards, none of Plaintiffs' claims should be allowed to proceed.

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A. Plaintiffs' Voting Rights Act (VRA) claim fails.

For this claim, Plaintiffs must allege facts establishing: (1) proof of disparate impact resulting from the law in question; and (2) that the disparate impact is caused by racial bias. *See GBM*, 992 F.3d at 1328-30. They have not done so. Moreover, when a law based on valid governmental interests imposes only "modest burdens" and its "disparate impact" is "small [in] size," it conforms to Section 2. *Brnovich*, 141 S. Ct. at 2346.

The challenged provisions so conform, and Plaintiffs have not "plausibly alleged that SB 202 makes voting less equally open and deprives Plaintiffs' members of an equal opportunity to vote." [Doc. 49 at 9]. For instance, Plaintiffs do not allege a racially disparate impact traceable to SB 202's provisions for mobile voting units and drop boxes. Stating that "the majority of" Fulton County "is nonwhite" [Doc. 49 at 10] says nothing about an impact

on other races across Georgia, *see Brnovich*, 141 S. Ct. at 2337-38 (applying Section 2's "equal openness" rule). Moreover, such allegations fail because these provisions *expand* Georgians' statutory ability to vote under ordinary, non-emergency circumstances. SB 202 at 5:113-18; 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).

The same is true for early voting during runoff elections, approaching voters in line, and voting in the correct precinct. Plaintiffs fail to allege facts showing a racially disparate impact. Rather, they speculate that "[t]he challenged limitations on early voting during runoff elections" are "obviously targeted to Black voters and Plaintiff churches and faith-based organizations." [Doc. 49 at 11]. Similarly, Plaintiffs speculate that the restriction on approaching voters in line "will be experienced disproportionately by . . . voters of color." *Id*. Plaintiffs also argue, without support, that the in-precinct voting requirement "will disproportionately affect Black voters and historically disenfranchised communities, who experience a higher rate of in-county moves and are thus more likely to cast an out-of-precinct ballot." *Id*. Plaintiffs do not allege any facts supporting these assumptions and speculation does not demonstrate that SB 202 causes racial disparity. Accordingly, Plaintiffs cannot even "clear the hurdle of demonstrating that minority voters are less likely than white voters" to be able to vote because of SB 202. *GBM*, 992 F.3d at 1329.

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Finally, Plaintiffs focus on Georgia's distant racial history, *see* [Doc. 49 at 13-14], attempting to "punish [Georgia] for the past," *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 553 (2013). But the principle of equal sovereignty forecloses such an argument. *See Nw. Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009). That "fundamental principle" precludes organs of the *federal* government—including the courts—from treating one state worse than another. *Shelby Cty.*, 570 U.S. at 542. Yet, in asking the Court to treat Georgia as a second-class, delinquent state, Plaintiffs turn their backs on equal sovereignty and the Supreme Court's focus on "*current* conditions." *Id*. at 553-56 (emphasis added). For all these reasons, Plaintiffs' Section 2 claim fails as a matter of law.

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B. Plaintiffs fail to state a claim of intentional racial discrimination under the Fourteenth Amendment.

Plaintiffs' intentional racial discrimination claim fails under the Supreme Court's multi-factor test announced in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267-68 (1977). On the first factor—*Impact of Challenged Law*—Plaintiffs allege no facts showing that SB 202 has an impact "unexplainable on grounds other than race." *Id*. at 266. Rather, SB 202 was a reasonable legislative response to allegations of voter suppression, fraud, intimidation, and confusion, and an effort at enhancing

uniformity and voter confidence. *See* SB 202 at 4:69-7:14.

On the second factor—*Contemporary Statements and Actions of Key Legislators and Historical Background*—Plaintiffs do not allege that any legislator spoke or acted in a discriminatory manner "during the same [legislative] session" as SB 202, and thus no such intent may plausibly be inferred. *GBM*, 992 F.3d at 1323. And Georgia's distant past does not render SB 202 racist. *See id.* at 1328; Part II.A, *supra*. Therefore, Plaintiffs have not alleged legislative behavior reflecting a discriminatory motivation.

