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. 1:21-cv-02070-JPB**

PLAINTIFFS' RESPONSE TO MOTIONS TO DISMISS

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Plaintiffs file this Response to the Motions to Dismiss filed by Defendants (ECF 41) ("Defendants" or "the State") and the Intervenors ("RNC) (ECF 42).

I. INTRODUCTION

The Motions to Dismiss should be denied, the Defendants and the RNC should be ordered to answer the allegations of the Amended Complaint, and the Motions for Preliminary Injunction as to the Challenged Criminal Provisions and the 11 Day Rule should be granted with respect to all upcoming elections.

Defendants and the RNC devote a substantial portion of the briefs to the issue of standing. But, as explained in Part II, Plaintiff Coalition for Good Governance has organizational standing both because it has sustained direct injury because of SB202, an issue not addressed by Defendants or the RNC, and because it has suffered concrete injury from its diversion of resources in line with controlling Eleventh Circuit precedent. In Parts II through IV, Plaintiffs will show that, for each Count, in addition to the Plaintiff organizations, multiple individual Plaintiffs have standing to assert the claims asserted. Plaintiffs will also show that each Count states a claim for relief under well-established caselaw. The responsive arguments are grouped as follows: Part III addresses the claims arising from SB202's Takeover Provisions (Counts I, II and III); Part IV addresses the claims challenging SB202's criminal laws (Counts IV through X); Part V

addresses the claim challenging the Relaxed Voter ID Rule (Count XI); and Part VI addresses the claims challenging the Absentee Ballot Application Deadline (Counts XII, XIII and XIV). As will be shown, for each Count, Plaintiffs have sufficiently alleged multiple bases for standing and plead legally sufficient claims for relief. The Motions should be denied.

II. ORGANIZATIONAL STANDING

The State's entire attack on Coalition's organizational standing is limited to the single flawed argument that the amended allegations, taken as true, are legally insufficient to show diversion of resources. (ECF 41-1, at 12–17.) But diversion of resources is only *one* basis for Coalition's organizational standing. The State completely ignores the numerous direct injuries to Coalition's operations that are threatened by the State's enforcement of unconstitutional provisions of SB202. These direct injuries, which are clearly established by the Amended Complaint's allegations and by the preliminary injunction record,[1] are more than adequate to establish Coalition's organizational standing without regard to the diversion-of-resources doctrine.

For example, the Amended Complaint alleges that Coalition's activities

[1] The State characterizes its challenge to Plaintiffs' standing as a factual attack under Rule 12(b)(1), (ECF 41-1, at 9–10), rather than as a purely facial attack. In a factual attack, the Court evaluates whether standing exists based on evidence and facts extrinsic to the complaint (such as the preliminary injunction record). *Carmichael v. Kellogg, Brown & Root Servs.*, 572 F.3d 1271, 1279 (11th Cir. 2009).

include, among other things, "poll watching and ballot monitoring" and "auditing election results." (*Id*. at 67, ¶¶ 147, 148.) Supplementing these allegations (which must be treated as true), the preliminary injunction record shows that Coalition routinely sends volunteers to the polls to monitor the tabulation and processing of ballots (ECF 15-3 ¶ 3). Coalition also routinely speaks to the press, candidates, law enforcement, and attorneys regarding the things that its volunteers observe. (ECF 15-3 ¶ 17). Coalition makes videos or photos of post-election ballot processes to educate the public, document observed process errors, and assure election integrity. (ECF 15-3 ¶¶ 11-15).

Both the Amended Complaint and the preliminary injunction record, respectively, allege and establish that these activities of the organization will continue to be directly impaired by the State's threatened enforcement of SB202's unconstitutional provisions. Such impairments of Coalition's organizational activities amount to a legally sufficient injury-in-fact—i.e., each is a concrete infringement on the entity's legally cognizable interests in serving its organizational purposes. These injuries-in-fact will be caused by Defendants' enforcement of the unconstitutional provisions of SB202 and are redressable by an injunction. The allegations and evidence that demonstrate these impacts thus establish Coalition's direct standing to seek injunctive relief—even *without* any diversion of resources. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)

(elements of standing). Yet the State focuses its organizational standing challenge exclusively on disputing Coalition's alleged lack of diversion and addresses none of these direct injuries to Coalition. For this reason alone, Coalition must be found to have established organizational standing.

