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

COALITION FOR GOOD GOVERNANCE, *et al.*, *Plaintiffs*, v. BRIAN KEMP, Governor of the State of Georgia, in his official capacity, *et al.*, *Defendants*.	CIVIL ACTION FILE NO. 1:21-CV-02070-JPB

PLAINTIFFS' RESPONSE TO MOTION FOR SUMMARY JUDGMENT

Plaintiffs file this Response to Defendants' Motion for Summary Judgment. (ECF No. 123).

I. INTRODUCTION

In their Motion for Summary Judgment, Defendants repeat meritless arguments on the law that this Court thoroughly rejected in its order denying their Motion to Dismiss. (ECF No. 78). Defendants argue again that Plaintiffs do not have standing under *Clapper v. Amnesty Intl. USA,* 568 U.S. 398 (2013), that Plaintiffs' injuries from the challenged laws are not traceable to the Defendants who are charged with their enforcement, and that this case does not fall within the *Ex parte Young* exception to the Eleventh

Amendment. The Court has rejected each of these arguments before and should do so again.

The only possibly new argument that the Defendants advance is that the Plaintiffs' claims are not justiciable (either because of standing or on the merits) because the challenged laws have not yet been enforced against them. But this has never been the law. Courts routinely allow pre-enforcement challenges, even to rarely invoked statutes. *E.g., Babbitt v. Farm Workers*, 442 U.S. 289 (1979). *See also Susan B. Anthony List v. Driehaus,* 573 U.S. 149 (2014). Plaintiffs have standing because the laws, even before their enforcement, chill the exercise of their constitutional rights and, separately, because they have a credible fear of prosecution. *Wollschlaeger v. Governor of Florida,* 848 F.3d 1293 (11th Cir. 2017). Moreover, this action for prospective injunctive relief is timely brought *before* any additional injury is caused by the enforcement of the statutes. *Summit Medical Associates, P.C. v. Pryor,* 180 F.3d 1326, 1338 (11th Cir. 1999).

The only evidence that Defendants have submitted in support of their Motion for Summary Judgment concerns policy justifications for some of the challenged laws. But, as explained below, Defendants attempt to justify laws that Plaintiffs do not challenge, such as the provisions of SB 202 allowing the performance review process recently undertaken in Fulton County, or the

Communications Rule's prohibition on the disclosure of vote tallies. As for the laws Plaintiffs do challenge, Defendants have little or nothing to say. For example, Defendants provide no justification for the law that that allows Defendant State Election Board to remove (but not replace) boards of registration, or the law forbidding any communication whatsoever about absentee ballot processing.

II. STANDING

A. Organizational Standing

Defendants do not address or challenge the organizational standing of Plaintiffs Coalition for Good Governance ("CGG"), Jackson County Democratic Committee ("JCDC"), or Georgia Advancing Progress Political Action Committee ("GAPPAC").[1] These organizations are parties[2] to every count except for Count I. Because Defendants do not challenge the standing

[1] Defendants do not mention organizational standing in their Brief (ECF No. 123-1, *passim*) and identify no material facts relating to organizational standing in their Statement of Material Facts (ECF No. 123-2, *passim*). Defendants also did not file the transcripts of the Rule 30(b)(6) depositions of the organizational plaintiffs.

[2] The Second Amended Complaint, like the prior complaints, defines two groups of plaintiffs. The "Board Member Plaintiffs" are Plaintiffs Lang, Pullar, McNichols, Shirley and Thomas-Clark." (ECF No. 104 at 119, ¶ 348). The Board Member Plaintiffs are the only parties to Counts I. The "Voter Plaintiffs" are all the Plaintiffs (including organization plaintiffs and Board Member Plaintiffs) except for Plaintiff Friedman. The Voter Plaintiffs are parties to Counts II through XI. Plaintiff Friedman, a California resident, is a party to Counts VII through XI.

of the organizational plaintiffs, the Defendants arguments relating to the other plaintiffs on Counts II to XI (meritless anyway), are immaterial. "Where only injunctive relief is sought, only one plaintiff with standing is required." *Martin v. Kemp,* 341 F. Supp. 3d 1326, 1333 (N.D. Ga. 2018); *see also Glassroth v. Moore,* 335 F.3d 1282, 1293 (11th Cir. 2003) ("Having concluded that those two plaintiffs have standing, we are not required to decide whether the other plaintiff . . . has standing."). As for Count I, the Board Member Plaintiffs' standing is addressed below, in Part B.

Although they have no burden to do so,[3] each of the three Organizational Plaintiffs have gone far beyond their pleadings and presented evidence that the challenged laws "impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts." *Fla. State Conf. of NAACP v. Browning,* 522 F.3d 1153, 1165 (11th Cir. 2008). Citing the Declaration of CGG Executive Director Marilyn Marks, this Court found in its Order on Plaintiffs' Motion for Preliminary Injunction that

[3] Plaintiffs have the ultimate burden at trial to prove standing, but Plaintiffs have no burden on summary judgment to rebut arguments that Defendants do not make. "When a party moves for summary judgment on ground A, his opponent is not required to respond to ground B—a ground the movant might have presented but did not." *Malhotra v. Cotter & Co.,* 885 F.2d 1305, 1310 (7th Cir. 1989) (Posner, J.); *John Deere Co. v. American National Bank*, 809 F.2d 1190 (5th Cir. 1987) (reversing granting of summary judgment on ground not advanced by moving party).

CGG "likewise testified that it is diverting resources to provide advice to its members regarding how to navigate SB 202's requirements. Marks Decl. ¶ 13, ECF No. 15-3." (ECF No. 49 at 10). In the recent Rule 30(b)(6) deposition of CGG, Ms. Marks testified as to how CGG continues to divert its resources to counteract SB 202. (ECF No. 130 at 32:22-36:7; 39:20-41:18).

In its Rule 30(b)(6) depositions, Plaintiff JCDC verified its allegations of standing in the Second Amended Complaint (found at ECF No. 104 at 114 to 115, ¶ 329; *see* ECF No.128 at 21:23-23:7) and described the organization's continuing diversion of resources (*id.* at 27:12-17). In its Rule 30(b)(6) depositions, Plaintiff GAPPAC verified each of its allegations of standing in the Second Amended Complaint (found at ECF No. 104 at 80-82, ¶¶ 201-210; *see* ECF No. 126 at 24:24-25:6). GAPPAC Chair Cam Ashling explained how SB 202 has made it more difficult to recruit poll monitors and how her organization continues to divert resources to educate volunteers on the dangers of the challenged laws. (*Id.,* at 60:14-21).

Defendants point to no evidence rebutting the testimony of the Organization Plaintiffs. Plaintiffs have therefore established that at least one plaintiff has standing as to Counts II through XI.

B. Board Member Plaintiffs Have Standing

Relying again on *Clapper* and *Tsao v. Captiva MVP Rest. Partners, LLC,* 986 F.3d 1332 (11th Cir. 2021), Defendants argue that the Board Member Plaintiffs do not have standing because "there is no evidence of any pending action against any county boards" and any injury to them "is only speculative and cannot constitute the basis for any relief." (ECF No. 123-1 at 15-16). The argument has already been flatly rejected by this Court. (ECF No. 78 at 11) (distinguishing *Clapper* and *Tsao*.

Here, the threat of enforcement of the Suspension Rule is credible and substantial. First, and most obviously, Defendants still do not deny that "any alleged violation of SB 202 will be 'vigorously' prosecuted." (ECF No. 78 at 9). The Defendants' promise to enforce the challenged statute alone defeats any argument that the threat of enforcement is not "credible." *See Pernell v. Fla. Bd. of Governors,* 2022 WL 16985720, at *22 (N.D. Fla. Nov. 17, 2022).

Second, though the SEB has not suspended any superintendent, it has initiated proceedings under SB 202 that easily could have led to the suspension of Fulton County's Board of Elections and Registration. *See Susan B. Anthony List,* 573 U.S. at 164 (past enforcement "is good evidence that the threat of enforcement is not 'chimerical'") (citations omitted).

Third, the credibility of the threat is bolstered by the fact that suspension proceedings may be initiated by any number of individuals or political organizations, including the jurisdiction's state legislative delegation, the "governing authority of the county," or the SEB "on its own motion." O.C.G.A. § 21-2-33.2(a). *See Susan B. Anthony List,* 573 U.S. at 164 ("The credibility of that threat is bolstered by the fact that authority to file a complaint with the Commission is not limited to a prosecutor or an agency.").

Fourth, the suspension of a Board Member Plaintiff is predicated – not on his or her own violation of an election statute or rule – but upon the violation by the "superintendent," which is defined by Georgia law as the local board in its entirety. The county board could, over an individual board member's objection, decide to take action that led to a violation of election laws. Under SB 202, the individual board member would be suspended along with the rest of the board.

In addition, relatively minor violations of Georgia's election laws in two consecutive election cycles may trigger suspension.[4] This too increases the

[4] For example, three violations of the following rules could trigger suspension of the entire board: failure to print an individual badge for each poll watcher, Rule 183-1-13-.04; failure to swear in voting system programmers. Rule 183-1-12-.17; failure to conduct an hourly sweep of each voting station to find any unauthorized materials

credibility of the threat for purposes of standing to bring a pre-enforcement challenge. See *Georgia Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1259 (11th Cir. 2012) (credibility of threat increased because defendants confirmed "that any minor traffic violation such as failure to use a turn signal or failure to come to a complete stop can provide the requisite probable cause to trigger application" of challenged law).

In sum, the Board Member Plaintiffs have satisfied the injury requirement by "establishing a realistic danger of sustaining direct injury as a result of the statute's operation or enforcement." *Georgia Latino Alliance for Human Rights v. Governor of Georgia,* 691 F.3d 1250, 1257-58 (11th Cir. 2012).

In addition to standing under the diversion of resources doctrine, each of the organizational Plaintiffs has standing because the current laws, even before prosecution, is causing them direct injury because, among other reasons, they are unable to monitor elections effectively. (ECF No. 15-3 ¶¶ 3, 11-15, 17; Marks Dep., ECF No. 130 at 81:6-85:17, 86:1-9; Ashling Dep., ECF No. 126 at 34:3-34:25, 36:2-8; Fuller Dep., ECF No. 128 at 51:22-52:8).

left behind. Rule 183-1-12-.11(3)); equipment storage room exceeded 80% humidity on rainy day. Rule 183-1-12-.04(2).

C. Individual Plaintiffs Have Standing

In Section B,[5] Defendants address the standing of the Plaintiffs to challenge the Observation, Tally, and Communications rules, arguing again that "Plaintiffs have not shown any enforcement or investigation against them personally for any violations." (ECF No. 123-1 at 17-18). Initially, since the organizational plaintiffs are parties to each of these counts, and their standing is not challenged, the Court need not reach the standing of the individual plaintiffs. Nevertheless, Defendants' argument as to the individual plaintiffs is meritless.

Throughout their Brief, Defendants contend that since none of the challenged laws have been enforced, that Plaintiffs either do not have standing or that their claims are for some other reason not justiciable. This is not and has never been the law. Courts routinely allow pre-enforcement challenges even to rarely invoked statutes. In *Babbitt v. Farm Workers*, 442 U.S. 289 (1979), the Court found that the plaintiffs had standing to challenge a criminal provision that "ha[d] not yet been applied and may never be

[5] In the first paragraph of Section B, Defendants repeat their "certainty impending" argument from *Clapper* that this Court rejected in its Order and that is discussed above.

applied to commissions of unfair labor practices." *Id.* at 302. Because "the State ha[d] not disavowed any intention of invoking the criminal penalty provision," the Court reasoned, the plaintiffs' fear of prosecution was "not without some reason[.]" *Id.* *See also Brooklyn Branch of NAACP v. Kosinski,* 2023 WL 22185901 (S.D.N.Y. Feb. 23, 2023) (relying on *Babbitt,* holding that "although it is not certain that Plaintiff or its members will be prosecuted for violating the Line Warming Ban, Plaintiff has established a credible threat of such enforcement").

The controlling test in this Circuit is set forth in *Wollschlaeger,* as this Court explained:

> Therefore, courts allow a plaintiff to bring a pre-enforcement suit 'when he has alleged an intention to engage in the course of conduct arguably affected with a constitutional interest, but prescribed by a statute, and there appears a credible threat of prosecution. *Wollschlaeger,* 848 F.3d 1304 (internal punctuation omitted) (quoting *Driehaus,* 573 U.S. at 159). This type of injury is not considered too remote or speculative for standing purposes. *See id.* at 1303.

(ECF No. 78 at 7). The law does not require plaintiffs to "first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson,* 415 U.S. 452, 459 (1974). Each of the Plaintiffs are actively involved in those very activities that expose citizens to prosecution under S.B. 202, whether it

is voting in-person, monitoring or observing elections, or gathering news about elections in Georgia.

As to the credibility of the threat of prosecution, again, Defendants do not deny that they intend to "vigorously enforce" SB 202, defeating any contention that the threat of prosecution is not credible. In addition, this Court found that the evidence presented in support of Plaintiffs' Motion for Preliminary Injunction established that "at least Dufort has demonstrated a credible threat and fear of prosecution because SB 202 is the law, and the record reflects evidence of pending complaints against poll watchers for election monitoring activities not related to SB 202." (ECF No. 78 at 9). Defendants do not challenge this finding or cite any evidence suggesting that the threat of prosecution has diminished since this Court's Order.

Second, Defendants' argument ignores the actual Article III injury that Plaintiffs are *currently* suffering because of the laws. Again, as this Court found:

> Here, the record shows that individual plaintiffs have changed or intend to change their behavior in response to SB 202 or are otherwise impacted by its provisions. For example, Plaintiff Jeanne Dufort ("Dufort"), a poll watcher, member of the Vote Review Panel of Morgan County and vocal critic of Georgia's election system, testified that the challenged provisions will deter or prohibit her from voting in person, requesting an absentee ballot or serving as a poll watcher or election monitor.

(ECF No. 78 at 8). In their Motion for Summary Judgment, Defendants do not address this evidence or attempt to muster any new evidence that would eliminate an issue of fact on Dufort's – or the other Plaintiff's – actual injury. In her deposition, Plaintiff Rhonda Martin explained how SB 202 has in fact changed her behavior:

> Q: [By Mr. Weigel, Defendants' counsel] So as far as your current election-related activities as you describe it, taking into consideration the one you identified, do you still currently participate in all of those Election Day activities or has it changed in any way?
>
> A: [By R. Martin] It's changed. I've been much less likely to be an observer during elections because of the difficulties; the threat of SB202 and the constraints it places on poll watchers; the dangers of being accused of looking at someone's vote intentionally when it would be unintentional or impossible to avoid; not being allowed to speak about what you see when you observe elections; so various parts of SB202, which is why we are here, have made it problematic for me to continue the work I was doing before.

(ECF No. 131 at 20:6-20).

In its Order, the Court also reviewed the evidence showing the "concrete" impact SB 202 was having on Plaintiff Friedman. Friedman, "host of a nationally syndicated radio show that addresses election security, testified that SB 202's restrictions will limit his show's news reporting activity for upcoming elections." (ECF No. 785 at 8 (citing Friedman's Declaration ¶ 8, ECF No. 15-5)). In his deposition, Mr. Friedman agreed that

gathering information for his listeners and readers about elections in Georgia depends in part on "upon law-abiding citizens being willing to risk violating the law." (ECF No. 127 at 100:2-9; *see also id.* at 62: 17-20 ("Essentially, I may be asking them [his sources] to commit a crime by asking them to, you know, go to a poll, a polling place, and tell me what you see.")).

In sum, even without the presumptions as to which Plaintiffs, as the non-moving party, are entitled, Plaintiffs have easily met their burden of pointing to evidence of actual injury for purposes of Article III standing.

D. Traceability and Redressability

Defendants argue that the Governor's general authority to enforce criminal laws, and the SEB and Secretary's general authority to enforce election laws, do not make the injuries caused by these laws traceable to the Defendants or redressed by an injunction against them. (ECF No. 123-1 at 18 – 22).[6] Defendants acknowledge that this Court has already rejected this argument (*see* ECF No. 49 at 11), but contend that the Court relied on Eleventh Circuit caselaw predating *Jacobson v. Fla. Secretary of State,* 974

[6] Defendants concede that these traceability and redressability arguments do not apply to the counts challenging the Suspension Rules, and only to the counts challenging the Observation, Tally, Communication and, presumably, Photography Rules. (ECF No. 123-1 at 20).