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On the third factor—*Procedure Leading Up to SB 202's Passage*—Plaintiffs have not plausibly alleged any procedural irregularity. Plaintiffs acknowledge that SB 202 was the result of a legislative process with extensive public comments and testimony. *See* [Doc. 1 ¶¶ 97-99]. Plaintiffs have thus not alleged facts showing a "brevity of the legislative process" that can "overcome the presumption of legislative good faith." *Abbott v. Perez*, 138 S. Ct. 2305, 2328-29 (2018). Rather, the State's "valid neutral justifications" for enacting SB 202 render this allegation implausible. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008) (controlling op.).

As to the fourth factor—*Foreseeability and Knowledge of Disparate Impact*—Plaintiffs' allegations do not indicate that the legislature could reasonably have predicted a disparate impact. It is of no moment that SB 202's

opponents may have suggested such an impact. "The Supreme Court has . . . repeatedly cautioned . . . against placing too much emphasis on the contemporaneous views of a bill's opponents," as the "speculations" of opponents "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). With respect to the final factor—*Availability of Less Discriminatory Alternatives*—Plaintiffs have not attempted to set forth an "alternative option that [they] would have preferred." *GBM*, 992 F.3d at 1327. At any rate, the State's reasonable belief that SB 202 would satisfy its compelling interests is worthy of considerable deference. *See New Ga. Project*, 976 F.3d at 1284.

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Finally, because SB 202 has a "plainly legitimate sweep," *Wash. State Grange*, 552 U.S. at 449, this claim cannot survive as a facial attack on SB 202, *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. Plaintiffs fail to state a claim of undue burden on the right to vote under the First and Fourteenth Amendments.

Plaintiffs misstate the applicable legal standard for this claim. *See* [Doc. 49 at 17-18]. Only "[r]egulations imposing severe burdens" must "be narrowly tailored and advance a compelling state interest." *Timmons v. Twin*

Cities Area New Party, 520 U.S. 351, 358 (1997). "Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.* (cleaned up); *see also Burdick*, 504 U.S. 428; *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Plaintiffs' allegations focus on limitations "arising from life's vagaries," which constitute such lesser burdens. *Crawford*, 553 U.S. at 197-98. And Plaintiffs' allegations do not come close to overcoming Georgia's "important regulatory interests." *Timmons*, 520 U.S. at 358.

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Plaintiffs also argue, without support, that SB 202's restructuring of the State Election Board's (SEB) role will elicit "arbitrary and unpredictable changes in county election administration, which will destabilize elections and disproportionately burden voters." [Doc. 49 at 18]. Similarly, Plaintiffs baldly allege that other SB 202 provisions will "disproportionately and unjustifiably burden[ ]" voting in "[c]ounties that have a history of long lines at the polls and ballot processing delays." *Id.*[2] Neither of these conclusory allegations states a claim or suggests anything beyond the "usual burdens of voting" that must be tolerated. *Brnovich*, 141 S. Ct. at 2338. Plaintiffs thus fail to state a claim of

[2] SB 202 also addresses line length, requiring either reduction in precinct size or additional voting equipment for precincts where electors had to wait more than one hour before checking in to vote during the previous election. *See* SB 202 at 29:721-23.

an undue burden on the right to vote.

D. Plaintiffs' freedom of speech and expression claim fails.

Plaintiffs next challenge SB 202's limitation on approaching voters in line, arguing that "[b]ecause SB 202 imposes content-based restrictions on expressive conduct such as line warming activities, it must face strict scrutiny." [Doc. 49 at 18-19]. They also argue that this restriction "is unnecessary to serve the asserted [governmental] interests" and that it "is [not] narrowly tailored to serve a significant governmental interest." *Id*. at 19. Plaintiffs also blanketly assert that "[t]he motivations behind the law's passage are deeply suspect." *Id*.