Moreover, even setting aside Coalition's direct injuries, the State is still wrong that Coalition has not alleged a cognizable diversion of resources. "[A]n organization has standing to sue on its own behalf if the defendant's illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts." *Fla. State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008). Coalition satisfies this test.

The Eleventh Circuit requires a plaintiff to identify which activities the entity will "divert resources away from" to address a defendant's challenged conduct. *Jacobson v. Florida Secretary of State,* 974 F.3d 1237, 1250 (11th Cir. 2020). Coalition has expressly done so. (ECF 14, at 67–70, ¶¶ 151–62.)[2]

The State invokes out-of-circuit appellate cases and a single N.D. Ga. opinion to argue that a cognizable diversion cannot occur where resources are diverted to different activities that are also within the scope of the entity's mission,

[2] The State erroneously claims the complaint does not "adequately allege" Coalition's mission has been "impeded." (ECF 41-1, at 15.) On the contrary, the Amended Complaint *expressly* alleges Coalition's ability to engage in its own projects is impaired by resource diversion due to SB202. (ECF 14, at 67, ¶ 151.)

that a diversion cannot be a mere reprioritization of the organization's activities, and that a diversion necessitated by having to help members respond to threatened injuries that are "speculative" does not count as a diversion. But Eleventh Circuit cases support none of these arguments. On the contrary, the Eleventh Circuit has approved organizational standing based on the same sorts of diversions away from and between the same kinds of activities that Coalition has alleged here. *See, e.g., Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341–42 (affidavits showed plaintiff organizations "have missions that include voter registration and education, or encouraging and safeguarding voter rights, and that they had diverted resources to address the Secretary's programs."); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (diverting volunteers and resources from one organizational priority to another—i.e., from voter registration to voter education—was a diversion that conferred standing).

The close similarity between the diversion allegations that the Eleventh Circuit deemed to be sufficient in *Arcia*, *Billups*, and *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008), on one hand, and Coalition's diversion allegations here, on the other hand, demonstrates that Coalition has sufficiently alleged the concrete injury of diversion of resources under the law of the Eleventh Circuit. *See Allen v. Wright*, 468 U.S. 737, 751–52 (1984) ("In many cases the standing question can be answered chiefly by

comparing the allegations of the particular complaint to those made in prior standing cases."). Accordingly, the State's arguments about the insufficiency of Coalition's diversion allegations should be rejected.

Coalition's establishment of its own direct organizational standing enables all plaintiffs to withstand dismissal of the claims they share with Coalition, since only one plaintiff must demonstrate standing for each claim. *See American Civil Liberties Union of Florida, Inc. v. Miami-Dade Sch. Bd.*, 557 F.3d 1177, 1195–96 (11th Cir. 2009).[3] Because Coalition, as a "Voter Plaintiff," is a party to all claims except Count I, this means that standing exists as to all those claims by virtue of Coalition's showing of organizational standing.

III. Claims Arising From Takeover Provisions

A. Count I: Takeover Provisions - Procedural Due Process

1. The Board Member Plaintiffs Have Standing For Count I

Constitutional standing has three requirements: "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547. "When the harm alleged is prospective . . .

[3] Owing to page limits, and recognizing that only one plaintiff must show standing per claim, this Brief confines its discussion of organizational standing to Coalition's own showing. But identical reasoning supports a finding of organizational standing for both GAPPAC and JCDC as well.

a plaintiff can satisfy the injury-in-fact requirement by showing imminent harm." *Arcia*, 772 F.3d at 1341.