F.3d 1236 (11th Cir. 2020), *Lewis v. Governor of Alabama,* 944 F.2d 1287 (11th Cir. 2019), and *City of South Miami v. Governor of Florida,* 65 F.4th 631 (11th Cir. 2023), cases which, according to Defendants, compel a different result. (ECF No. 123-1 at 19). This Court's holding on traceability and redressability is completely consistent with *Jacobson* and *Lewis,* which this Court cited in its discussion, and *City of South Miami,* decided earlier this year. The facts and holding of these three cases will be discussed in detail below.

Jacobson. Plaintiffs alleged that they were injured because Republicans, not Democrats, appeared first on the ballot in Florida's general elections. The plaintiffs, however, only sued the Secretary of State, and the Secretary *did not have any role* in determining the sequence of the candidates on the ballot. 974 F.3d at 1253. Instead, Florida law gave election supervisors, and not the Secretary, authority for the "printing the names of candidates on ballots in the order prescribed by the ballot statute." Because the Secretary, the lone defendant, would not do (or fail to do) anything that harmed the Plaintiffs, the Court concluded, the plaintiffs "cannot meet Article III's traceability requirement." *Id.*

In this case, on the other hand, Plaintiffs have also sued the Governor and, as this Court held, the Governor is *the* state official responsible for the enforcement of the laws. Ga. Const. Art. 5, § 2, ¶ 2. The Governor further

has the power to commence criminal prosecutions, O.C.G.A. § 17-1-2, and has the final authority to direct the Attorney General to "institute and prosecute" on behalf of the state. O.C.G.A. § 45–15–35.

Furthermore, even if the Governor were not a defendant, Plaintiffs' injuries would be traceable for standing purposes to the SEB. The SEB has the power to enforce the challenged provisions by initiating civil prosecutions which can, and do, result in fines and referrals to the Attorney General for criminal prosecution. As the unanimous Supreme Court held in *Susan B. Anthony List*: "administrative action, like arrest or prosecution, may give rise to harm sufficient to justify pre-enforcement review." 573 U.S. at 165 (citing *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.,* 477 U.S. 619, 625–626, n. 1 (1986) ("If a reasonable threat of prosecution creates a ripe controversy, we fail to see how the actual filing of the administrative action threatening sanctions in this case does not")).

Lewis: Like *Jacobson, Lewis* featured plaintiffs who simply sued the wrong defendants. The City of Birmingham had raised the minimum wage to $10.10, which was above the $7.25 federal baseline. In response, the State Legislature passed a law that voided any local law, including Birmingham's, from requiring employers to pay wages higher than state of federal law mandates. 944 F.3d at 1292. The plaintiffs were two city employees who

were paid at a rate lower than the $10.10 prescribed by the City ordinance. Rather than suing their employers – whose violation of the City ordinance was causing plaintiffs harm – the Plaintiffs brought suit against the Alabama Attorney General, alleging that the State law that voided the Birmingham ordinance violated Equal Protection. The Eleventh Circuit held had since the Attorney General had not done, or threatened to do, anything that harmed the Plaintiffs, the plaintiffs' injuries were not traceable to the Attorney General, 944 F.3d at 1299-1301, or redressable by an injunction against the Attorney General. 944 F.3d at 1301-1303.

Lewis is completely consistent with the Court's rejection of Defendants' traceability and redressability arguments. Unlike the Attorney General in *Lewis,* the Defendants here are threatening to enforce the challenged laws and, also unlike the Attorney General in *Lewis,* are empowered by state law to do so. An order enjoining Defendants from enforcing the laws will obviously redress the harm that will be caused by their enforcement.

City of South Miami: Plaintiffs sued the governor and attorney general, challenging a state law that required local law enforcement to cooperate with federal immigration officials and allowed local law enforcement to transport aliens to federal custody. 65 F.4th at 634. The plaintiffs claimed the state law was being enforced in a racially discriminatory way by local law

enforcement. The plaintiffs insisted that their injuries were traceable to the governor and the attorney general and redressable by an injunction against them "because those officials have sufficient control over law enforcement." *Id.* at 641. But the plaintiffs "failed to produce any evidence at trial to support this claim." "Indeed, they have offered nothing to prove that the governor or attorney general has enforced or threatened to enforce" the challenged law. 65 F.4th at 641. *City of South Miami* is obviously distinguishable. Here, the Defendants have the authority to enforce the challenged laws and have threatened to do so.

Moreover, all three cases relied upon by Defendants address a fundamentally different fact pattern. In none of the three cases were *the plaintiffs* the subject of the challenged regulatory action. Where, as here, the plaintiff is the object of the regulatory action, traceability and redressability are seldom an issue. The Eleventh Circuit in *Lewis* explained:

> In explaining the traceability and redressability aspects of the case [*Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992)], the Supreme Court observed that where, as is perhaps typically the case, 'the plaintiff is himself an object of the [regulatory] action (or foregone action) at issue,' there is 'ordinarily little question that the action or inaction has caused him injury and that a judgment preventing or requiring the action will redress it.' . . . But when, as the Court said was true in the case before it, 'a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*" –

there, the funding agencies – "much more is needed" to establish standing.

For the foregoing reasons, Defendants' traceability and redressability arguments should be rejected.

III. MERITS

A. Suspension Rules (Counts I, II and III)

1. Count I – Procedural Due Process

In their long argument on the Board Member Plaintiffs' procedural due process claims, Defendants begin with the question of whether the Suspension Rules provide due process (ECF No. 123-1 at 22 – 24), then address the "initial" question of whether Plaintiffs have a constitutionally protected interest in the first place (*id.* at 24 – 25), and then return to the issue of whether the Suspension Rules provide due process (*id.* at 26 – 27). In this response, Plaintiffs will first address the threshold issue of whether Plaintiffs have a constitutionally protected interest and then address whether the Suspension Rules provide the required due process.

a) Plaintiffs Have a Constitutionally Protected Property Interest

Citing *Taylor v. Beckham,* 178 U.S. 548, 576 (1900), Defendants argue that Plaintiffs do not have a constitutionally protected property interest in their tenure as appointed board members of their county's boards of election.

(ECF No. 123-1 at 28). *Taylor,* however, concerned publicly *elected* officials and its holding, reached decades before the currently authoritative Supreme Court due process cases,[7] has never been applied to persons, like the Board Member Plaintiffs, who serve by appointment on governmental boards.

There is abundant authority confirming that the Board Member Plaintiffs have a constitutionally protected property interest in their board seats. *See, e.g., Langton v. Town of Chester,* 168 F.Supp.3d 597, 606 (S.D. N.Y. 2016) (plaintiff had protected property interest in unpaid, appointed, town library board position); *Cirulli v. Astorino,* 2015 WL 4635707, at *8-10 (S.D.N.Y. Aug. 3, 2015) (plaintiff had protected property interest in unpaid politically appointed board position); *DeKalb County School District v. Georgia State Board of Educ.,* No. 1:13-cv-00544 (N.D. Ga., Mar. 3, 2013, ECF No. 16 at 8) (Story, J.) (school board member plaintiff "appears to have a property interest that is subject to the protections of the Fourteenth Amendment"). ; *Allman v. Padilla,* 979 F.Supp.2d 205, 219-220 (D. P.R. 2013) (Veteran's Ombudsman "had a property interest in his position that

[7] *See Velez v. Levy,* 401 F.3d 75, 86-87 (2nd Cir. 2005) (holding that elected officials did not have a protected property interest, but noting: "We are mindful that, since *Taylor* and *Snowden* were decided, the Court has adopted a more expansive approach to identifying 'property' within the meaning of the 14th Amendment.").

validly stemmed from the enabling statute under which he was appointed"); *Guzman-Vargas v. Calderon,* 672 F.Supp.2d 273, 292 (D. P.R. 2009) (plaintiff had protected property interest in unpaid appointed board position on Puerto Rico Corporation for Public Broadcasting); *Ford v. Blagojevich,* 282 F. Supp. 2d 898, 905 (C.D. Ill. 2003) ("those lawfully appointed as commissioners have a constitutionally protected property interest in the position"). *See also City of Ludowici v. Stapleton*, 258 Ga. 868, 869 (1989) (an "elected . . . official who is entitled to hold office under state law has a property interest in his office which can be taken from him only by procedures meeting the requirements of due process."); *Linskey v. Guariglia,* 2012 WL 1268913, at *8 (M.D. Pa., Apr. 16, 2012) (elected board member had constitutionally protected property interest).[8]

b) Defendants are Not Entitled to Summary Judgment on Whether the Suspension Rule Complies with Due Process

Defendants explain correctly that the "what process is due" issue is resolved by balancing the factors set forth in *Mathews v. Eldridge*, 424 U.S.

[8] Under these cases, a constitutionally protected interest does not depend upon the board membership being a paid position. *E.g., Cirulli, supra, Guzman-Vargas, supra.* In this case, however, the Board Memberships are paid positions, further strengthening the claim for due process protection.

319 (1976). (ECF No. 123-1 at 22-23). But then Defendants jump to another issue (whether Plaintiffs have a property interest in the first place), *id.* at 24-25, then restate their standing argument, *id.* at 26, and never return to evaluating the *Mathews* factors, much less showing how they could possibility be entitled to summary judgment on such a fact-specific issue.

Along the way, Defendants state that Plaintiffs acknowledge "they would only be deprived of their purported property right *after* a notice and hearing takes place," citing Paragraph 84 of the Second Amended Complaint, ECF No. 104. But Plaintiffs make no such concession. Instead, in Paragraph 84(g), Plaintiffs allege, correctly, "[T]here is no stated required notice period for a takeover action when initiated by the SEB." (ECF No. 104 at 41). O.C.G.A. § 21-2-33.2 states: "the State Election Board may suspend a county or municipal superintendent pursuant to this Code section if at least three members of the board find, after notice and hearing" that a superintendent "has committed at least three violations of this title or of the State Election Board rules or regulations." But the law does not describe the notice that must be provided and does not say, anywhere, that *individual board members* must be given notice or the opportunity to be heard.

Moreover, Defendants do not address one of the fatal due process defects in SB 202's Suspension Rules. Throughout, SB 202 refers to the

"superintendent," which is a county's entire board of directors, as if the "superintendent" were an individual board member. For example, the law states: "In the event that a suspended superintendent or registrar does not petition for reinstatement … *his or her* suspension shall be converted into permanent removal." O.C.G.A. § 21-2-33.2(e)(2). This provision makes absolutely no sense at all: the "superintendent" is not a "his or her," it is the entire local board. Using the wrong personal pronouns is not a constitutional violation. But whether by mistake or design, SB 202 does not require that the SEB give any notice to any individual board members, either before or after they are deprived of their constitutionally protected property interest in their board positions. In addition, SB 202 only allows the superintendent (i.e., the entire board) to petition for reinstatement following a suspension; unless a board member convinces a majority of the suspended board to petition for reinstatement, the individual board member's suspension becomes permanent.

Defendants also make the confounding argument that, although it has never been enforced, "the Suspension Rule incentivized the county official to improve the administration of elections." What Defendants are referring to is the performance review process, not the Suspension Rules that Plaintiffs

are challenging. Plaintiffs do not challenge the performance reviews and they have nothing to do with this case.

As they did in their Motion to Dismiss, Defendants rely heavily on the decision of Georgia Supreme Court in *DeKalb County School District v. Georgia State Board of Education,* 249 Ga. 349 (2013). But analysis of that case, and a comparison of the local school board provisions at issue to SB 202, shows exactly why the Suspension Rule violates due process.

In *DeKalb County,* the Georgia Supreme Court held that the local school board removal provisions of O.C.G.A. § 20-2-73 complied with procedural due process under the Georgia Constitution, which the Court held mirrored the requirements of the U.S. Constitution. 294 Ga. at 369. The Court's analysis of the statutory school board removal provisions shows essential protections missing from SB202:

Initiation of removal. If a local school board receives notice from an accrediting agency of the school system's impending loss of accreditation, it is obligated to self-report the notification to state authorities, which reporting will trigger the Governor's authority to remove the local school board.

O.C.G.A. § 20-2-73 (a)(1)(A).[9] As the Georgia Supreme Court found, this provides adequate notice because the process is initiated by the *self-reporting* of the local school board. 294 Ga. at 369. SB202 begins with a provision that triggers the SEB's authority to initiate removal proceedings upon a "petition" from certain groups of *elected* officials (not the local board of elections) "following a recommendation based on an investigation by a performance review board." O.C.G.A. §21-2-33.2 (a).[10] SB202, however, also permits the SEB to initiate removal proceedings "on its own motion," *id., without* an investigation by performance review board. In addition, another provision of SB202, O.C.G.A. § 21-2-107(d), states: "the findings of . . . *any* audit or investigation performed by the State Election Board may be grounds for removal of one or more local election officials[11] pursuant to Code Section 21.2.33.2(b)." (Emphasis added). SB202 thus gives the SEB much more independent power to swiftly remove boards of elections than O.C.G.A. § 20-

[9] The Governor's authority may also be triggered if one-half of the schools in the district are deemed "turnaround eligible." O.C.G.A. § 20-2-73 (a)(1)(B). In *DeKalb Schools,* the triggering event was the notice of pending loss of accreditation.

[10] That performance review board is not independent, but one chosen by the State Election Board. O.C.G.A. § 21-2-107(b).

[11] "Local election official" means a county board of elections, a board of elections and registration, a probate judge fulfilling the role of election superintendent, or a municipal election superintendent. O.C.G.A. § 21-2-105.

2-73 gives to the Governor to remove local school boards.

More significant for procedural due process, however, is that SB202 allows the SEB to begin suspension proceedings "on its own motion" without providing affected individual board members with any notice at all. *Compare DeKalb County,* 249 Ga. at 371 (the notice from the accrediting agency "should give at least some indication of the problems identified by the accrediting agency to which the members of the local board of education could respond").

Predeprivation hearings. O.C.G.A. § 20-2-73(a)(1) requires the State School Board to conduct a public hearing in which testimony is taken and then make a recommendation to the Governor as to whether the local school board should be temporarily removed. SB202 provides that the SEB is to conduct a preliminary hearing to determine "if sufficient cause exists to proceed to a full hearing on the petition or if the petition should be dismissed." But no "full hearing" is required by, or provided for, in the law. In addition, SB202, does not require that individual members like the Board Member Plaintiffs receive any kind of notice or grant individual board members an opportunity to be heard at the hearing.

Reinstatement – postdeprivation hearing. Crucially, although both O.C.G.A. § 20-2-73 and SB202 provide for the temporary suspension of the

entire board as a group, O.C.G.A. § 20-2-73, unlike SB202, gives *individual* board members the right to seek reinstatement based upon whether the removed "member's continued service on the local board of education is more likely than not to improve the ability of the local school system or school to retain or reattain its accreditation." O.C.G.A. § 20-2-73(c). SB202, by contrast, allows for reinstatement of the election board entity, not an individual member, if the service of the "superintendent" – (apparently the *new appointee* superintendent) "is more likely than not to improve the ability of the jurisdiction to conduct elections." SB202 gives the individual board member no opportunity to be heard – ever – as to whether his or her continued service would be beneficial. Thus, under SB202, even an outstanding board member with impeccable service can be removed and have no opportunity for separate reinstatement.

In its consideration of whether O.C.G.A. § 20-2-73 complied with due process, the Georgia Supreme Court placed dispositive weight upon two features of the law: the requirement that the local boards be given notice of the deficiencies from objective third parties prior to the initiation of the removal proceedings and the opportunity it gave to an individual board

member to make his or her case for reinstatement.[12] SB202 has neither of these due process protections nor any process that resembles it.

Defendants' motion as to Count I should be denied.

2. Count II – The Suspension Rules Violate Substantive Due Process

In Count II, Plaintiffs allege that the Suspension Rules infringe on Plaintiffs' substantive due process rights by violating the Georgia Constitution in two distinct ways. First, the Suspension Rules "constitute a delegation of legislative functions to the executive in violation of the Separation of Powers Clause of the Georgia Constitution, Ga. Const. Art. I, § II, Para. III." (ECF 104 at 123, ¶ 360). Second, because the Suspension Rules allow the SEB to remove (but not replace) boards of registrars in counties that have separate boards of registration, it violates Article II, Section 1, Paragraph II of the Georgia Constitution, which provides: "The General Assembly shall provide by law for the registration of voters." (ECF 104 at ¶ 371). These state law violations are actionable under Section 1983:

[12] 249 Ga. at 370: "Before a member is removed permanently, however, the member is afforded the opportunity to petition for reinstatement;" "the member is afforded the opportunity to represented by counsel, to respond, and to present evidence on all issues involved"; *id.* at 371; the law "permits a suspended member petitioning for reinstatement to present evidence relevant to his or her role." *Id.*

Violations of state statutes or constitutional laws implicating the very integrity of the electoral process constitute a denial of substantive due process under the Fourteenth Amendment. *Gonzalez v. Governor of Georgia,* 978 F.3d 1266, 1271 (2020); *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981).