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Basic First Amendment principles doom this claim. As a "lesser burden[ ]" under the *Anderson/Burdick* framework, SB 202's limitation on approaching voters in line is amply supported by the State's interest in preserving election integrity and voter confidence. *Timmons*, 520 U.S. at 358. Moreover, the General Assembly determined that "[p]rotecting electors from improper interference, political pressure, or intimidation while waiting in line to vote" was critical to maintaining electoral integrity. SB 202 at 6:126-29. As States may restrict even campaign speech near polling locations and precincts, they can certainly limit other forms of speech and expression in such locations. *See Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1886 (2018). It is thus

unsurprising that several states restrict the provision of food or drink to voters in line. *See* N.Y. ELEC. LAW § 17-140; MONT. CODE ANN. § 13-35-211(2).

Under these circumstances, the General Assembly concluded that SB 202's preventative measures are the only practical solution: Not only might handing objects over to voters standing in line be a pretext to intimidate or pressure them, *see* SB 202 at 6:126-29, but enforcing the State's interests once the elector has already voted would be difficult, *see Common Cause/Georgia*, 554 F.3d at 1354. Plaintiffs' allegations reinforce this point. They claim a right to approach voters in line to engage in "speech and expression." [Doc. 1 ¶ 196]. In other words, Plaintiffs concede that they are not approaching voters merely to provide water, but rather to engage in "political speech" [Doc. 49 at 19-20], which is precisely the type of "improper interference, political pressure, or intimidation" SB 202 seeks to prevent. Therefore, Georgia adopted the "most expeditious if not the only practical method" to combat this problem. *New York v. Ferber*, 458 U.S. 747, 759-60 (1982).

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Plaintiffs have not pleaded facts alleging racially suspect motivations behind these provisions. Moreover, since SB 202 has a "plainly legitimate sweep," *Wash. State Grange*, 552 U.S. at 449, this claim cannot survive as a facial challenge, *see Williams*, 553 U.S. at 303. Accordingly, the Court should dismiss this claim.

E. Plaintiffs' ADA claim fails.

Plaintiffs' ADA claim fails because the SEB has no role in ADA compliance for elections and, even if it did, Plaintiffs' factual allegations fail to state a claim for an ADA violation. *See* [Doc. 46 at 22-25].

Despite Plaintiffs' bald statement to the contrary, *see* [Doc. 49 at 23-24], the SEB unquestionably does not administer elections. Under Georgia law, the SEB's responsibilities include adopting rules and regulations to ensure election uniformity. *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 ensuring that voting locations comply with Title II of the ADA. Therefore, Plaintiffs cannot identify an ADA injury that is "fairly traceable" to Defendants or "redress[able] by a favorable judicial decision" against Defendants. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

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Plaintiffs' factual allegations also fail to state an ADA claim. None of the challenged provisions discriminates against disabled voters or deprives them of equal access to the franchise. SB 202 offers multiple options for voting. The Eleventh Circuit has held: "[I]f 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). Accordingly, Georgia's voting system must be viewed in its entirety,

and Plaintiffs' narrow focus on select provisions of SB 202 fails to state a claim.

Moreover, Plaintiffs have not alleged facts showing that the challenged provisions impose serious obstacles on disabled voters. Georgia provides accessible voting equipment for all voters and all Georgians can vote using no-excuse absentee-by-mail ballots returned at a drop box, by mail, or directly to a county elections office, providing disabled voters with multiple methods to vote. Nor does SB 202's identification requirement for absentee ballots impose a burden on disabled voters. Likewise, SB 202's restriction on approaching voters in line does not impair disabled voters' ability to vote; they may bring food or water like other voters.

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At bottom, modest election measures do not violate the ADA. The Supreme Court has expressly conditioned Title II's constitutionality on its remedying "*pervasive[ly]* unequal treatment" against the disabled and "systematic deprivations of fundamental rights." *Tennessee v. Lane*, 541 U.S. 509, 524 (2004) (emphasis added). Plaintiffs do not allege any facts hinting at such evils. Accordingly, Plaintiffs have failed to state an ADA claim.

CONCLUSION

Plaintiffs lack standing to pursue this action and have failed to plead legally cognizable claims. The Court should dismiss this case in its entirety.

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 Reply Brief in Support of Defendants' Motion to Dismiss 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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