"An imminent injury is one that is 'likely to occur immediately.'" *Browning*, 522 F.3d at 1161. A "realistic probability" that the injury will occur suffices. *Arcia*, 772 F.3d at 1341. "Immediacy requires only that the anticipated injury occur with some fixed period of time in the future, not that it happen in the colloquial sense of soon or precisely within a certain number of days, weeks, or months." *Browning*, 522 F.3d at 1161.

Applying these authorities, the Board Member Plaintiffs have standing to pursue Count I. Each of the five "Board Member Plaintiffs"—Plaintiffs Lang, Pullar, McNichols, Shirley, and Thomas-Clark—is an individual member of an entity "superintendent" that has existing Election Code violations. (See, e.g.., ECF 14, at 71, ¶ 166.) Defendants have expressed their intention to suspend county superintendents with existing violations under the Takeover Provisions. (Id. at 71, ¶ 167; id. at 63–64, ¶¶ 139–42.) Using Plaintiff Shirley as an example, once Defendants do what they have threatened and remove the Athens-Clarke County Board as an existing violator, Defendants' promised action will divest Shirley of office, deprive him of future compensation for attending board meetings, and impair his ability to exercise the supervisory powers of his office. These

prospective harms are plainly injuries-in-fact sufficient to confer standing on Shirley to challenge the constitutionality of the Takeover Provisions.

Defendants do not dispute causation and redressability. Instead, they argue that Shirley's injuries are not likely, but rather "speculative" and "purely hypothetical," because they are contingent upon the SEB actually following through on its stated intention to suspend superintendents with existing violations. But Defendants' argument fails for the simple reason that the Defendants' stated intention to do the very act that will cause the injury establishes *at least* a "realistic probability" that those injuries resulting from the intended action will in fact occur. *Arcia*, 772 F.3d at 1341. On this basis, Shirley and the other Board Member Plaintiffs have standing to bring Count I.

2. Count I States a Claim for Relief

Plaintiffs allege that the provisions of SB202 that allow the SEB to remove county boards of elections violate the Plaintiff Board Members' procedural due process rights.[4] In the Eleventh Circuit, a plaintiff making a facial procedural due process challenge to a state law must allege (a) a constitutionally-protected liberty or property interest (b) that is subject to deprivation without a constitutionally-

[4] The background section of the Amended Complaint describes the Takeover Provisions in Detail, (ECF 14 at 39 – 45), and Count I specifies the ways in which they violate the Board Member Plaintiffs' procedural due process rights (*Id.* at 126 – 128).

adequate process. *Grayden v. Rhodes,* 345 F.3d 1225, 1232 (11th Cir. 2003);[5] *Martin v. Kemp,* 341 F. Supp. 3d 1326, 1337 (N.D. Ga. 2018) (granting relief in facial procedural due process challenge to Georgia voting law).

a) Constitutionally Protected Interests

The Board Member Plaintiffs have a constitutionally protected liberty and property interest in their tenure and compensation as members of county boards of election. (ECF 14 at 126, ¶ 368). *Becton v. Thomas,* 48 F. Supp. 747, 757 (W. D. Tenn. 1999); *see also Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). In considering a procedural due process challenge to Georgia's laws allowing for the removal of school board members, Judge Story found that the board member "appears to have a property interest that is subject to the protections of the Fourteenth Amendment." *DeKalb County School District v. Georgia State Board of Education,* N.D. Ga., No. 1:13-cv-00544 (ECF 16 at 8, March 3, 2013) (citing *Board of Education v. Allen,* 392 U.S. 236, 241 n.5 (1968), and *Finch v. Miss. State Med. Ass'n, Inc.,* 585 F.2d 765, 773 (5th Cir. 1978)).

[5] A third element – state action – is not at issue in this case. The Defendants, but not the RNC, argue that Plaintiffs have not adequately alleged state action. (ECF 41-1 at 27). Yet this is a facial attack on a state statute, a claim that obviously is based on state action because, other than the state officials, there is no other actor responsible for the alleged injury to Plaintiffs' constitutional rights. *See Blum v. Yaretsky,* 457 U.S. 991 (1982) ("state action" issue is whether the action "can fairly be attributed to the State").