In their Motion for Summary Judgment, Defendants repeat the arguments that they made in their unsuccessful Motion to Dismiss, each of which were rejected by this Court. Defendants first contend that the "claims are not cognizable in federal court because they do not allege 'an ongoing violation of *federal* law and seek[] relief properly characterized as prospective. *Verizon Md. Inc. v. PSC,* 535 U.S. 635, 645 (2002)." (ECF No. 123-1 at 30-31 (emphasis added by the Defendants). Yet the claims seek *only* prospective relief, and it is hard to imagine a claim more cognizable in federal court than one that alleges that the enforcement of a state law should be enjoined because it violates the U.S. Constitution. Defendants cite *Verizon,* but do not explain the case's relevance. In *Verizon,* the Court, per Justice Scalia flatly rejected the defendants' jurisdictional argument, holding that "the doctrine of *Ex parte Young* permits Verizon's suit to go forward against the state commissioner in their official capacities." 535 U.S. at 648.

Defendants next argue that Count II, because it turns on state-law violations, intrudes upon state sovereignty contrary to the holding in *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 106 (1984). *Pennhurst,* however, applies only to state law claims. Count II is a federal claim brought, explicitly, under Section 1983 and the Fourteenth Amendment. As the Eleventh Circuit recently held in *Gonzalez,* violations of the state constitution implicating the very integrity of the electoral process also violate federal substantive due process. *See Duncan,* 657 F.2d at 691.

Defendants next argue that the *Ex parte Young* exception to the Eleventh Amendment does not apply to Count II because there is "no evidence that the SEB has or will use the takeover provision in the cavalier manner suggested by Plaintiffs." (ECF No. 123-1 at 31). Initially, this argument improperly conflates the merits of the claim with the *Ex parte Young* inquiry.[13] To the extent that the *Ex parte Young* issue overlaps with a consideration of the merits, there is no dispute that the SEB has not yet used the suspension provisions – carefully or cavalierly. It also is correct that the

[13] As this Court stated in its Order denying Defendants' Motion to Dismiss, "[i]n determining whether the *Ex parte Young* exception applies, a court conducts only a 'straightforward inquiry' into the complaint's allegations and does not analyze the merits of the claim." (ECF No. 78at 26, citing *Verizon,* 535 U.S. at 645-46).

Ex parte Young doctrine applies to on-going violations of federal law. But, as Judge Marcus explained in *Summit,* 180 F.3d at 1338, *Ex parte Young* does not require "that the enforcement of the allegedly unconstitutional state statute actually must be in progress." Rather, "where there is a threat of future enforcement that may be remedied by prospective relief, the ongoing and continuous requirement has been satisfied." *Id.*

Moreover, to survive summary judgment on their claims for prospective injunctive relief under *Ex parte Young*, Plaintiffs do not need to show that the enforcement of the Suspension Rules is "imminent." As Judge Marcus explained in *Summit,* a suit to enjoin the enforcement of an unconstitutional state law under *Ex parte Young* is properly brought "*before* enforcement is imminent." *Id.* (emphasis added). In fact, multiple lines of precedent encourage plaintiffs to seek equitable relief at the earliest opportunity to

avoid interfering with an ongoing election[14] or ongoing state criminal prosecutions.[15]

As to the actual merits of Count II - whether the Suspension Rule is an unconstitutional delegation of legislative authority - Defendants make only two brief arguments. First, Defendants, without elaboration, state that the issue is controlled by the decision of the Georgia Supreme Court in *DeKalb County,* 294 Ga. at 368 (ECF No. 123-1 at 32). In *DeKalb,* however, "no one contend[ed] that OCGA § 20–2–73 vests *legislative* or *judicial* power in the Governor, an executive officer." *Id.* (emphasis in original). In this case, however, this is exactly the contention. SB 202 vests in the SEB, an executive office, legislative power by giving the SEB the authority to make the rules which, if violated, triggers suspension. "A statute will be held unconstitutional as an improper delegation of legislative power if it is

14 *See Purcell v. Gonzalez*, 549 U.S. 1 (2006). As this Court explained recently in the consolidated cases, In re. SB 202, No. 1;21-mi-55555 (ECF No. 613 at 33), "[h]ad Plaintiffs filed their motions earlier, their prospective harms would not have been imminent, but had they filed any later, their relief may have been barred by Purcel." Plaintiffs do not concede that any of the injunctive relief that they now seek would be subject to *Purcell*, but the Court's reasoning demonstrates that it is entirely appropriate to seek injunctive relief well in advance of the enforcement of the challenged statute.

15 *See Younger v. Harris*, 401 U.S. 37 (1971) (federal courts should abstain from exercising jurisdiction over lawsuits when, among other requirements, the federal proceeding would interfere with an ongoing state judicial proceeding).

incomplete as legislation and authorizes an executive board to decide what shall and what shall not be an infringement of the law, because any statute which leaves the authority to a ministerial officer to define the thing to which the statute is to be applied is invalid." *Howell v. State,* 238 Ga. 95, 95 (1976).

Second, Defendants argue that the issue should be certified to the Georgia Supreme Court. Plaintiffs note that, in *Gonzalez,* Judge Cohen declined the State's request for certification of the state constitutional issue and ruled for the plaintiffs. On appeal, the Eleventh Circuit affirmed, but only after certifying the issue to the Georgia Supreme Court, which agreed with Judge Cohen's analysis of Georgia constitutional law. *Gonzalez,* 978 F.3d at 1271.

Plaintiffs do not necessarily oppose consideration of certifying the delegation issue at the appropriate time, provided the Defendants agree, or the Court order, that the Suspension Rule not be invoked during the pendency of the litigation on the issue. Such a stay would not harm Defendants. To the contrary: pre-existing law (outside of SB 202), gives the SEB full authority to investigate violations of election law and oversee local boards of election. O.C.G.A. §§ 21-2-31(5), 21-2-33.1.

Plaintiffs, however, *do* oppose certification of the "remove-but-not-replace" provision since there is no question that it violates Georgia law (and

Defendants do not contend otherwise). In counties, like Fulton, that have a combined board of elections and registration, the issue does not arise. A separate board of registration, however, like Chatham County's, is not a "superintendent" under Georgia law, O.C.G.A. § 21–2–2 (35) (2021), or a "local election official" under SB202. O.C.G.A. § 21–2–105 (2021). A separate board of registration may be suspended under SB202, O.C.G.A. § 21–2–33.2(e), but only "superintendents" (which includes boards of election and combined boards of registration and election) may be replaced. Thus, under SB 202, the SEB may remove, but not replace, a board of registrars, leaving an entire county and its voters with no official to handle voter registration or any of the many tasks associated with absentee voting. (ECF No. 104 at 29, ¶ 64).

In their Brief, Defendants do *not* deny that removing but not replacing a board of registrars would be unconstitutional under the Georgia Constitution.[16] The Defendants should concede the point and consent to (or not oppose) an order enjoining its enforcement.

[16] The Suspension Rules that allow the SEB to remove (but not replace) boards of registrars in counties that have separate boards of registration is challenged by the Plaintiffs in both Count II (substantive due process) and Count III (fundamental right to vote). In their Brief, Defendants address this claim only in their discussion of Count III.

3. The "Remove but Not Replace" Provision of SB 202 Violates the Fundamental Right to Vote

In Count III, Plaintiffs allege that the "remove but not replace" provisions of SB 202 violate the fundamental right to vote. As the Court stated in its Order denying Defendants' Motion to Dismiss, resolving an *Anderson-Burdick* claims requires the Court to balance the "character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendment" against the "precise interest" advanced by the state as a justification for the burden. (ECF No. 78 at 30 (quoting *Anderson v. Celebreeze,* 460 U.S. 780, 789 (1983)). There is no dispute that without a board of registration, a county has no means of conducting absentee balloting.

The law plainly is unconstitutional under *Anderson-Burdick*. The law allows the SEB to disable absentee balloting in an entire county – a severe burden on the right to vote – with no conceivable governmental justification. The only question is whether injunctive relief should be granted is whether Plaintiffs must wait until the SEB actually invokes this provision and guts absentee balloting in an entire county. The answer is "no." "A plaintiff 'does not have to await the consummation of threatened injury to obtain preventive relief.'" *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 473 (7th Cir. 2012) (quoting *Babbitt,* 442 U.S. at 298).

B. Observation Rule: Counts IV, V, and VI

1. Count IV - The Observation Rule Violates the Fundamental Right to Vote

The Observation Rule makes it a felony to "intentionally observe an elector while casting a ballot in a manner that would allow such person to see for whom or what the elector is voting." O.C.G.A. § 21-2-568.1. In its Order on Plaintiff's Motion for Preliminary Injunction, this Court held that the Observation Rule requires the voter to have the intention, not just to see another elector, but of seeing for whom or what the other elector is voting. (ECF No. 49 at 28-29). Plaintiffs do not agree with that reading of the rule, but for purposes of weighing the burden that the law places on the right to vote, the difference may be immaterial for two reasons.

First, the Court's reading of the Rule may reduce voters' exposure to the felony, but only as a matter of degree, and any conclusion as to whether the burden is "severe," "substantial," or "minimal" for purposes of *Anderson/Burdick,* is essential a fact question that depends upon the credibility of Plaintiffs' testimony. Given the size of the BMD touchscreen that the state uses for in-person voting, as a factual matter the requirement that the voter have the intention to see for whom or what another elector is voting does not make much of a difference. The Plaintiffs' evidence, which for

purposes of summary judgment must be taken as true, establishes that voters are genuinely and reasonably fearful that lawfully casting a vote in person in Georgia will subject them to prosecution for a felony.

Without doubt, protecting ballot secrecy is a legitimate state interest. But if existing Georgia law were followed, the Observation Rule, and the burden on the vote that it imposes, would be unnecessary. O.C.G.A. § 21-2-379.22(5) states: "No electronic ballot marker shall be adopted or used" unless they "[p]ermit voting in absolute secrecy so that no person can see or know any other elector's votes." The Georgia Constitution provides: "Elections by the people shall be by secret ballot." Ga. Const. Art. II, § 1, Para. 1. Thus, a voter cannot violate the Observation Rule unless the State has already violated the Georgia Constitution and O.C.G.A. § 21-2-379.22. Or, to put in terms of the *Anderson-Burdick* test, the State interest in ballot secrecy does not make it "necessary to burden the plaintiff's rights" with the Observation Rule, *Anderson,* 460 U.S. at 789; the state simply needs to follow existing Georgia Constitutional and statutory law. If it cannot use electronic ballot markers "so no person can see or know any other elector's votes," then it cannot use electronic ballot markers.

In partial anticipation of this argument, the Defendants make the breathtaking argument that Defendants are not responsible for ensuring that BMDs are used in compliance with Georgia law:

> It is the *counties* that select polling locations and decide how to set up ballot stations according to the orientation of the space they have selected. . . . If the scenario occurs where Plaintiffs simply cannot look around without accidentally (but also somehow intentionally) viewing other voters' ballots, it is because the county has set up the polling location in a way that allows for that.

(ECF No. 123-1 at 33-34 (emphasis in original). But O.C.G.A. § 21-2-379.22(5) is a state election law that these Defendants are duty bound to respect and enforce. Blaming this ongoing violation of Georgia law upon local superintendents (who the SEB is supposed to be overseeing) is irresponsible when it has been demonstrated since the system's implementation in 2020 that counties are unable to position BMD touchscreens to avoid ballot secrecy problems.[17] If Defendants complied with their duty to ensure that the superintendents are following Georgia law, and ensured that BMDs were used properly, then the Observation Rule could not be violated and would be

[17] (ECF No. 104 at 29 (photo of Dalton voting location BMD layout); ECF No. 15-1 at 7 (photos of Cartersville and State Farm Arena voting locations); ECF No. 15-3 at 17-19 (multiple photos of voting locations using layout not in compliance with Secretary's "guidance"); Nakamura Dep., ECF No. 132 at 27:1-4 (across the room "I could see three BMDs very clearly").

unnecessary. But the issue is not who amongst Georgia's government officials are responsible for protecting ballot secrecy with the BMDs. With respect to Plaintiffs' fundamental right to vote claim, it cannot be disputed that the size and placement of the BMDs make it extremely difficult to vote without reasonable fear of committing a felony. This is at least a substantial burden on the right to vote.

In their Motion for Summary Judgment, Defendants do not point to any undisputed facts supporting any governmental interest that outweighs the burden that the Observation Rule places on the right to vote. Summary judgment on this claim, therefore, must be denied.

2. Count V - The Observation Rule is Void for Vagueness

The Court denied Plaintiffs' Motion for Preliminary Injunction on Plaintiffs' void for vagueness challenge to the Observation Rule, stating that Plaintiffs were unlikely to prevail at trial. (ECF No. 49 at 31). Plaintiffs have now submitted evidence creating a genuine issue of material fact as to whether, in the actual context of typical voting locations crammed with large screen BMDs, the vagueness of the Observation Rule allows it to be selectively enforced. (This evidence will overlap with the evidence supporting the other challenges to the Observation Rule.) Other than noting that the law has never been enforced, Defendants provide no argument or evidence

supporting summary judgment on this claim. A trial on the issue will allow the Court to consider this testimony live and consider its strength.

3. Count VI - The Observation Rule Violates the VRA

In their Motion for Summary Judgment, Defendants argue that there is no private right of action to enforce the Voting Rights Act, again citing Judge Branch's *dissent* in *Alabama State Conference of the NAACP v. Alabama,* 949 F3d 647, 656-57 (11th Cir. 2020). The Court already rejected this identical argument, explaining that the Supreme Court's decision in *Brnovich v. Democratic National Committee,* 141 S. Ct. 2321 (2021), "confirms that the Supreme Court has assured that an implied right of action exists under the VRA. (ECF No. 78 at 36). Plaintiffs also have submitted evidence supporting their allegations (deemed by the Court sufficient, *id.*) that the Observation Rule could be "invoked to selectively criminalize mere entry into a polling place." Graham Dep., ECF No. 129 at 76:11-13.

C. Communications and Tally Rule (Counts VII, VIII and XI)

1. The Communications Rule Violates the First Amendment

The "Communications Rule," O.C.G.A. § 21-2-386(a)(2)(B)(vii), prohibits "monitors" and "observers," under penalty of criminal misdemeanor, from:

> (vii) Communicating any information that they see while monitoring the processing and scanning of the absentee ballots, whether intentionally or inadvertently, about any ballot, vote, or

> selection to anyone other than an election official who needs such information to lawfully carry out his or her official duties.

Plaintiffs do not challenge restrictions on the disclosure of information about tallies of contests "before the close of the polls," but the Communications Rule "criminalizes far more," including "any information about absentee ballot processing or scanning." (ECF No. 104 at 411). Plaintiffs allege:

> For example, if a monitor or observer (including the public and members of the press) witnessed scanning machine malfunctions, unsecured ballots, mishandling of ballots, or improperly rejected ballots, such information must not be concealed from the Secretary of State, law enforcement, interested parties and the public. Under SB202, however, if the monitor or observer reported such discrepancies to someone other than the election official who was responsible for the failure, the monitor or observer would be potentially guilty of a criminal misdemeanor.

(ECF No. 104 at 412).

In its Order on the Motion for Preliminary Injunction, this Court held that content-based restrictions like the Communications Rule are "'presumptively unconstitutional and may be justified only if the government proves that the regulation is narrowly tailored to serve compelling state interests.'" (ECF No. 49 at 16 (quoting *Reed v. Town of Gilbert,* 576 U.S. 155, 165 (2015)). "However," this Court continued, "the Supreme Court of the United States has 'long recognized that the government may impose some

content-based restrictions on speech in nonpublic forums,'" where the justification needs only be reasonable. (ECF No. 49 at 16-17).

The issue to be tried in this case is whether the Communications Rule operates to restrict speech in a nonpublic forum – such as in the "physical space" of the ballot processing room (ECF No. 49 at 18-19), or beyond, and whether there is a sufficient justification for the restriction. In its Order denying Defendants' Motion to Dismiss this claim, the Court observed: "Determining the type of forum where the rules would apply and selecting the appropriate level of review requires the type of substantive merits inquiry that is not appropriate on a motion to dismiss." (ECF No. 78at 40).

In their Motion for Summary Judgment, Defendants do not address the "substantive merits issue" framed by the Court, but instead claim that the Communications Rule is justified in prohibiting communications about vote counts prior to the closing of the polls. (ECF No. 123-1 at 10, 39). But this argument only makes sense if the Communications Rule prohibited the disclosure of vote counts anywhere, not just in the ballot processing room. Though the argument reveals that the Defendants agree with the Plaintiffs that the Communications Rule prohibits speech anywhere, and not just in the ballot processing room, it is otherwise irrelevant: Plaintiffs specifically do *not*

challenge the restrictions on the disclosure of information about vote tallies "before the close of the polls." (ECF No. 104 at 412).