In their Motion to Dismiss, the State Defendants do not challenge the existence of a constitutionally-protected interest. (ECF 41-1 at 27). The RNC, however, argues that since state law created the board members' interest in the first place, the legislature was free to pass a law allowing for those interests to be taken away without due process. "Because members' rights are 'defined by' statute, and SB 202 is one such statute, Plaintiffs have 'no legitimate claim' for more than the legislature has provided." (ECF 42-1 at 6).

Though the RNC does not cite the case, the authority for its argument is the plurality opinion in *Arnett v. Kennedy*, 416 U.S. 134 (1974). *Arnett* involved a challenge by a former federal employee to the procedures by which he was dismissed. The plurality reasoned that where the legislation conferring the substantive right also sets out the procedural mechanism for enforcing that right, the two cannot be separated. "[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet." *Id.,* at 152–154. But the RNC's "take the bitter with the sweet" argument never garnered a majority of the Court[6] and was explicitly

[6] This view garnered three votes in *Arnett*, but was specifically rejected by the other six Justices. See 416 U.S. at 166–167, 177–178, 185, 211.

repudiated by the Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985):

> The "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. *While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.*"

470 U.S. at 538–41 (emphasis added). The Board Member Plaintiffs clearly have a constitutionally protected interest in their tenure and compemsation as board members.

b) Due Process

Both the Defendants and the RNC argue that SB202 satisfies due process. The Defendants' argument is based primarily upon the decision of the Georgia Supreme Court in DeKalb County School District v. Georgia State Board of Education, 249 Ga. 349 (2013). The RNC bases its argument upon what it purports to be a textual analysis of SB202. The arguments share similar, fatal, flaws.

(1) The School Board removal provisions are fundamentally different than SB202

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).[7] 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

[7] 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.

(a).[8] SB202, however, also permits the SEB to initiate removal proceedings "on its own motion," *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[9] 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. § 20-2-73 gives to the Governor to remove local school boards. More significant for procedural due process, however, is that SB202 allows the SEB to begin removal 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

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

[9] "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.

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. After the "preliminary hearing," the SEB may suspend a county superintendent if at least three members of the board "after notice and hearing" find either that the superintendent (the board) has violated SEB rules or has demonstrated nonfeasance, malfeasance, or gross negligence in the administration of the elections. SB202, however, does not require that individual members 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.

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.[10] SB202 has neither of these due process protections nor any process that resembles it.

(2) The RNC thoroughly misstates Georgia law

The RNC's argument that SB202 complies with procedural due process is based upon a gross misrepresentation of Georgia law. Confusing the term "superintendent," which is a county's entire board of elections, with an individual board member, the RNC states that a "board member cannot be removed unless . . ." and then lists seven purported procedural protections, beginning with the requirement that "*he* is accused of recently and repeatedly violating state law." (ECF 42-1 at 7) (emphasis added). But the SB202 provision that the RNC cites,

[10] 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.*

O.C.G.A. § 21-2-33.2(c), governs the removal of the "superintendent," which is the *entire* board. Thus, SB202 "violates due process in that it allows the SEB to remove board members, like the Board Member Plaintiffs, based upon the action or inaction of other current board members, or other former board members, and not upon the action or inaction of the board members themselves." (ECF 14, ¶ 370).

The RNC then states that a "board member cannot be removed unless" . . . "a 'performance review board' conducts an investigation." This too is wrong, for it ignores the SEB's power to fast track a removal of a county election board "on its own motion," as discussed above. The RNC then again misstates the law, stating that removal of a board member requires another investigation and another finding of "sufficient cause." The law, however, refers only to a removal proceeding initiated by elected officials' "petition"; it does not purport to apply to a removal proceeding initiated by the SEB "on its own motion."

The RNC then says that a board member cannot be removed unless "the board member receives notice and a public hearing" and that the removed member has a right under the reinstatement provision to "another notice, hearing and right to present evidence." To the contrary: there is no provision requiring any notice to an individual board member, or any right to have a hearing where the member may present evidence. Finally, the RNC states that a board member cannot be removed

unless the state board "finds that the board member broke the law," the "board member unsuccessfully 'petition[s] for reinstatement," and "unsuccessfully challenges his removal in state court." (ECF 42-1 at 7-8). All of these statements are wrong: a board member may be removed even if he or she did not break any law but *another* board member did, and the reinstatement and judicial review process is available only for the entire board, without any provision for how an individual member might invoke them.

In sum, SB202 violates procedural due process because it does not require that individual board members receive notice and does not give individual board members a fair opportunity to be heard by an impartial tribunal in either predeprivation or postdeprivation proceedings. *See McKinney v. Pate*, 20 F.3d 1550, 1561 (11th Cir. 1994) ("the Constitution requires that the state provide fair procedures and an impartial decisionmaker before infringing on a person's interest in life, liberty, or property"). Count I, therefore, states a claim for relief.

B. Count II: Takeover Provisions' Violation of State Law Separation of Powers

1. The Board Member Plaintiffs Have Standing For Count II

The Board Member Plaintiffs have standing to pursue Count II to enjoin the Takeover Provisions for the very same reasons they had standing to bring Count I. Both Counts I and II challenge the same conduct—Defendants' threatened

enforcement of the Takeover Provisions of SB202. Counts I and II invoke different legal theories to demonstrate the wrongfulness of Defendants' same conduct, but this distinction is irrelevant to the standing inquiry, which asks only whether there is injury-in-fact, causation, and redressability. This question is distinct from the legal theories asserted by the two claims. *See Duke Power Co. v. Carolina Envtl. Study Grp.,* 438 U.S. 59, 78 (1978) (plaintiffs need not "demonstrate a connection between the injuries they claim and the constitutional rights being asserted"). Because the injuries that the Board Member Plaintiffs will suffer from a takeover are identical under both Counts I and II, they have standing to bring both claims based on the same injuries.

2. The Voter Plaintiffs Have Standing For Count II

The Voter Plaintiffs—Coalition, JCDC, GAPPAC, Graham, Martin, Dufort, Nakamura, and Throop—also have standing to pursue Count II. As a threshold matter, determining the standing of the *individual* Voter Plaintiffs is unnecessary if any of Coalition, JCDC, GAPPAC, or the Board Member Plaintiffs have organizational or individual standing to bring Count II—which they all do (as shown in previous sections). *American Civil Liberties Union of Florida, Inc.*, 557 F.3d at 1195–96 (only one plaintiff per claim must have standing). But the individual Voter Plaintiffs have additional grounds for standing to challenge the Takeover Provisions in Count II because they will suffer individual injuries-in-fact

when the Defendants' carry out their expressed intentions to remove superintendents.

For example, all of the individual Voter Plaintiffs have alleged that they will suffer the loss of informational rights to monitor their county superintendents once those entities are removed. (See, e.g., ECF 14, at 91, ¶¶ 233–34 (Graham); at 93–95, ¶¶ 241, 249 (Martin); at 106, ¶¶ 287–88 (Throop).) The frustration of a procedural right to procure information has repeatedly been held to constitute an injury-in-fact for purposes of conferring standing. *See Spokeo*, 136 S. Ct. at 1549–50. This injury-in-fact will become manifest after a takeover when individual Voter Plaintiffs and members of the entity Voter Plaintiffs are deprived of their individual rights to participate in public meetings of a removed entity superintendent. (See, e.g., ECF 14, at 91, ¶ 234 (Graham); at 95, ¶ 249 (Martin); at 111, ¶ 307 (Coalition); at 122, ¶ 352 (GAPPAC).)

None of the foregoing injuries-in-fact are speculative because, as previously discussed, the Defendants' stated intentions to remove superintendents that are existing violators establishes *at least* a "realistic probability" that the injuries resulting from that intended action will in fact occur. *Arcia*, 772 F.3d at 1341. In fact, such proceedings have recently been initiated against Fulton County Board of

Registration and Elections, and are in the early phases.[11] For all these reasons, the Voter Plaintiffs have established standing to bring Count II.