The Communication Rule, however, criminalizes the disclosure not only of vote counts, but "any information" "about any ballot, vote or selection," restrictions that the Defendants do not address.

Plaintiffs respectfully submit that Court's reading of the Communications Rule as applying to only communications in the ballot processing room is incorrect.[18] As discussed above, the Defendants do not read the rule as limited to the ballot processing room. The "while monitoring" phrase describes the *information* that is subject to the Rule ("information that they see while monitoring"), not the forum in which the speech occurs. Since it is a content-based restriction on speech outside nonpublic fora and is not narrowly drawn to serve a compelling state interest, the Communications Rule is unconstitutional.

Though Plaintiffs have no burden to do so, Plaintiffs have presented substantial evidence showing how the Communications Rule seriously

[18] If any doubt remains on the meaning of this concededly poorly drafted provision, it should be found void for vagueness. *See Center for Individual Freedom v. Madigan,* 697 F.3d 464, 503-04 (7th Cir. 2012) (Posner, J., concurring) ("We should insist, in the name of the First Amendment, that the Illinois legislature speak with greater clarity."). !!!

inhibits the work, and speech, of poll monitors and observers. (*E.g.,* ECF No. 15-3 ¶¶ 3, 11-15, 17; Marks Dep., ECF No. 130 at 81:6-85:17, 86:1-9; Ashling Dep., ECF No. 126 at 34:3-34:25, 36:2-8; Fuller Dep., ECF No. 128 at 51:22-52:8; Martin Dep., ECF No. 131 at 20:6-20; Nakamura Dep., ECF No. 132 at 27:11-13).

D. The Tally Rules – Counts VIII and XI

a) Overview

Plaintiffs challenge two Tally Rules as void for vagueness (Count VIII) and a violation of the First Amendment (Count XI). Defendants attempt to defend the broad language of the Tally Rules as necessary to avoid early disclosure of ongoing vote tallies, which Plaintiffs agree is a critical policy element of ballot processing. But the Defendants' analysis fails to distinguish between the disclosure of information about absentee ballot processes and ballot counts, which is crucial for election transparency, on the one hand, and disclosure of *vote* counts before the close of the polls, which is appropriately universally condemned, on the other.

To review: what Plaintiffs call "Tally Rule 1" makes it a misdemeanor to "tally, tabulate, or estimate or cause the ballot scanner or any other equipment to produce any tally or tabulate partial or otherwise, of the absentee ballots cast until the time for the closing of the polls." O.C.G.A. §

21-2-386(a)(2)(A). What Plaintiffs call "Tally Rule 2" prohibits "monitors or observers" "while viewing or monitoring" from "[t]allying, tabulating, estimating, or attempting to tally, tabulate, or estimate, whether partial or otherwise, any of the votes on the absentee ballots cast." O.C.G.A. § 21-2-386(a)(2)(B)(vi).[19] The two "Tally Rules" are found in O.C.G.A. § 21-2-386(a)(2), which governs the wide-ranging activities that must be open to the public taking place in the absentee mail ballot processing facilities up until 7 am on Election Day.[20]

There are two important distinctions between Tally Rule 1 and Tally Rule 2. First, while the Court has read Tally Rule 2 to prohibit speech occurring only in the ballot processing room where the monitoring occurs,[21]

[19] The Tally Rule provisions of SB 2020, O.C.G.A. § 21-2-386(a)(2)(A) & (B)(vi), relate to the processing of absentee mail ballots from the third Monday prior to Election Day until 7 AM on Election Day. Long-existing statutes, codified at O.C.G.A. § 21-2-386(a)(5) & (6), provide different regulations for the same activities beginning at 7 AM on Election Day.

[20] Such activities include, but are not limited to, removing ballots from envelopes, inspecting ballots for damage, manual duplication of damaged ballots, verifying the validity of the ballot style, documenting ballot accounting controls, documenting and verifying chain of custody of ballots and envelopes, scanning and tabulation of ballots, and securing ballots when not in active use.

[21] Tally Rule 2 is in the same subsection as the Communications Rule and presents the same issue as to its territorial scope. It is Plaintiffs' position that both Tally Rule 2 and the Communications Rule apply to speech anywhere, not just in the ballot room.

Tally Rule 1 contains no such limitation and inarguably prohibits speech anywhere. Second, the content that Tally Rule 1 regulates is information about the "absentee ballots *cast*." Tally Rule 2, by contrast, regulates information about "*votes on* the absentee ballots cast." The number of absentee ballots cast – the subject of Tally Rule 1 - includes the number of absentee ballots that are in various stages of processing and counting. "Votes cast," "vote tallies," or "vote counts," the subject of Tally Rule 2, on the other hand, refers to how many votes a particular candidate or a particular proposition has received. This is a crucial distinction, addressed in greater detail below.

Plaintiffs originally challenged the Tally Rules as void for vagueness under the Due Process Clause because, among other reasons, they criminalize "pure thought." Plaintiffs did not originally challenge the Tally Rules under the First Amendment because Plaintiffs did not read the Tally Rules as prohibiting or restricting communications. In its Order on Plaintiffs' Motion for Preliminary Injunction, however, the Court rejected Plaintiffs' reading of the Tally Rules, holding that "objective conduct, rather than mere thought, would be necessary for enforcement," and noting in a footnote that Plaintiffs "mentioned but did not develop and argument that prohibiting communications regarding ballot estimates would implicate the First

Amendment." (ECF No. 49 at 34-35). With leave of Court, Plaintiffs amended their complaint to add a First Amendment challenge to the Tally Rules. (ECF No. 104 at 144).

b) Defendants' Arguments as to Count VIII (Void for Vagueness)

In their Motion for Summary Judgment, Defendants contend that the Court's clarification that the Tally Rules require objective conduct cures any unconstitutional vagueness in the Rules. The uncertain territorial scope of Tally Rule 2, however, still renders it void for vagueness. *See* note 22, *supra*.

c) Defendants' Arguments as to Count XI (First Amendment)

In their Brief, Defendants contend that they are entitled to summary judgment on Count XI because, first, the conduct prohibited by the Tally Rules "takes place in a non-public forum." (ECF No. 123-1 at 44). This is incorrect, particularly with respect to Tally Rule 1. Unlike Tally Rule 2 (and the Communications Rule), which might be read to prohibit only speech in the ballot counting room, Tally Rule 1 plainly criminalizes speech about absentee ballots cast wherever that speech may occur, "until the time for the closing of the polls." O.C.G.A. § 21-2-386(a)(2)(A).

Second, Defendants insist that the Tally Rules are "not content-based." (ECF No. 123-1 at 44). This too is incorrect. Both Tally Rules, as this Court

has already held, are explicitly content-based: they criminalize speech about estimating, tabulation, and tallying of absentee ballots cast (Tally Rule 1) or votes on the absentee ballots cast (Tally Rule 2), and not speech about other matters.[22]

Third, Defendants contend that the Tally Rules should be evaluated under *Anderson/Burdick* because the Tally Rules relate to the "mechanics of the electoral process." This argument is baseless, as this Court has held. (ECF No. 78 at 39). Plaintiffs do not challenge the Tally Rules as burdens on the right to vote, which *Anderson/Burdick* addresses, but instead as burdens their freedom of speech under the First Amendment.

Having thoroughly misstated the scope of the Tally Rules and the governing law, Defendants have no basis for summary judgment on Plaintiffs' First Amendment challenge to the Tally Rules. As content-based restrictions on speech, the Tally Rules are presumptively unconstitutional and may be justified only if the government proves that they are "narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.,* 575 U.S, 155, 163 (2015). *See also Consol. Edison Co. v. Public Service Comm'n,* 447 U.S. 530, 537 (1980) (even if viewpoint neutral, content-based restrictions are

[22] In this respect, they are no different that the Communications Rule, which this Court found to be content-based. *See* Order, ECF No. 49 at 18.

presumptively unconstitutional). Defendants contend that the government has a legitimate interest in prohibiting the disclosure of the number of *votes* cast for candidates or propositions before the close of the polls. Plaintiffs completely agree, and such a sound prohibition is almost universal across the nation. But this governmental interest has nothing to do with Tally Rule 1, which criminalizes communications about *the number of absentee ballots cast.* Defendants have identified no governmental interest in criminalizes communication about the number of absentee ballots cast. This is public information that is routinely the subject of public and official oversight and legitimate press coverage.

E. Photography Rules (Counts IX and X)

1. Overview

The Photography Rules, O.C.G.A. §21-2-568.2 (2)(B), contains two bans. Photography Rule I (what Plaintiffs called "Photo Ban A") makes it a misdemeanor to "[p]hotograph or record the face of an electronic ballot marker while a ballot is being voted or while an elector's votes are displayed on such electronic market." In light of the Court's holding that Photography Rule 1 applies only to photography in the nonpublic forum of a voting location (ECF No. 49 at 22), Plaintiffs do not challenge Photography Rule 1. Photography Rule II (what Plaintiffs called "Photo Ban B") makes it a

misdemeanor to "[p]hotograph or record a voted ballot." This Court granted Plaintiffs' motion for preliminary injunction as to Photography Rule II, holding:

> Even if the Court accepts State Defendants' argument that Photography Rule II serves the compelling state interest of preserving ballot secrecy and preventing fraud, they have neither argument that it is narrowly tailored to serve those interests or rebutted Plaintiffs' assertion that the rule is a blanket prohibition on recording any voted ballot under any circumstance.

(ECF 49 at 22). The Court therefore found that Plaintiffs were likely to succeed on the merits of their claim. (*Id.*).

In their Motion for Summary Judgment, Defendants again discuss the interest in preserving ballot secrecy and preventing fraud (such as through "vote buying schemes"[23]), but do not address their failure to explain how Photograph Rule II is narrowly tailored to serve those interests. Photography Rule II prohibits the recording of a voted ballot at any time, before or after an election, under any circumstances. On this basis alone, Photography Ban II is not narrowly tailored.

Since voted ballots do not disclose the identity of the voter, photographs

[23] Vote buying schemes are already a crime in Georgia. O.C.G.A. § 21-1-579(1).

of them are commonplace and an essential part of transparent elections. As the historic photos previously filed vividly display,[24] photographs of voted ballots are essential to preserving election transparency, one stated purpose of SB202. Photo Ban II, which criminalizes them, is unconstitutional. *See also* GFAF Amicus Brief, ECF No. 29 at 8 – 10. Defendants articulate no basis for a reconsideration of this Court's ruling. The Court has found that Plaintiffs are likely to prevail on this claim at trial; a fortiori they have carried their lighter burden of showing that Defendants are not entitled to summary judgment.

2. Count X: Photography Rule – Void for Vagueness

So long as Photography Rule I is read to apply only to photography in the nonpublic forum of a voting location while active voting is occurring (ECF No. 49 at 22), it is not void for vagueness. Photography Rule II, if read literally, is not void for vagueness but it is unconstitutional under the First Amendment. If Photography Rule II is given something other than its plain meaning, then it is to that extent void for vagueness.

Defendants' Motion for Summary Judgment should be denied.

Respectfully submitted this 24th day of August 2023.

[24] *See* ECF No. 15-2 at 2-3.

/s/ Bruce P. Brown
Bruce P. Brown
Georgia Bar No. 064460
BRUCE P. BROWN LAW LLC
1123 Zonolite Rd. NE
Suite 6
Atlanta, Georgia 30306
(404) 386-6856
bbrown@brucepbrownlaw.com

/s/ Cary Ichter
Cary Ichter
Georgia Bar No. 382515
ICHTER DAVIS LLC
3340 Peachtree Road NE
Suite 1530
Atlanta, Georgia 30326
(404) 869-7600
CIchter@Ichterdavis.com

/s/ Greg K. Hecht
Greg K. Hecht
Georgia Bar No. 003860
HECHT WALKER, P.C.
205 Corporate Center Dr.
Suite B
Stockbridge, Georgia 30281
(404) 348-4881
greg@hmhwlaw.com

/s/ Shea E. Roberts
Shea E. Roberts
Georgia Bar No. 608874
GIACOMA ROBERTS & DAUGHDRILL LLC
945 East Paces Rd.
Suite 2750
Atlanta, Georgia 30326
(404) 924-2850
sroberts@grdlegal.com

CERTIFICATE OF SERVICE AND CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 5.1

Pursuant to N.D. Ga. L.R. 5.1(C), I certify that the foregoing was prepared using Times New Roman 14 font. I electronically filed this using CM/ECF, thus electronically serving all counsel of record.

This 24th day of August 2023.

/s/ Bruce P. Brown
Bruce P. Brown
Georgia Bar No. 064460
BRUCE P. BROWN LAW LLC
1123 Zonolite Rd. NE
Suite 6
Atlanta, Georgia 30306
(404) 386-6856
bbrown@brucepbrownlaw.com

EXHIBIT A

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

COALITION FOR GOOD GOVERNANCE, ET AL.,
Plaintiffs,

vs.

BRIAN KEMP, Governor of the State of Georgia, in his official capacity, ET AL.,

Defendants.

Civil Action File No.
1:21-CV-02070-JPB

30(b)(6) VIDEOTAPED DEPOSITION OF GAPPAC
TESTIMONY OF CAM T. ASHLING
May 30, 2023
10:05 a.m. - 12:15 p.m.
TAKEN BY REMOTE VIDEOCONFERENCE

Shawn E. Fleck, RPR, CCR #2859

that.

A. You want me to read it out loud, or you want me --

Q. No. Just -- just to yourself.

A. -- to read it to myself?

Okay.

Ooh. Uh-oh.

Q. And you can just let me know when you need me to scroll down.

A. Okay. Thank you.

Okay. You can scroll down, please.

Scroll down, please.

Q. I think it's that one.

If you want to complete that -- that sentence on that page, and I'll -- I'll go to the next page for you.

A. You can scroll down, please.

Okay. I'm done.

Q. Thank you. And thank you for taking the time to read through that.

It might be easier, as we go through these topics to just reference back, instead of having to keep going through it.

So just quickly, Ms. Ashling, do you recognize the allegations contained in Paragraphs

201 through 210, that you just read?

A. Yes.

Q. And to the best of your knowledge, are these statements in those paragraphs true and accurate, as they relate to the Organization?

A. Yes.

Q. And when I reference later on in the deposition "diversion of resources", do you understand how this term is used, and relates to Paragraph 207?

A. I do.

Q. Now I will stop sharing Docket 104 or Document 104 on the docket, and bring back up Defendant's Exhibit 1, and we will just kind of go through these topics one-by-one on the exhibit to the deposition notice, but I just wanted to check in real fast to see if you wanted to take a break before we start going, or if you're doing okay?

A. I'm doing all right.

Q. And I will be scrolling down.

And again, Ms. Ashling, can you see my screen?

A. I can.

Q. Perfect.

And we will turn to what is identified as

voters on that?

A. We probably did the same thing.

We shared other people's information, and if we made some, and then I would just write whatever I needed to write, and then people would read what I write, and that's kind of like my, you know, my public awareness, because I am GAPPAC.

Q. After SB 202 was passed, is the Organization still able to do its voter education work, as it relates to educating voters on their requirements for the exact match?

A. I'm sorry. Can you say that again?

Q. Yeah. I'm sorry. I'll rephrase.

After SB 202 was passed, does the Organization still do its work educating voters, generally?

A. We -- we do, but we have to do more of it than we used to have to do, and I rather not be doing the education stuff, and be recruiting AAPI candidates, and just getting out the vote.

You know, voter education is not our main objective. I think that's like the nonprofit side that they should be doing that, and we are having to do that, because, you know, of how cumbersome it is to navigate the system now after SB 202.

Q. You mentioned the voter takeover provision.

Were there any additional efforts that the Organization participated in related to specific provisions of SB 202 that you can recall?

A. You mean other -- other points in the lawsuit?

Q. Yeah. Other -- other -- other efforts related to specific provisions of SB 202 that the Organization has devoted resources to.

A. We have -- we have numbers of the Georgia Advancing Progress PAC that also do poll monitoring. And, you know, they're unable to communicate back what they see or what they found, because of provisions of SB 202.

That makes it hard for us to monitor, and to make sure that our community is not getting discriminated against.

I'm also concerned about the voters going to the poll, and being possibly scared to go and vote, because of a felony provision that allows anybody to arbitrarily, like, accuse you of looking at people's ballots. That's scary.

I'm dealing with a very timid base of voters. They are, a lot of times, new voters, or they're second -- you know, they're, you know,

limited English voters, or they're very elderly.