3. Count II States a Claim for Relief

In Count II, Plaintiffs allege that the Takeover Provisions "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 14 at 129, ¶ 377). Plaintiffs further allege that "[v]iolations 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 to the U.S. Constitution." (*Id.* ¶¶ 376; 30 (citing *Gonzalez v. Governor of Georgia,* 978 F.3d 1266, 1271 (2020); *Duncan v. Poythress,* 657 F.2d 691 (5th Cir. 1981)).

In their Motion to Dismiss, Defendants devote a page on Count I, making three meritless arguments. First, Defendants state: "these claims are not cognizable in federal court because they do not allege 'an ongoing violation of federal law and seeks [sic] relief properly characterized as prospective.'" (ECF 41-1 at 29). Yet the claim seeks 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.

[11] https://apnews.com/article/elections-georgia-local-elections-voting-rights-election-2020-d7d7dfffd60f3ce0a93f4c522c4d3370

Defendants cite *Verizon Md., Inc. v. PSC,* 535 U.S. 635, 645 (2002), 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 commissioners in their official capacities." *Id.* at 648.

Second, Defendants contend that Count II "falls outside of *Ex parte Young* because it alleges only violations of state law." (ECF 41-1 at 30). The RNC snips: "Plaintiffs try to recast their alleged violations of the Georgia Constitution as alleged violations of federal substantive due process. . . . This tactic doesn't work." (ECF 42-1 at 9). But in a case decided just months ago between, among others, Adam Shirley (a plaintiff in this case), and Defendant Governor Kemp, the Eleventh Circuit, per Judge Branch, affirmed Judge Cohen's decision enjoining the Governor from enforcing a state election law that, because it violated the Georgia Constitution, violated the Fourteenth Amendment. *Gonzalez,* 978 F.3d at 1271. In so holding, the Eleventh Circuit quoted *Duncan v. Poythress*, 657 F.2d at 704: "It is fundamentally unfair and constitutionally impermissible for public officials to disenfranchise voters in violation of state law so that they may fill the seats of government through the power of appointment. ... [S]uch action violates the due process guarantees of the fourteenth amendment." Neither the Defendants nor the RNC discuss either *Gonzalez* or *Duncan v. Poythress,* even though both cases are

directly on point and were featured in the Amended Complaint. (ECF 14 at 12, ¶ 30).

The Defendants final argument on Count II is that, in the alternative to dismissing Count II, the Court should certify questions of state law to the Georgia Supreme Court. (ECF 41-1 at 30). Plaintiffs note that Judge Story in *DeKalb County* and the Eleventh Circuit in *Gonzalez* certified the state law issues to the Georgia Supreme Court, but only after the issues had been thoroughly briefed and the issues for certification precisely defined. Here, the Defendants and the RNC do not even mention the Georgia law issues,[12] much less address them on their merits. In any event, since Count II plainly states a claim for relief, the motions to dismiss it should be denied.

C. Count III: Takeover Provisions' Burden on Voting

1. The Voter Plaintiffs Have Standing For Count III

The Voter Plaintiffs have standing to pursue Count III. Just as the Board Member Plaintiffs have standing to bring different legal theories in Counts I and II on the basis of the same injuries-in-fact, so too do the Voter Plaintiffs have

[12] The RNC's suggestion that SB202 must only meet a "rational basis standard" of review is incorrect. (ECF 42-1 at 9-10). The issue presented by Count II is not whether SB202 is irrational (though it is), but whether it complies with the Georgia Constitution. "It is thus for this Court alone to determine whether legislation enacted by the General Assembly is inconsistent with the Constitution and where, as here, such an inconsistency has been determined to exist, it is irrelevant whether any rational basis exists for the legislation. *Gwinnett Cty. Sch. Dist. v. Cox,* 289 Ga. 265, 272 (2011).

standing to bring Count III, challenging the Takeover Provisions, for the same reasons and based on the same injuries-in-fact as were just discussed for Count II.

2. Count III States a Claim for Relief

In Count III, Plaintiffs allege that SB202 violates the fundamental right to vote because it allows the SEB to eliminate voter registration functions and absentee voting entirely, for no reason, in those counties, like Chatham, that have a board of registration that is separate from the county's board of election. (ECF 14 at 45, ¶¶ 91, 92; *id.* at 134 ¶¶ 393). In those counties, the board of registration handles the voter registration activities and the absentee ballot issuance, applications, ballot issuance, and ballot acceptance. (*Id.*). Unlike a board of election, or a combined board of election and registration, a separate board of registration is not a "superintendent" or a "local election official" under SB202. O.C.G.A. §§ 21-2-2 (35), 21-2-105. SB202 gives the SEB the power to remove "superintendents or boards of registrars," but does not provide for the replacement of the board of registrars with an appointee, as it does for boards for elections. Consistent with SB202, therefore, the SEB may eliminate voter registration activities and absentee voting in an entire county by removing a board of registrars but not replacing it.

Defendants devote less than a page to Count III in their Brief. (ECF 41-1 at 34-35). Defendants (unlike the RNC, *see supra*) do not disagree with the premises

of Count III – that SB202 allows the SEB to remove but not replace a board of registrars on the eve of an election and thereby eliminate absentee voting in the entire county and curtail county-level registration activities. What is alarming about Defendants' response is that they do not say that this is something that they would never do. Instead, Defendants argue that the harm is "speculative." (ECF 41-1 at 34 n. 10).[13] But the harm will remain "speculative" until the SEB actually removes but does not replace a board of registrations on the eve of an election and by then Defendants and the RNC will argue that, under *Purcell v. Gonzalez,* 549 U.S. 1 (2006), it is too late for a federal court to do anything about it. Indeed, under *Purcell*, now is exactly the time for the Court to address this election rule and to consider its constitutionality.

Notably, the RNC disagrees with Plaintiffs' (and, apparently, the Defendants') analysis of SB202: "Nothing in SB202 authorizes the removal of registrars in counties where the board of registration has not been combined with the board of elections." (ECF 42-1 at 19). The RNC misstates Georgia law again, saying: "If registrars are not 'superintendents' then they cannot be removed in the

[13] Both the RNC and the Defendants suggest that in the event the SEB removes but does not replace a separate board of registrars, the "county officials" may appoint a board to fill the void. (ECF 41-1 at 34 n. 10; 42-1 at 19). But there is no provision in state law allowing county officials to appoint boards of registrars at all. The authority to appoint a Boards of Registration rests with the grand jury and a superior court judge in the county, in a deliberative process, not intended for replacing an entire board. (O.C.G.A. 21-2-212)

first place." (*Id.*) Unfortunately, the law says the exact opposite: "If the State Election Board makes a finding in accordance with subsection (c) of this Code section, it may suspend the superintendent *or* board or registrars with pay and appoint an individual to serve as the temporary superintendent." O.C.G.A. § 21-2-33.2(e). Further, the referenced subsection (c) has no provision for any findings relating to registrars, only "superintendents." Thus, literally, the law allows the SEB to find that the Chatham County Board of Elections (the "superintendent") committed three violation of the election laws (subsection c), make no finding about the Chatham County Board of Registrars (for none is available under subsection c), remove both the Chatham County Board of Elections and the separate Board of Registrars (subsection e, first clause), and then replace only the Board of Elections (subsection e, last clause), crippling the absentee balloting and voter registration activities.

In any event, neither the Defendant nor the RNC muster any coherent defense of the rationality of SB202 on this issue. On the registrar removal issue Defendants state only this:

> [T]he government interest in uniformity and a well-run election system, including ensuring opportunities for all voters to vote, more than justifies the policy. *Burdick,* 504 U.S. at 434. As a result, Plaintiffs' fundamental right to vote claim must be dismissed.

(ECF 41-1 at 34-35). This statement does not make sense. Removing but not replacing the ability of a select county to give its citizens – including the elderly,

the sick, and the disabled – the opportunity to vote absentee and to register to vote or update their voter records does not promote "the government interest in uniformity" or ensure "opportunities for all voters to vote."