So if it's very easy for them to suddenly get arrested and thrown in jail, I'm going to have a very hard time motivating people to go vote.

And SB 202 is scary. It just allows for, you know, any -- anyone to arbitrarily prosecute others without them having a very good ability to defend themselves.

Q. And so we'll start off with the poll monitoring provision concerns you identified.

What resources has the Organization devoted to combating the effects of the poll monitoring provision?

A. Well, we're in this lawsuit, for one. I don't know how else to fight it besides raising awareness about it, and then taking legal action to kind of stop it.

Q. And then same question for the concerns you identified with the felony provision of SB 202.

What resources has the Organization diverted to address and combat the concerns with the felony provision in SB 202?

A. We have diverted me to deal with a lot of this, and I'm having to, like, educate the public on it. Speak out about, you know, what's harmful.

going to recruit poll watchers and monitors, if we're going to put them at risk for being jailed. So that's -- I don't know how we're going to do that.

That's definitely diverting resources, because we have people who want to do it, but now we're concerned if they can do it, and if they want to anymore. It's -- you know.

It shouldn't be this hard.

Q. And with those -- the poll monitoring work and activities you just described, what specific activities and projects related to poll monitoring has the Organization been unable to engage in?

A. Not being able to poll monitor, or having less poll monitors. Having difficulty recruiting poll monitors, which means we have to spend more time trying to find more people.

And then having to explain everything. And then having anxiety about, you know, making sure our people are safe when they're trying to protect democracy.

Q. Has the Organization been able to recruit poll monitors since SB 202 has been passed?

A. Not more than we had before. So not successfully.

EXHIBIT

B

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

COALITION FOR GOOD GOVERNANCE, et al.,

Plaintiffs,

vs.

BRIAN KEMP, Governor of the State of Georgia, in his official capacity, et al.,

Defendants.

CIVIL ACTION FILE

NO. 1:21-CV-02070-JPB

VIDEO DEPOSITION OF
JEANNE DUFORT
May 12, 2023
9:33 a.m.
TAKEN BY REMOTE VIDEOCONFERENCE
Robyn Bosworth, RPR, CRR, CRC, CCR-B-2138

MR. BROWN: I'm going to --
A Paragraph 98.
MR. BROWN: I'm going to object to the form.
BY MR. JACOUTOT:
Q Yeah, let me rephrase.
So do you see paragraph 98 there?
A I do see paragraph 98.
Q And it cites a -- it cites a statutory provision of the Georgia Code, correct?
A It does.
Q And can you take a look at -- take a look at that Code section that's cited for me and let me know when you've had a chance to look through it?
A I have read it.
Q Okay. And to your knowledge, have you observed any voters in violation of this Code section since the enactment of SB202?
MR. BROWN: Object to the form.
BY MR. JACOUTOT:
Q And you can answer, Ms. Dufort.
A I believe you're asking me to make a judgment on the word "intentionally," and I think that -- I can tell you this, I have many times been at a polling place with -- where many people in the

polling place had to take direct action to not see what was on the screen because the screens are so obvious.

I had an experience as a poll watcher where the room was tight, the room was set up in a way that the voting station for voters who needed special access was set up facing the three chairs that were the only place for the three poll watchers to sit, and we were directed to sit in those places. And that screen, when a voter came to use it, was clearly visible to us and in the path of our looking out over the entire room.

So it was impossible -- we had to choose between continuing to observe the normal activity in the room, and we would see that screen while he was voting.

Immediately after that voter left, the poll manager had also observed that happening, the problem of it, changed the configuration, realized that the change instead made the screen visible to every voter waiting in line to vote and changed it back, and instructed us that whenever that station was in use, we would please avert our eyes and stop doing our poll watching duties.

So intentional, not intentional, you tell

me.

Q So you made the decision in that moment to sort of purposely avert your eyes from the screen, I guess, so you didn't observe it?

A Correct. We reacted very -- there were two Republican poll watchers and me, and all three of us realized simultaneously the fundamental problem.

Q Uh-huh.

Do you have any intention to attempt to observe a voter's ballot in the future at a polling place?

MR. BROWN: Object.

A I have no intention to observe how another voter votes. I am a strong advocate for ballot secrecy for reasons I have laid out in several declarations.

BY MR. JACOUTOT:

Q Uh-huh.

How many times have you observed the polling places since the enactment of SB202?

A However many elections there have been since SB202. I haven't stopped to count, but I am consistently a poll watcher and an organizer of poll watchers in Morgan County as part of my

like mine is generally the person who says, Here is where you can stand.

Q And so are you able to see the ballot in a way that you're actually able to determine, you know, what votes are going where? Let me rephrase that actually.

Can you see the content of the ballot when you're doing this observation?

A It literally would depend on where you're instructed to stand. I would also say that it depends on the content of the ballot itself. For example, a runoff election where there's only one or two contents, even a flash look, you visually can understand is this the top choice or the bottom choice, right, without trying, without any effort from a further distance than you could discern where is it on a more complicated ballot. So it's very situational, and we have one rule.

Q Okay. And in those situations where you could potentially see the content of the ballot, what do you do to mitigate that from happening?

A So isn't that the conundrum, right? Because your job is to observe and report, not to violate ballot secrecy or anything, but if the only alternative is to not look, then you're being

instructed not to do your job.

Q And this is on a hand-marked paper ballot that's been delivered presumably either by mail or through a drop box?

A In Georgia, all early absentee votes are hand-marked paper ballots, yes.

Q When you say "absentee votes," you're referring to absentee, I assume, by mail because --

A Absentee by mail. That's the only thing you're observing because the in-person early voting is getting recorded, you know, on a scan card. So there's no observation of that until the polls are closed and they're popping in their little scan cards.

Q Okay. And ballot secrecy has been mandated by the law since before SB202, correct?

A It's in the Georgia Constitution.

Q Okay. And when you were doing these observations of poll watchers opening absentee ballots prior to SB202, you were able to maintain the ballot secrecy of the votes that you were observing, correct?

A No, that's an incorrect statement. Poll watchers don't open absentee votes.

Q Did you ever observe people opening

EXHIBIT C

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

COALITION FOR GOOD GOVERNANCE, et al.,

Plaintiffs,

vs.

BRIAN KEMP, Governor of the State of Georgia, in his official capacity, et al.,

Defendants.

CIVIL ACTION FILE

NO. 1:21-CV-02070-JPB

30(B)(6) VIDEOTAPED DEPOSITION OF
JACKSON COUNTY DEMOCRATIC COMMITTEE
BY WITNESS: LARRY ANDREW "PETE" FULLER
APPEARING REMOTE FROM
JEFFERSON, GEORGIA

MAY 16, 2023
3:05 P.M.

Reported By:
Judith L. Leitz Moran
RPR, RSA, CCR-B-2312
APPEARING REMOTELY

Plaintiff's most recent complaint that has been filed in this action. It is Document 104 in this matter. And I am going to scroll down to Paragraph -- well, first, I'm jumping ahead of myself -- ahead of myself a little bit.

Mr. Fuller, are you familiar with this document?

A Which document are you referring to?

Q Can you -- oh, and I just wanted to quickly clarify. Can you see the document on the screen that says the Second Amended Complaint?

A If it's on the screen now, yes, I can see it.

Q Okay. And again, this is Document 104 in this matter.

Are you familiar with this document, Mr. Fuller?

A Yes.

Q And have you read through this document?

A The sections that pertain to myself, yes.

Q And I will scroll down to Paragraph 329 which is -- I'll find a page number shortly.

And this is going to cover packages 114 to 115 of Document 104 as it is identified in the file stamp at the top of the document, and Pages

109 to 110 as originally numbered.

And Mr. Fuller, I'm going to do my best to get Paragraph 329 in its entirety on the screen. Can you see Paragraph 329?

A Yes.

Q I'm just going to quickly read through it.

"Plaintiff JCDC's resources are being diverted from its day-to-day operating activities and advocacy for its candidates to engage in this legal action to protect its interests. Further, JCDC is diverting resources and will continue to do so to educate its voters on the complex changes in the law that will impact how and when they vote. Resources will be required to be diverted to attempt to explore mitigating strategies to the voter intimidation that is certain to be experienced because of the threat of felony allegations for observing display screens in the polling place."

A Yes.

Q Did I read that paragraph 329 accurately?

A Yes.

Q And are those allegations in Paragraph 329 true and accurate as it relates to JCDC's

diverted resources in this matter?

A Yes. Our mitigating strategies had to change significantly in -- in our outreach in order to mitigate some fears that were in our communities about how and what constituted voting legally versus other issues that came to -- came to light with -- with SB 202.

Q We will -- I will stop sharing the screen momentarily and ask you about the -- the specific activities.

And I'll start off with what you just described as educating -- well, would it be accurate to say it was educating voters on the changes in SB 202? Well, there are -- well, strike that question.

I will start off by asking you about the diverted resources that you mentioned as it relates to informing voters of how to vote legally.

How did that occur after SB 202 was passed?

A Discussions with voters. We had to first educate our own committee members which took time. And use resources that were available to -- to do so.

And those committee members then when

in?

A If the -- if we're not participating in it because SB 202 made it either illegal or difficult to take part in, then no.

Q And has the Organization undertaken any analysis to determine if there are other ways to perform those activities?

MR. BROWN: Object to form.

A We have to the best of our ability reached our voters and tried -- and done our best to facilitate them being able to get to the polls and exert -- and exercise their right to vote. And we will continue to do that.

BY MR. WEIGEL:

Q And generally going back to the election-related activities that the Organization participates in -- and I believe we may have certainly touched upon this -- but, for example, the activities in connection with poll watching, is the Organization still able to participate in poll watching activities?

A Poll watching is still an activity that we will participate in, but there are limitations on our poll watchers and a chilling effect due to the bill that -- that does impact our ability to

recruit poll watchers and their ability to perform those duties.

Q Just to get into that a little bit. In what specific ways has the Organization been unable to recruit those poll watchers?

A There is a definite fear of running afoul of the law amongst some people that would normally take part in those activities.

Q And moving along to Topic No. 6. I will be sharing my screen again.

And Topic No. 6 is "The specific laws, policies, and protocols the Organization alleges are unconstitutional or violate federal law as asserted in the action and the specific steps that the Organization took to address its understanding of those laws, policies, and protocols."

And Subpart A of this is "The specific steps the Organization has taken to address those laws, policies, and protocols it advocates are unconstitutional or violate federal law and its involvement in this action and the process by which those steps were determined."

And Subpart B, "The specific steps the Organization took to address those laws, policies, and protocols it advocates are unconstitutional or

EXHIBIT D

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

COALITION FOR GOOD GOVERNANCE, et al.,

Plaintiffs,

vs.

BRIAN KEMP, Governor of the State of Georgia, in his official capacity, et al.,

Defendants.

CIVIL ACTION FILE

NO. 1:21-CV-02070-JPB

VIDEOTAPED DEPOSITION OF RYAN T. GRAHAM
APPEARING REMOTE FROM
ATLANTA, GEORGIA

MAY 16, 2023
10:04 A.M.

Reported By:
Judith L. Leitz Moran
RPR, RSA, CCR-B-2312
APPEARING REMOTELY

Could you just expand on how that relates to the poll watchers that you have appointed in the past?

A Yeah. So we've had poll watchers who just express that, you know, they are concerned that there would be -- you know, if they even glance in the wrong direction, it could be misconstrued as intentionally observing.

Or if they are at a poll place and the -- the poll workers don't want them there, then they could accuse them of such a thing pretty easily.

Q Since SB 202 has been passed, are you aware of any -- strike that.

Regarding the poll watchers and mail ballot observers alleged to fear the observation rule in -- in Paragraph 212, can you provide the names of those?

A Not at this time. Those conversations went through Marilyn Marks.

Q I'll just quickly go through your experiences in relation to the elections that have occurred since SB 202 has been passed.

How has the appointment process gone since in -- as it relates to elections since the passage of SB 202?

A Yeah, I mean, we've had poll watchers who have not participated. And so because of that, we were -- you know, we were down a person. So there was precincts that maybe didn't have eyeballs in them.

But I know even when I personally go in to vote, most times when I voted, those screens are visible. There's not really a way to make them not visible no matter what they say.

Because, I mean, I walk in and I can see -- and I -- I am concerned that at any given time I could be accused of looking at someone's ballot and, you know, prosecuted for it.

And they could potentially do that to me for any -- any reason they want, they could accuse me of that. Just say I looked up at -- at clearly visible ballots that are in the election precinct.

MR. BROWN: Those are the only questions that I have.

Thank you for your time, Mr. Graham. Very much appreciate it.

THE WITNESS: Thank you.

MR. WEIGEL: And Mr. Graham, I just have a few quick follow-ups based on the testimony you provided responding to your -- either counsels'

EXHIBIT E

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

COALITION FOR GOOD GOVERNANCE, et al.,

Plaintiffs,

v.

BRIAN KEMP, Governor of the State of Georgia, in his official capacity, et al.,

Defendants.

CIVIL ACTION FILE NO. 1:21-CV-02070-JPB

REMOTE VIDEOTAPED 30(B)(6) DEPOSITION OF
COALITION FOR GOOD GOVERNANCE
THROUGH
MARILYN MARKS
May 11, 2023
9:30 a.m.

Robin K. Ferrill, CCR-B-1936, RPR

you've already described, did you speak to anyone currently associated with the coalition to prepare for your testimony regarding topic Number 6?

A. Nothing other than what we have already described.

Q. And similar question, did you speak to anyone formerly associated with the coalition to prepare for providing testimony regarding topic Number 6?

A. No.

Q. And did the coalition consider ways to continue engaging in the activities it discontinued because of SB 202?

A. Well, it was, I know, feasible. There are just only so many hours in a day, so, no. So, no, we -- there was no -- there was nothing we could do. We don't have a budget to hire more people.

Q. And so would it be fair to say that the coalition did not identify any alternative ways to continue engaging in those activities?

A. I don't think that would be quite fair. As I say, many times, we have to pull way back from what we should be doing and we might be able to maintain some minimal activity, and that's the alternative as opposed to completely giving it up. We are diverting

Q. And it would be fair to say that after SB 202, the coalition would still need to expend resources educating voters, correct?

MR. BROWN: She just answered that.

Q. (By Mr. Weigel) I'll clarify. That was prior to SB 202.

I'm now asking after SB 202, will the coalition still expend resources educating voters?

A. Yes, but on topics that we would prefer to work on, rather than on things like felony -- you know, the chance of getting charged with a felony. Yes, of course, we will spend time on voter education but not on that topic, on preferred topics.

Q. And you mentioned that while educating voters -- and this might be a mischaracterization of your testimony, so certainly feel free to correct my description of it if it's wrong -- but the suggestion that you have provided to voters is to essentially not vote in person and pursue alternative means to vote, correct?

A. That's one that I mentioned. That is one alternate would be to vote by mail. But if that is not doable for them, as an example, what we would tell the voter is: Okay. Find a time to vote that is not crowded, you know, so that you won't

inadvertently see someone's screen but be accused of it. You know, I have even told people, Go to vote where you think that there are friendly -- particularly friendly poll workers, not grumpy poll workers who may be looking to try to find a violation.

You know, when you are voting, go to the most private station that you can find, look down on your way to that polling station. When I mean polling station, touchscreen machine. Look down, don't look around, particularly people who feel that they may be targeted politically or by some kind of personal vendetta someone may have or by the Secretary of State's inspectors, investigators, et cetera. So, yes, those are the types of things that we tell people in this one example of what we are talking about about felony charge for observation of a touchscreen.

Q. And are there -- you mentioned that that's one example.

What are other examples?

A. You mean of the other types of voter education that we would be doing?

Q. As it relates specifically to SB 202.

MR. BROWN: I object. There's some

confusion over -- the question's whether you are relating to a specific provision of the law, such as the observation rule or the tally rule or something else or the law in general. And y'all are talking past each other on that, I think.

A. I think so. Yes, please clarify.

MR. WEIGEL: Thank you. Yes, thank you so much for that clarification, Mr. Brown.

Q (By Mr. Weigel) And again, to your counsel's distinction that he is making, specific voter education efforts similar to those that are directed at the observation provision that the coalition has participated in.

A. Okay. One that has come up often and recently is the photography rule and photographing a voted ballot. Voters have told me how they are confused by what the law says versus what the judge's order was in terms of photographing a voted ballot. Because there has been -- there have been different interpretations by various counties as to what -- what the -- how much they are going to comply with the judge's order. And so I have had to talk to voters about this and tell them, Be cautious because I really do not know what your county is going to try

to do.

So I have spent time doing that. Also, trying to educate voters as to what the judge's order was, but not being able to assure them that the county is going to follow the judge's order. That's -- that is another example of time spent on the provisions of SB 202. Also, I have spent a good bit of time on voters/poll watcher, monitor, public observation of absentee ballot processing. And the rules, very confusing rules, involving that in warning them about the tally rules, for example, and the communication rules, if they are going to be observing absentee ballot processing. It's hard to really educate, though, because the rules are so confusing.

Q. And aside from those that you have just described, are there any other education activities that the coalition participates in as it relates to the specific provisions in SB 202 that are challenged in this action?

A. Sure, there are. I'm giving you examples off the top of my head. But there's not a day that goes by that we are not answering questions from a voter that are directly or indirectly related to some of the provisions of SB 202. Sometimes it's voters,

re- -- distinctly remembering those two.

Q. And so would it be fair to say that those two webinars were right after SB 202 was passed?

A. It wasn't too long after. I just can't tell you right now exactly when it was.

Q. And again, this may just be reiterating your testimony, but have there been any similar events that the coalition has conducted since that time related to the SB 202 provisions that are challenged in this action?

A. Not really recently. not in terms of putting on something like a formal webinar.

Q. Now we will go back and, again, jumping around a little bit, but we will jump to topics 3 and 4. I will be sharing my screen again.

Topic 3 is the organization's -- do you see where I'm starting with topics 3 and 4, Ms. Marks?

A. I do.

Q. Okay. And topic 3 is the organization's mission and its exempt purpose since its founding to the present and the activities it undertakes in accordance with its mission and its exempt purpose.

Topic 4, the organization's organizational structure, including individuals who have the authority to make funding and resource allocation

decisions for the organization from January 1st, 2021 through the present generally and specifically as related to the provisions of SB 202 challenged in this action.

And Ms. Marks, you are the designated witness for topics Numbers 3 and 4, correct?

A. That's correct.

Q. And did you review any documents specifically in preparation -- again, aside from the steps we've discussed previously -- in preparation for providing testimony for topics 3 and 4?

A. Not anything in addition to what we have discussed.

Q. And again, same questions. Aside from what we have already discussed before and ensuring that we do not get into any privileged discussions that you've had with your attorney, did you speak to anyone currently associated with the coalition to prepare for your testimony on these topics?

A. No.

Q. And did you speak to anyone formerly associated with the coalition to prepare for providing testimony on these topics?

A. No.

Q. And do you know the exempt purpose of the

coalition?

A. I can't repeat it word for word off the top of my head, but it's certainly on our form 990, that explains the exempt purpose. But it is to protect constitutional rights of citizens, and we, I believe, talk about in that exempt purpose specifically voting rights issues, including voter privacy.

Q. And what activities does the coalition -- strike that. I'll take a step back.

How would you describe the coalition's organizational structure?

A. It -- in one word "thin." We have a board of directors that consists now of four individuals. And I am on that board. I spend all of my time as the executive director. One of the board members is our accountant. And we -- we really do not have any full-time paid staff. We do some contract work with internal research analyst level people from time to time. But it's a very small organization.

Q. And as far as the present organization structure you just described, how long has that been the organization structure for the coalition?

A. Generally, since 2014. We did have another board member but she's recently passed away.

Q. Sorry to hear that.

specifically for this topic?

A. No.

Q. And same question, did you discuss with anyone presently or formerly with the organization to prepare for providing testimony on this topic?

A. No.

Q. Does the organization have individual members?

A. Yes, we do.

Q. And how does an individual become a member of the organization?

A. Generally, by saying to us that they want to be a member. It can be by telephone, e-mail is generally the way that it happens. Sometimes we go out and recruit members and ask people to join us.

Q. And specifically to that, how does that process go for going out and recruiting members?

A. There is no, you know, go knock on the door and sign this card kind of process. It's much more of an individual process where we decide we need help with perhaps advocating to voters, advocating to a local election board, et cetera, in a particular area and begin to talk internally about who do we know in that particular county who could help us expand our work in that county. It's more organic, not very

formalized.

Q. So would it be fair, perhaps not fair, to characterize that as a kind of case-by-case engagement, as far as that goes?

A. That's right. That's what I'm calling organic. Case by case is a good way to say it as well.

Q. And what obligations do members have once they become members?

A. Unfortunately, they have no obligations. There are no membership fees. There are no duties to -- to put in any number of volunteer hours. There's no requirement to agree with us on any particular policy.

Q. And what benefits does the organization offer its members?

A. Well, we have talked about education on various topics. So we are offering voter education. We -- as we've talked about, we do some amount of lobbying with county election board, state election board, legislators; and in that, we are representing our members and often speaking for members who maybe not -- are not comfortable for either political, personal reasons, or just maybe a little bit timid. So we are speaking for them. And that is a benefit.

We try to keep our members informed of pending legislation, pending policy matters, those types -- those types of benefits.

Q. And would it be fair to characterize those benefits as available to both members and nonmembers of the organization?

A. Not really. Certainly we would hope that our work is beneficial to the entire public. But if a member calls me and says: Marilyn, would you prepare a memo to go to the Fulton County election board regarding this particular topic, I am going to be much more inclined to do it than if a random person calls me and says -- I get lots of random requests -- asking me to prepare something for the Fulton County election board for them. So, no, those benefits are not available equally for members and nonmembers.

Q. And is there sort of kind of -- I'm trying to figure out the best way to phrase this -- and maybe using an example from earlier, which is similar to the example you just provided, but we discussed earlier the organization receiving a lot of calls about, for example, the ballot observation provision in SB 202.

Do you recall that testimony?

A. Certainly.
Q. So did all of those calls come from members; did some come from nonmembers?
What was kind of the breakdown with that?
A. You know what, I don't remember right now. I couldn't tell you. If it's -- I don't know. Too long ago.
Q. And now we will move down to topic Number 10.
I will share my screen again.
A. All right.
Q. Can you see my screen, Ms. Marks?
A. Not quite yet, but it will pop up in a moment. Okay. It's up now.
Q. And do you see topic 10 there?
A. Yes.
Q. And topic 10 states, Whether and how the organization determined if any of its individual members are impacted by the laws, policies, and protocols challenged in this action.
And Ms. Marks, you are the designated witness for the organization on topic 10, correct?
A. Yes.
Q. Quickly going through those same questions, did you review any documents specifically related to

topic 10 other than what we have discussed?

A. No.

Q. And did you speak with anyone inside or outside the organization to prepare for providing testimony as it relates to topic Number 10?

A. No.

Q. And again, we went through a lot of this previously, so sorry if we are kind of overlapping a little bit about that; but I want to, with this topic, get into a little bit of specific detail with some of the earlier testimony that you provided as it relates to the specific provisions in SB 202.

And let's start off with the ballot observation issues that we discussed previously with SB 202.

Has the organization identified any individual member that has been subject to the punishments that are at issue with the ballot observation provision in SB 202?

A. Mr. Weigel, just to clarify so that I'm really clear on which one we are talking about. You are talking about the ballot, the touch screen ballot observation rule where one could be charged with a felony. Is that what we are both talking about?

Q. Yes. Yes, correct.

A. Okay. No. I do not know of anyone at this point who has actually been charged with a felony for seeing someone else's voting screen.

Q. And same question for the photography rules. Is the organization aware of any specific members that had been subject to any punishments pursuant to the provision SB 202 related to the photography rules that we discussed previously?

A. While not punishments, certainly threats of punishment.

Q. And what were those threats of punishment?

A. Okay. I will start with myself. And that is I was observing the DeKalb County 2022 May primary election last year and wanted to take pictures of voted ballots having been counted already once and being processed again for another count. And I was threatened with arrest for even having my camera out. I was threatened with arrest for taking a picture in a room where the ballots had not even arrived yet. I was threatened with arrest for taking a picture of a room where the ballots were still in cardboard boxes and was not permitted to take pictures of the ballots once they did arrive on the desk where I could see them. So, yes, I was threatened with arrest.

Q. And aside from that experience that you

just discussed, is the organization aware of any members that have been subject to similar experiences?

A. I'm thinking for a moment. Not that I am aware of on the photography rule. Certainly the press has been prohibited from taking pictures, and I have watched that occur. By the way, I was also prohibited from taking pictures in Fulton County of voted ballots after the close of the polls. So I have watched the press be prohibited and I have been prohibited.

Q. And you jumped right into my next question, was the experiences, whether one or multiple, that you described related to the photography rules, did that occur exclusively in Fulton County or was it in any other county?

A. Well, I mentioned DeKalb.

Q. DeKalb, that's correct.

A. DeKalb and --

Q. So aside from DeKalb and Fulton?

A. For me personally. And I may not be aware of what our members have experienced on that -- or may not be remembering, if I know.

Q. And do you recall, at least from your personal experience with it, what precincts in DeKalb

and Fulton that that occurred in?

A. This was at the central count, at the one for Fulton at what I call the English Street warehouse. And then in DeKalb, at the Memorial Drive central count location.

Q. And similar line of questioning for the absentee ballot processing that we discussed previously. Is the organization aware of any individual members that had been impacted directly by laws, policies and protocols related to the absentee ballot processing?

A. Yes.

Q. And what were those?

A. So when you say impacted, I take that to mean that their activities have been curtailed or reduced. And certainly, there are impacts on the organization from that, but, yes, for example, the rules that require no discussion of what's going on in the absentee balloting room -- absentee ballot processing room, I should say -- the rules that require no discussion. Our members cannot collaborate, confer on what they are observing, for example. And that, of course, is a harm.

We poll watch -- poll observers, absentee ballot monitors routinely work in teams and confer

with each other on what they are seeing. And the inability to do that for fear of violating a law reduces the effectiveness of what any monitor can do, if they cannot work in a team and communicate about what they are seeing.

Q. Just for my own understanding on what the effect of that would be, could you just go into a little bit deeper detail on how it reduces the effectiveness or how it curtails the election administration activities of your members.

A. Certainly. Let me give you an example, a kind of a before-and-after example.

Ms. Rhonda Martin, who is a co-plaintiff, and I were observing a special election in the first quarter of 2020. And we were at the absentee ballot processing in the -- I believe we were in Colquitt County. And we were watching, and we were in a small room, watching the very few absentee ballots be processed. We were watching violations of ballot privacy as it was happening. And there were very small number of absentee ballots, only eight.

And we were chatting with each other, saying: I wonder if this is all -- you know, please watch how many they scan. I'm going to try to walk over to the guy's desk who is running the operation.

Please watch while I walk away. We conferred on the number of ballots between the two of us that we had watched. We conferred about how they were being mishandled from a privacy standpoint. And then we later watched as the number of ballots was uploaded into the results to make sure that eight ballots in total from that particular county were uploaded as absentee ballots.

Today, under SB 202, we would not have been able to confer about how many ballots were being scanned. I would not have even been able to count as they were going through the scanner because SB 202 tells us we are not supposed to get any information, do any counts. I would not have been legally able to say, Okay. I saw eight ballots go through. Let me make sure that eight ballots is what gets reported.

And we would not have been able to confer. As we were watching, I remember saying to Ms. Martin, Look at the way she is handling the ballots in terms of looking at the voter's name and looking at the ballot before she puts it into the scanner. I would not have been able to say that to her under SB 202.

And, of course, you like to work in teams so that you have got a witness for whatever complaints you might make later on so that you are

sure that you know what you are looking at. So if there are more than just eight ballots going through the scanner, you can confer on the count, make sure that you are not missing anything. So it's very normal for ballot monitors to work in teams. That's been my experience since I started doing this in 2008 or 9 of being able to work in teams. And basically SB 202 says you cannot do that.

Q. And the testimony you just provided touches on this aspect of it that I wanted to go into a little bit, but as far as the benefits that you described with working as a team, as you say, would a poll worker in that instance still be in compliance with the law but by -- strike that.

Is there still a way for reporting mishandling from a privacy standpoint as you described?

What is the mechanism for that, I'll ask?

A. That is also confusing. In the law, yes, while you can report and I believe the phrase -- I'm not going to have this exactly right -- but the phrase in the law is something like, "You can only report it to the official who has the need to know that information for their performance of their duties under the law." So that leaves you very

unclear as to who it is you should report a privacy violation to. But it also restricts you from confirming with your colleague the extent of the violation. It also brings into question what you can put in a declaration that you saw, if you can only report it to that election official.

So it is going to restrict quite dramatically what you feel free to report, to whom to report it, the form of that reporting, and the ability to have witnesses back up what you said.

Q. Thanks for that clarification. That's really helpful. So would it be fair to characterize it, at least in part, is that the new absentee ballot processing provisions that are in place inhibit, at least in your personal experience, your ability to perform your duties?

A. Absolutely. Yes.

Q. And just similar to my prior line of questioning, is the coalition aware of any of its members or are you personally being punished for violating that provision, the absentee ballot processing provision of SB 202?

A. Well, the result of SB 202, now, the example I gave you, again, was from pre-SB 202, right? So what has happened is that we don't operate

EXHIBIT F

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

COALITION FOR GOOD GOVERNANCE, et al., Plaintiffs,	)	CIVIL ACTION FILE
vs.	)	NO. 1:21-CV-02070-JPB
BRIAN KEMP, Governor of the State of Georgia, in his official capacity, et al., Defendants.	)	

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VIDEOTAPED DEPOSITION OF RHONDA JO MARTIN
Taken by Counsel for the State Defendants
Before Richard Bursky, RMR, CRR
Certified Court Reporter

Via Zoom Videoconference

On May 22, 2023, commencing at 9:32 a.m.

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participate in those same activities while being on the board?

A Being on the board has not affected my participation, so other things have affected my participation, but not being on the board.

Q So as far as your current election-related activities as you described it, taking into consideration the ones you the identified, do you still currently participate in all of those Election Day activities or has it changed in any way?

A It's changed. I've been much less likely to be an observer during elections because of the difficulties; the threat of SB202 and the constraints that it places on poll watchers; the dangers of being accused of looking at someone's vote intentionally when it would be unintentional or impossible to avoid; not being allowed to speak about what you see when you observe elections; so various parts of SB202, which is why we are here, have made it problematic for me to continue in the work I was doing before.

Q Aside from the litigation -- excuse me, strike that.

Aside from the laws at issue in the litigation that we are talking about currently today, have there been any other factors that have led to a change in the

accidentally seeing someone else's vote and being accused of intentionally looking at someone else's vote. Again, as I stated earlier, the ballot marking devices, the screens are so big, and when you go to vote in person, you typically have to stand in line. And while you are standing in line, your eyes are going to look around.

And if someone decides that they think you are looking at someone else's ballot, you could be charged, you know, in a very serious way. Even if you are not standing in line, as you walk from the check-in station to the ballot marking device and from there to the scanner, you are going to walk past other people that are voting.

And again, the screens are so big that it is hard not to see. You have to try very hard not to look to avoid the danger of being charged with looking at how someone else is voting.

So just as a random voter, you are really in jeopardy every time you walk into a polling place where the ballot marking devices exist. So that's my biggest concern as a voter.

I am trying to remember the other issues with SB202. Some of the others are more concerned with when I am an observer than when I am a voter.

EXHIBIT G

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

COALITION FOR GOOD GOVERNANCE, et al.,

Plaintiffs,

vs.

BRIAN KEMP, Governor of the State of Georgia, in his official capacity, et al.,

Defendants.

CIVIL ACTION FILE

NO. 1:21-CV-02070-JPB

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VIDEOTAPED DEPOSITION OF AILEEN SAYA NAKAMURA
Taken by Counsel for the State Defendants
Before Richard Bursky, RMR, CRR

Certified Court Reporter

Via Zoom Videoconference

On May 22, 2023, commencing at 1:58 p.m.

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poll manager had told me that I can sit. So I crossed the room and I sat down and realized that from the other side of the room, I could see three BMDs very clearly.

And about ten minutes later, the poll manager and the assistant poll manager came to me and told me that I would have to move because I can see the screens. And clearly because of SB202, I didn't want to be accused of a felony, so I quickly got up and moved back to the original location where I couldn't see the check-in process at all. And that defeated the purpose, you know, part of the purpose of being there as a poll watcher.

Q Are you aware of anybody who has been charged with a violation of SB202 as involves either estimating ballots or observing votes on a BMD?

A I am not, but I don't know how anybody could be aware of anybody who has been charged or is being investigated.

MR. BROWN: That wasn't the question. He just asked you if you knew. He didn't ask you if you had any way of knowing that one way or the other.

THE WITNESS: Okay.

MR. BROWN: So just answer yes or no.

BY MR. BOYLE:

EXHIBIT H

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

COALITION FOR GOOD GOVERNANCE, et al.,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION NO.
BRIAN KEMP, Governor of the State of Georgia, in his official capacity, et al,	)	1:21-CV-02070-JPB
Defendants.	)	

VIDEOTAPED 30(b)(6) DEPOSITION OF ADAM C. SHIRLEY
(Taken by Defendants)
June 16, 2023
1:03 p.m.

Reported by: Debra M. Druzisky, CCR-B-1848

somebody through the carrels or whatever they're called, I might -- my eyes might move across their ballot marking device.

And if somebody is -- a poll observer or somebody else sees that, they could then allege that I was intending to look at someone's voting going on there.

And it just, it seems -- it seems like it's unavoidable. And it's too -- far too easy to misconstrue what someone's intentions were, whether it was to not to bump into somebody or whether it was, in fact, to see how somebody is voting.

Q. And since enacted have you been prosecuted or threatened with prosecution in relation to the Observation Rule in SB 202?

A. No.

Q. And are you aware of anyone in Georgia that has been prosecuted or threatened with prosecution as it relates to the Observation Rule in SB 202?

A. I am not.

Q. Now I will move the screen back up to Paragraph 151. Again, this is still docket number 104, Plaintiff's Second Amended Complaint. I will be highlighting Paragraph 151 with my cursor. This

EXHIBIT I

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

COALITION FOR GOOD GOVERNANCE, et al.,

Plaintiffs,

vs.

CIVIL ACTION FILE

NO. 1:21-CV-02070-JPB

BRIAN KEMP, Governor of the State of Georgia, in his official capacity, et al.,

Defendants.

VIDEO DEPOSITION OF
ELIZABETH THROOP
May 12, 2023
2:01 p.m.
TAKEN BY REMOTE VIDEOCONFERENCE

Robyn Bosworth, RPR, CRR, CRC, CCR-B-2138

about?

A Yes, I have done that.

Q Is that something you shared at some of these meetings?

A At the Board of Elections meetings?

Q Yes, ma'am.

A I haven't ever shown a floor layout at a Board of Elections meeting that I recall.

The State -- the Secretary of State's office did issue guidelines about the room arrangements and sent them to the counties. And I did create my own and did present those at a State Election Board meeting to show how the guidelines from the Secretary of State were unrealistic and problematic.

Q Can you be specific about your criticisms of the guidelines?

A Well, it's easier with a picture, but I will try. In the Secretary of State's diagrams, there were only maybe four or six ballot-marking devices in the room, and, in fact, many polling places have, you know, 12 or 20 ballot-marking devices.

Their diagrams showed sight lines, like little dotted lines from an eyeball to a

ballot-marking device, but they only showed those sight lines that they preferred. They didn't show them for the really problematic people, you know.

So, yeah, it's true that this person in the preferred arrangement can't see that ballot-marking device screen, but they didn't draw a line from this other person, and that person could see. So -- at least that's what I recollect.

There were also a lot of problems with room arrangement that have to do with where are electrical outlets, are cords going to present a tripping hazard, can poll managers monitor the equipment, and their advice didn't take that into account.

Q Look at paragraph 11, bottom of page 3. Could you read that to yourself, and let me ask you about that.

A Yes.

Q Has anyone ever accused you personally of intentionally observing a person voting?

MR. BROWN: Object.

To your knowledge.

I may have heard your question wrong. I assume you mean to her knowledge.

MR. BOYLE: Yeah. I mean, I'm just -- she

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

COALITION FOR GOOD GOVERNANCE, et al., Plaintiffs, v. BRIAN KEMP, et al., Defendants.	Civil Action No. 21-cv-02070-JPB

PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiffs file this response to Defendants' Statement of Undisputed Material Facts (ECF No. 123-2). Defendants' statements will be single-spaced; Plaintiffs' responses will be double-spaced.

Statement 1

SB 202 provided the State Election Board (SEB) the ability, after notice and hearing, to temporarily suspend election superintendents after they committed multiple violations of the law over multiple election cycles. O.C.G.A. § 21-2-33.2.

Response to Statement 1

Disputed. SB 202 allows for suspension or removal without notice. SB 202 states that the SEB may "suspend" after following the procedures set

forth in O.C.G.A. § 21-2-33.2. That section says that the SEB "shall conduct a preliminary investigation" which is followed by a "preliminary hearing." An "audit" of unspecified records or activities is also sufficient grounds for "removal" of the election officials. O.C.G.A. 21-2-106(c).

The statute permits the suspension of a superintendent after the preliminary hearing. O.C.G.A. 21-2-33.2 (c). There is no requirement of notice for the "preliminary hearing." At the "preliminary hearing," the SEB "shall determine if sufficient cause exists to proceed to a full hearing." O.C.G.A. § 21-2-33.2 (b). The statute, however, does not describe any "full hearing," and permits the suspension to take place after the preliminary hearing and before any "full hearing." Accordingly, subsection (c) describes the substantive standards for suspending a superintendent (three violations of rules in last two general election cycles, etc.). Subsection (c) says that the findings of the SEB are to be made "after notice and hearing," but there is no description of the notice or the hearing. SEB is able to remove a superintendent after "findings" of an undefined audit are presented in a preliminary hearing that has no notice requirements.

Statement 2

Since the adoption of SB 202 in 2021, none of the counties where the Board Member Plaintiffs serve (currently or previously) were subjected to an

investigation or performance review. Declaration of Ryan Germany ("Germany Dec."), attached as Ex. A, ¶¶ 4–6.

Response to Statement 2

Not in dispute as stated. However, Board Member Plaintiff Thomas-Clark is a member of the Coffee County Board of Elections. Coffee County has been the subject of multiple investigations, including SEB Case Nos. 2018-082, 2020-250, and 2021-094. Another is an open investigation arising out of the events that also underlie the indictment by Fulton County of former President Trump and others. The SEB conducted a hearing of an investigation of Jackson County Board of Elections in 2021. SEB Case No. 2018-027. Audits can also trigger removal of superintendents, O.C.G.A. §21-2-106 (c), and all counties have been subject to the audit of election results in two 2022 elections.

Statement 3

The only county election officials who have undergone a performance review are the members of the Fulton County Board of Elections and Registration and staff. Germany Dec., ¶¶ 4–6; Fulton Performance Review Board Report ("Fulton Report"), attached as Ex. 1 to Germany Dec.; Excerpts of Response to Interrogatories, attached as Ex. B, Nos. 1-2.

Response to Statement 3

Not in dispute. However, a performance review is not a prerequisite to a suspension. Instead, SB 202 provides that the SEB "JI its JRIH JOWI or

following a recommendation based on an investigation by a performance review =J<M? pursuant to Part 5 of this article, may pursue the extraordinary relief provided in this Code section. O.C.G.A. § 21-2-33.2(a). Also, an "audit" may trigger the "removal" of one or more officials. O.C.G.A. §21-2-106 (c).

Statement 4

The Fulton County Performance Review was initially by members of the General Assembly in the local legislative delegation. Fulton Report, p. 5.

Response to Statement 4

Not in dispute but not material because Plaintiffs' do not challenge the review process. Instead, Plaintiffs challenge the provisions of SB 202 that allow the SEB to suspend election superintendents.

Statement 5

The three-member Review Board personally observed "pre-election, Election Day, and post-election processes at Fulton County in both the 2021 municipal elections and the 2022 general and runoff elections." *Id.* at 6.

Response to Statement 5

Not in dispute, but not material.

Statement 6

Those observations included at least four visits to the Fulton County Election Processing Center and at least 16 visits to different election day polling place and advance-voting locations. *Id.*

Response to Statement 6

Not in dispute, but not material.

Statement 7

The Review Board also worked with the Carter Center to observe Fulton County elections in November 2022 to assist with its review. *Id.*

Response to Statement 7

Not in dispute, but not material.

Statement 8

The Review Board conducted formal interviews with staff and members of the Fulton County Board of Elections, reviewed procedures, and coordinated with the Secretary's office for its review. *Id.* at 7.

Response to Statement 8

Not in dispute, but not material.

Statement 9

When it issued its report, the Review Board confirmed that, in prior years "disorganization and a lack of sense of urgency in resolving issues plagued Fulton County Elections." *Id.* at 1.

Response to Statement 9

Not in dispute, but not material.

Statement 10

The Review Board also recognized the improvement in election administration in Fulton County from 2020 through 2022, at least in part because of the incentives created by the Performance Review itself. *Id.* at 18.

Response to Statement 10

Not in dispute, but not material.

Statement 11

The Review Board did not recommend any Fulton officials be suspended under the Suspension Rule. *Id.* at 18–19.

Response to Statement 11

In dispute to the extent that it assumes that the Review Board could recommend suspension of individual Fulton officials. SB 202 does not provide for the suspension of individual election officials, only the entire board, even if the performance or actions of individual board members is beyond reproach.

Statement 12

The SEB did not suspend the Fulton officials. Germany Dec., ¶¶ 7–8.

Response to Statement 12

In dispute to the extent that it assumes that the Review Board could recommend suspension of individual Fulton officials. SB 202 does not provide for the suspension of individual election officials in counties with a board of elections, but only the entire board can be suspended, even if the performance or actions of individual board members is beyond reproach.

Statement 13

The SEB has not announced any plans for conducting additional performance reviews. Germany Dec., ¶¶ 7–8.

Response to Statement 13

Not in dispute.

Statement 14

The SEB is not considering suspension of additional county election officials, including the Board Member Plaintiffs here. Germany Dec., ¶¶ 7–8.

Response to Statement 14

In dispute to the extent that it assumes that the Review Board could recommend suspension of individual Fulton officials. SB 202 does not provide for the suspension of individual election officials (except for municipal superintendents and probate judges, not relevant here), only the entire board, even if the performance or actions of individual board members is beyond reproach.

Statement 15

SB 202 added a provision making it a felony to engage in the *intentional* observation of an elector casting a ballot "in a manner that would allow such person *to see for whom or what the elector is voting*." SB 202 (Ex. D) at 95:2448–2454 (emphasis added).

Response to Statement 15

Disputed in part. The statute makes it a felony to "intentionally observe an elector while casting a ballot in a manner that would allow such person to see for whom or what the elector is voting." O.C.G.A. § 21-2-568.1.

Statement 16

The Secretary of State provided guidance to counties on proper precinct layout, and county election officials are ultimately responsible for the setup of voting machines in ways that comply with Georgia law. Declaration of Blake Evans, attached as Ex. C ("Evans Dec."), ¶ 3 and Ex. 1.

Response to Statement 16

Disputed. First, the Secretary did not provide meaningful or effective guidance on proper precinct layout. (Throop Dep., ECF No. 133 at 34:14-15 ("the guidelines from the Secretary of State" are "unrealistic and problematic")). For example, in the Secretary of State's diagrams, there were only 4 BMDs in the room. (ECF No. 123-5 at 8-10). Many if not most polling places have 12 to 20 BMDs. (*Id.*, at 34:19-23). Second, the counties do not follow the Secretary's guidelines. (ECF No. 104 at 29 (photo of Dalton voting location BMD layout); ECF No. 15-1 at 7 (photos of Cartersville and State Farm Arena voting locations); ECF No. 15-3 at 17-19 (multiple photos of voting locations using layout not in compliance with Secretary's "guidance"); Nakamura Dep., ECF No. 132 at 27:1-4 (across the room "I could see three BMDs very clearly"). Third, county election officials do have responsibility

for ensuring that voting machine placement protects ballot secrecy, but Defendants are responsible for ensuring that county election officials discharge that obligation effectively.

Moreover, the issue in this case is whether, given the reality of the actual layout of BMDs in polling places (regardless of who is at fault as between the various government officials), the Observation Rule violates the fundamental right to vote or due process.

Statement 17

Following the 2020 election, some counties were repeatedly asked how many votes they had left to tabulate that they could not answer in a timely fashion. Germany Dec., ¶ 9.

Response to Statement 17

Not in dispute.

Statement 18

Posting election results quickly is one of the best things that election officials can do to generate confidence in the outcome of an election. Germany Dec., ¶ 9.

Response to Statement 18

Plaintiffs do not dispute that election results should be posted as soon as possible consistent with an election process that is accurate, accountable,

and transparent. However, there is no need to tabulate the results prior to the closing of the polls, nor risk the early disclosure of vote tallies.

Statement 19

Prior to SB 202, early scanning of absentee ballots could only be performed by a sequestered group of individuals beginning at 7:00 a.m. on Election Day itself, so there was no danger of those individuals leaving to report vote totals or estimates during that single-day process. O.G.C.A § 21-2-386(a)(2) (2019); Germany Dec., ¶ 13.

Response to Statement 19

Not in dispute.

Statement 20

To mitigate the risk that early vote counts would be disclosed during early scanning in the weeks before an election, the legislature designed a process that ensured that information about the scanning process would not be publicized prior to the final close of the polls. Germany Dec., ¶¶ 11, 12, 14.

Response to Statement 20

Disputed and Georgia law provides to the contrary: the "processing and scanning of absentee ballots" "shall be open to the view of the public." O.C.G.A. § 21-2-386(a)(2)(B). It is not in dispute that vote totals should not be disclosed until the close of the polls.

Statement 21

SB 202 permits only election officials to handle absentee ballots, requires individuals to swear an oath, and places several requirements on observers to avoid disclosure of vote counts. SB 202 at 39:965–40:981; 66:1687–1690; 67:16998–1712; Germany Dec., ¶¶ 15.

Response to Statement 21

Not in dispute.

Statement 22

The early scanning provisions of SB 202 closely track the emergency SEB rules that were used throughout 2020 for early scanning of ballots. Germany Dec., ¶ 10.

Response to Statement 22

Not in dispute, but not material.

Statement 23

The Communication Rule only applies to "any ballot, vote or selection" during the viewing or monitoring of the absentee-ballot scanning process. Germany Dec., ¶ 16.

Response to Statement 23

Statement 23 is not a complete statement of fact and is disputed. SB 202 requires that the "processing and scanning of absentee ballots" "shall be open to the view of the public." O.C.G.A. § 21-2-386(a)(2)(B). It then prohibits "monitors and observers," under penalty of a misdemeanor, from "Communicating any information that they see while monitoring the processing of the absentee ballots . . . about any ballot, vote, or selection." O.C.G.A. § 21-2-386(a)(2)(B).

Statement 24

The absentee-ballot scanning process occurs in a room that also has other specific requirements about the use of recording devices and other equipment. Germany Dec., ¶ 17.

Response to Statement 24

Not in dispute, but not material.

Statement 25

Maintaining the secrecy of that absentee-ballot scanning process is critical to preserving the integrity of the election process by ensuring vote totals are not disclosed while other voters are still voting or have yet to vote. Germany Dec., ¶ 18.

Response to Statement 25

In dispute. Georgia law provides to the contrary: the "processing and scanning of absentee ballots" "shall be open to the view of the public." O.C.G.A. § 21-2-386(a)(2)(B). It is not in dispute that vote totals should not be disclosed until the close of the polls.

Statement 26

The Tally Rules protect the integrity of the election process by ensuring that counting votes or estimates about vote totals do not take place prior to the conclusion of the voting process. Germany Dec., ¶ 19.

Response to Statement 26

This is disputed as Defendants confuse two different Tally Rules. Tally Rule 1 makes it a misdemeanor to "tally, tabulate, or estimate or cause the ballot scanner or any other equipment to produce any tally or tabulate partial

or otherwise, of the absentee ballots cast until the time for the closing of the polls." O.C.G.A. § 21-2-386(a)(2)(A). Tally Rule 2 prohibits "monitors or observers" "while viewing or monitoring" from "[t]allying, tabulating, estimating, or attempting to tally, tabulate, or estimate, whether partial or otherwise, any of the votes on the absentee ballots cast." O.C.G.A. § 21-2-386(a)(2)(B)(vi).

It is not in dispute that vote totals should not be disclosed until the close of the polls.

Statement 27

If officials were enjoined from enforcing these two provisions, individuals would be free to share information about the early-scanning process with the general public and with candidates. Germany Dec., ¶¶ 20–22.

Response to Statement 27

Not in dispute. This result is consistent with Georgia law, which provides that "processing and scanning of absentee ballots" "shall be open to the view of the public." O.C.G.A. § 21-2-386(a)(2)(B). It is not in dispute that vote totals should not be disclosed until the close of the polls.

Statement 28

Having information about early scanning totals shared with the general public and with candidates would undermine the integrity of the election process. Germany Dec., ¶¶ 20–22.

Response to Statement 28

In dispute as stated. It is not disputed that vote totals should not be shared with anyone until after the close of the polls.

Statement 29

The Photography Rules can prevent vote-buying schemes that require a voter to show proof of their vote to the person paying them and also prevent others from pressuring voters to show for whom they voted. Germany Dec., ¶ 23.

Response to Statement 29

Disputed. There is no foundation for Mr. Germany's testimony about the deterrent effect of the Photography Rule upon vote-buying schemes. A person willing to sell their vote (already illegal) is not likely to be deterred by the Photography Rule any more than a bank thief would be deterred by a law prohibiting selfies of a bank heist. Since voted ballots do not disclose the identity of the voter, photographs of them are commonplace and are essential to preserving election transparency.

Statement 30

The Photography Rules protect individuals from being subjected to outside pressure as a result of the votes they cast and ensures ballot secrecy. Germany Dec., ¶¶ 24–26; Ga. Const. Art. II, § I, ¶ I (guarantee of secret ballot).

Response to Statement 30

Disputed. A photograph of a voted ballot, without more, does not violate ballot secrecy because voted ballots do not disclose the identity of the voter and cannot be connected to the voter.

Statement 31

The Photography Rules ensure that photographic images of a voter's ballot are not stored in ways that can connect the ballot to the voter, preserving the voter's privacy, ballot secrecy, and the integrity of the election. Germany Dec., ¶ 27.

Response to Statement 31

Disputed. A photograph of a voted ballot, without more, does not violate ballot secrecy because voted ballots do not disclose the identity of the voter.

Statement 32

Patricia Pullar is no longer serving on an election board. Deposition of Patricia Pullar [Doc. 122] ("Pullar Dep."), 24:18–25:1.

Response to Statement 32

Not in dispute.

Statement 33

There are no performance reviews or other pending action related to the Suspension Rules against Athens-Clarke, Coffee, Chatham, Clayton, and Jackson Counties. Germany Dec., ¶¶ 7–8.

Response to Statement 33

Not in dispute.

Statement 34

None of the Board Member Plaintiffs are currently subject to potential suspension under the Suspension Rules. Germany Dec., ¶¶ 7–8.

Response to Statement 34

In dispute. At any time, Board Member Plaintiffs are subject to "potential" suspension. **Statement 35**

None of the Board Member Plaintiffs are able to point to a single instance in which they were targeted because of the Suspension Rule. *See, e.g.* Deposition of Ernestine Thomas-Clark [Doc. 119], 39:11: –40:8; Deposition of Adam Shirley [Doc. 118], 40:21–41:1; Deposition of Judy McNichols [Doc. 121], 44:11–46:2; Pullar Dep., 28:11–29:4.

Response to Statement 35

Not in dispute.

Statement 36

The SEB has only empaneled one performance review panel since the adoption of SB 202. Germany Dec., ¶ 7.

Response to Statement 36

Not in dispute.

Statement 37

The Review Board investigation into Fulton County was robust and searching, involved state officials, county officials, and the Carter Center, and ultimately did not result in the suspension of any county official. Germany Dec., ¶ 6; Fulton Report.

Response to Statement 37

Not in dispute and not material because Plaintiffs are not challenging performance reviews.

Statement 38

The panel concluded that the creation of the performance review that precedes the Suspension Rule incentivized the county officials to improve the administration of elections. Fulton Report, pp. 18–19.

Response to Statement 38

Disputed as stated and not material because Plaintiffs are not challenging performance reviews. It is disputed because the Fulton Report states: "The existence of the Performance Review helped incentivize Fulton County to make improvements to their elections, *but it took an enormous amount of donated work, and it is difficult to see how it is a sustainable process that can continue to positively influence election administration in Georgia without some reforms."* (ECF No. 123-3 at 13).

Statement 39

The State Election Board has protected the voting rights of Georgia's citizens while protecting the rights of the members of local boards of election in the exercise of their duties. Fulton Report, pp. 18–19.

Response to Statement 39

Disputed. The Fulton Report does not say this, or anything close to it, on page 18 and 19. The statement of opinion is also immaterial.

Statement 40

The performance review of Fulton County was comprehensive, cooperative, and resulted in better election administration in Georgia's largest county. *Id.*

Response to Statement 40

Not in dispute and not material because Plaintiffs do not challenge performance review.

Statement 41

The SEB has suspended zero county officials under the Suspension Rule. Germany Dec., ¶¶ 6–8.

Response to Statement 41

Not in dispute.

Statement 42

The Suspension Rule processes have resulted in improved elections. Fulton Report, pp. 18–19.

Response to Statement 42

Disputed. First, the Fulton Report does not say this on pages 18 and 19. Second, the Suspension Rule processes have never been invoked. In fact, the Fulton Report recommended *against* suspension: "Replacing the board would

not be helpful and would in fact hinder the ongoing improvements to Fulton County elections." (ECF No. 123-3 at 13).

Statement 43

It is the counties that select polling locations and decide how to set up ballot stations according to the orientation of the space they have selected. Evans Dec., ¶ 3 and Ex. 1.

Response to Statement 43

Not in dispute. *See also* Response to Statement 16.

Statement 44

No individual is being prosecuted based on merely approaching a polling place with large windows. Germany Dec., ¶ 30.

Response to Statement 44

Not in dispute.

Statement 45

There is no evidence that any investigations or charges have been brought against any Plaintiff in this action or any voter for merely "approaching a polling place with large windows." *See* Ex. B, Response Nos. 1–2.

Response to Statement 45

Not in dispute.

Statement 46

The State has a strong interest in ensuring that observers do not attempt to depress or otherwise alter voter turnout by disclosing a vote tally before the election has concluded. Germany Dec., ¶¶ 11–14, 18–19.

Response to Statement 46

Not in dispute but not material because Plaintiffs do not challenge the prohibition of disclosure of vote tallies prior to the close of the polls.

Statement 47

It is possible that such observers may inadvertently (or purposely) disclose the *wrong* tally, which could depress or alter turnout in the election. Germany Dec., ¶¶ 20–22.

Response to Statement 47

Not in dispute but not material because Plaintiffs do not challenge the prohibition of disclosure of vote tallies.

Statement 48

The Tally Rules have not been arbitrarily or discriminatorily applied nor has it been applied in the manner Plaintiffs claim they feared. Ex. B, Response Nos. 1–2.

Response to Statement 48

Not in dispute as the Tally Rules have not yet been enforced.

Statement 49

Protecting voters from vote-buying schemes and intimidation give the entire electorate confidence in election results. Germany Dec., ¶¶ 23–25.

Response to Statement 49

Not in dispute.

Statement 50

Vote-buying schemes, where a third-party may offer to pay or offer something of value in return for a vote, or intimidates voters, where a third-party may not explicitly offer to buy votes but may pressure a voter to publicly reveal how they voted, undermine the foundations of merit-based representative democracy and the protections of a secret ballot guaranteed in the Georgia Constitution. Ga. Const. Art. II, § I, ¶ I; Germany Dec., ¶ 26.

Response to Statement 50

Not in dispute but not material in that there is no evidence of a connection between the Photography Rule and vote buying schemes.

Statement 51

Cameras are now commonplace in almost every mobile device in use today. Germany Dec., ¶ 28.

Response to Statement 51

Not in dispute.

Statement 52

Pictures are often quickly uploaded to a cloud storage provider on the Internet and would connect the voter's ballot with the voter immediately. Germany Dec., ¶ 28.

Response to Statement 52

Not in dispute.

Statement 53

It is typically private companies and not the user that control the security protocols at the locations where the photographic data is stored. Germany Dec., ¶ 29.

Response to Statement 53

Not in dispute.

Statement 54

The Photography Rules also ensure that photographic images of a voter's ballot are not stored in ways that can connect the ballot to the voter, preserving the voter's privacy, secret ballot, and the integrity of the election. Germany Dec., ¶ 27.

Response to Statement 54

Not in dispute.

Statement 55

The Photography Rules have not been arbitrarily or discriminatorily enforced in the ways Plaintiffs claim. *See* Ex. B, Response Nos. 1–2.

Response to Statement 55

In dispute. The Photography Rule prohibiting the photography of voted ballots has been enforced in an arbitrary manner against Marilyn Marks, Executive Director of CGG, both in the DeKalb County May 2022 primary election and the Fulton County November 2022 general election, where she served as an authorized poll watcher and absentee ballot monitor. Ms. Marks testified to both instances in the Rule 30(b)(6) deposition of CGG. (ECF No. 130 at 79:4 - 81:5).

Respectfully submitted this 24th day of August 2023.

/s/ Bruce P. Brown
Bruce P. Brown
Georgia Bar No. 064460
BRUCE P. BROWN LAW LLC
1123 Zonolite Rd. NE
Suite 6
Atlanta, Georgia 30306
(404) 881-0700
bbrown@brucepbrownlaw.com

/s/ Cary Ichter
Cary Ichter
Georgia Bar No. 382515
ICHTER DAVIS LLC
3340 Peachtree Road NE
Suite 1530
Atlanta, Georgia 30326
(404) 869-7600
CIchter@Ichterdavis.com

/s/ Greg K. Hecht
Greg K. Hecht
Georgia Bar No. 003860
HECHT WALKER, P.C.
205 Corporate Center Dr.
Suite B
Stockbridge, Georgia 30281
(404) 348-4881
greg@hmhwlaw.com

/s/ Shea E. Roberts
Shea E. Roberts
Georgia Bar No. 608874
GIACOMA ROBERTS & DAUGHDRILL LLC
945 East Paces Rd., Suite 2750
Atlanta, Georgia 30326
(404) 924-2850
sroberts@grdlegal.com

CERTIFICATE OF SERVICE AND CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 5.1

Pursuant to N.D. Ga. L.R. 5.1(C), I certify that the foregoing was prepared using Century Schoolbook 13 font. I electronically filed this using CM/ECF, thus electronically serving all counsel of record.

This 24th day of August 2023.

/s/ Bruce P. Brown
Bruce P. Brown
Georgia Bar No. 064460
BRUCE P. BROWN LAW LLC
1123 Zonolite Rd. NE
Suite 6
Atlanta, Georgia 30306
(404) 386-6856
bbrown@brucepbrownlaw.com

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

COALITION FOR GOOD GOVERNANCE, *et al.*, *Plaintiffs*, v. BRIAN KEMP, Governor of the State of Georgia, in his official capacity, *et al.*, *Defendants*.	CIVIL ACTION FILE NO. 1:21-CV-02070-JPB

PLAINTIFFS' STATEMENT OF ADDITIONAL FACTS

In response to Local Rule 56.1(B)(2)(b), Plaintiffs state as follows:

Plaintiffs have filed a Response to Defendants' Statement of Material Facts and a Response Brief showing that Defendants have failed to carry their burdens under Rule 56. In addition to the facts set forth in Plaintiffs' Responses, Plaintiff is not aware of any additional facts material to Defendants' Motion for Summary Judgment that require separate identification under Local Rule 56.1(B)(2)(b). *See In re A-1 Express Delivery Serv. Inc.,* No. 17-52865-PMB, 2020 WL 5883427, at *2 (Bankr. N.D. Ga. Oct. 1, 2020) (treating facts identified in Trustee's responses to statement of material fact as those the Trustee would have listed in statement of

additional facts). There are facts that Plaintiffs may prove at trial that are not addressed in Defendants' Motion, but Plaintiffs do not read Local Rule 56.1(B)(2)(b) as requiring the respondent to identify facts in dispute except those material to issues raised by the movants in their motion for summary judgment and not addressed in the response to the movants' statement of material facts.

However, in an abundance of caution, Plaintiffs identifies the following facts that, along with the facts set forth in Plaintiffs Response to Defendants' Statement of Material Facts, may be in dispute and therefore preclude the granting of Defendants' Motion for Summary Judgment or are not in dispute and therefore preclude the granting of Defendants' Motion for Summary Judgment.

1. Each of the three organizational plaintiffs has been directly injured by the challenged laws (in addition to having standing under the diversion-of-resources doctrine). Specifically, the election monitoring activities of each organization are directly impaired by the Observation Rule, Communications Rule, Tally Rules, and Photography Rules. (ECF No. 15-3 ¶¶ 3, 11-15, 17; Marks Dep., ECF No. 130 at 81:6-85:17, 86:1-9; Ashling Dep., ECF No. 126 at 34:3-34:25, 36:2-8; Fuller Dep., ECF No. 128 at 51:22-52:8).

2. Each of the three organizational plaintiffs has diverted resources away from activities to address Defendants' challenged conduct. (ECF No. 15-3; Marks Dep., ECF No. 130 at 32:22-36:7; 39:20-41:18; Fuller Dep., ECF No.128 at 21:23-23:7; Ashling Dep., ECF No. 126 at 24:24-25:6, 60:14-21).

3. Apart from the fact that the challenged laws have not yet been enforced, Defendants in support of their Motion for Summary Judgment do not identify any material facts not in dispute relating to standing. Defendants do not, for example, identify any facts relating to whether Plaintiffs are injured by the existence of the laws or whether there is a credible threat of prosecution. ECF 123-2 *passim*.

4. SB 202 gives the State Election Board the authority in appropriate circumstances to suspend a board of registration of a county that has a separate board of registration and, if it does so, since the State Election Board has no means or replacing such board of registration, the county will be left without the ability to provide absentee balloting for its citizens. O.C.G.A. § 21–2–33.2.

5. Defendants have never stated, directly or indirectly, that they do not intend to enforce the Suspension Rule to suspend a board of registration in a county that has a separate board of registration. *E.g.,* ECF No. 123-1, *passim*.

6. Defendants intend to vigorously enforce the Suspension Rule, the Observation Rule, the Communications Rule, the Tally Rules, and the Photography Rule. ECF No. 50 at 9 (observing: "Notably, State Defendants do not refute Plaintiffs' contention that any alleged violation of SB 202 will be 'vigorously' prosecuted.").

7. It is difficult for a voter to vote in-person, or a poll watcher to observe voting, in Georgia without appearing to be intentionally attempting to see for whom or what another elector is voting. *E.g.,* Dufort Dep. ECF No. 120 at 29:22-31:1, 43:22-44:1; Graham Dep., ECF No. 129 at 7:14-17, 51:4-8, 76:6-9; Martin Dep., ECF No. 131 at 36:8-18; Nakamura Dep., ECF No. 132 at 27:11-13; Shirley Dep., ECF No. 118 at 48:8-12; Throop Dep., ECF No. 133 at 34:14-35:3.

8. Because it is difficult for a voter to vote in-person in Georgia without appearing to be intentionally attempting to see for whom or what another elector is voting, and because the Observation Rule may be arbitrarily and discriminatorily enforced, the Observation Rule is a burden on the fundamental right to vote and intimidates voters in violation of the Voting Rights Act. *See* citations to previous statement.

9. There is no evidence that the Observation Rule (distinct from other laws prohibiting violation of ballot secrecy) has or will protect ballot

secrecy. ECF No. 123-1, 123-2, *passim* (Defendants' filings with no such evidence).

10. Defendants have not identified any governmental interest served by the Communications Rule or the Tally Rules other than the legitimate interest in prohibiting disclosure of vote tallies prior to the close of the polls. ECF No. 123-1, 123-2, *passim* (Defendants' filings with no such evidence).

11. There is no evidence that the Photography Rule's prohibition of photography of a voted ballot deters vote-buying schemes beyond laws already in effect. ECF No. 123-1, 123-2, *passim* (Defendants' filings with no such evidence).

Respectfully submitted this 24th day of August, 2023.

/s/ Bruce P. Brown
Bruce P. Brown
Georgia Bar No. 064460
BRUCE P. BROWN LAW LLC
1123 Zonolite Rd. NE
Suite 6
Atlanta, Georgia 30306
(404) 386-6856
bbrown@brucepbrownlaw.com

/s/ Cary Ichter
Cary Ichter
Georgia Bar No. 382515
ICHTER DAVIS LLC
3340 Peachtree Road NE
Suite 1530
Atlanta, Georgia 30326
(404) 869-7600
CIchter@Ichterdavis.com

/s/ Greg K. Hecht
Greg K. Hecht
Georgia Bar No. 003860
HECHT WALKER, P.C.
205 Corporate Center Dr.
Suite B
Stockbridge, Georgia 30281
(404) 348-4881
greg@hmhwlaw.com

/s/Shea E. Roberts
Shea E. Roberts
Georgia Bar No. 608874
GIACOMA ROBERTS & DAUGHDRILL LLC
945 East Paces Rd.
Suite 2750
Atlanta, Georgia 30326
(404) 924-2850
sroberts@grdlegal.com

CERTIFICATE OF SERVICE AND CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 5.1

Pursuant to N.D. Ga. L.R. 5.1(C), I certify that the foregoing was prepared using Century Schoolbook 13 font. I electronically filed this using CM/ECF, thus serving all counsel of record.

This 24th day of August 2023.

/s/ Bruce P. Brown
Bruce P. Brown
Georgia Bar No. 064460
BRUCE P. BROWN LAW LLC
1123 Zonolite Rd. NE
Suite 6
Atlanta, Georgia 30306
(404) 386-6856
bbrown@brucepbrownlaw.com