In sum, because SB202 threatens to severely burden the right to vote under *Burdick,* and the Defendants are unable to article any governmental interest in doing so, Count III states a claim for relief.

IV. Claims Challenging Criminal Laws

A. Individual Standing for Preenforcement Challenges

As to Plaintiffs' standing to assert preenforcement challenges to the SB202's four criminal laws, the State Defendants again do not address, distinguish, or even cite the controlling Eleventh Circuit authority, which is *Wollschlaeber v. Governor,* 848 F.3d 1293 (11th Cir. 2017), or Justice Thomas' opinion for a unanimous Supreme Court, *Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 163 (2014). These two controlling cases were highlighted in the July 1, 2021 hearing and discussed at length in prior briefing. (ECF 15-1 at 4-5; ECF 23 at 4-10). What follows is primarily a summary of prior briefing with an additional discussion of the two cases that Defendants rely upon in their Motion to Dismiss, *Tsao v. Captiva MVP Rest. Partners, LLC,* 986 F.3d 1332, 1339 (11th Cir. 2021), and *Los Angeles v. Lyons,* 461 U.S. 95 (1983).

Under *Driehaus* and *Wollschlaeber*, whether a plaintiff making a preenforcement challenge to a criminal law has an actual injury for purposes of standing depends upon whether (1) the plaintiff has "alleged an intention to engage in a course of conduct arguably affected with a constitutional interest" that is "proscribed by statute" and (2) whether "there exists a credible threat of prosecution."

1. Plaintiffs have alleged an intention to engage in the conduct

Plaintiffs have alleged and shown that they intend to engage in the conduct that is proscribed by each of the four criminal laws. (ECF 15-1 at 3 n.1). In addition, by *not* engaging in activity because of the Challenged Criminal Laws – including voting in person and other constitutionally protected activity – Plaintiffs have incurred actual Article III injury by engaging in "self-censorship," like the plaintiffs who had standing in *Wollschlaeber.* 848 F.3d at 1305. Every individual Plaintiff has alleged that he or she is avoiding or will avoid engaging in arguably constitutionally protected conduct because of the Challenged Criminal Provisions. (ECF No. 15-1 at 5 n.1 (citing to 16 sets of allegations)). Crucially, Defendants have conceded the point, stating over and over again that the evidence shows that Plaintiffs are changing "their behavior as a result of their subjective fears of prosecution." (ECF No. 21 at 15).

In their Brief in Support of their Motion to Dismiss, Defendants, citing *Tsao,* argue that Plaintiffs cannot "'conjure standing by inflicting some harm on itself to mitigate a perceived risk.'" (ECF No. 41-1 at 23-24). This is not the holding of *Tsao.* In *Tsao,* an identity theft case, the Eleventh Circuit held that *if* the underlying threat of an injury is not substantial, then a plaintiff cannot manufacture Article III standing by incurring costs to avoid that "non-imminent harm." 986 F.3d at 1445. In this case, since the underlying threat of criminal prosecution is substantial, *see infra,* by "self-censoring," Plaintiffs have incurred actual Article III injury under *Wollschlaeber.*

2. Credible threat of prosecution

Plaintiffs have plausibly alleged a credible threat of prosecution for violating the Challenged Criminal Provisions. In fact, four of the named plaintiffs (at least) are currently under investigation by the SEB. Plaintiff Rhonda Martin and CGG Executive Director Marilyn Marks have been singled out for prosecution by the SEB for violating the so-called "enclosed space" rule by allegedly standing too close to BMDs on election day. Plaintiff Jeanne Dufort's investigation and advocacy relating to the accuracy of the scanning pitted her against the leadership at the Secretary of State's office in a very public dispute in 2020. Secretary of State official Gabriel Sterling reportedly called her an "activist with an ax to grind." (ECF 15-4 at 4 ¶ 18).

Unsurprisingly, after Ms. Dufort's successful investigation and advocacy, the Secretary launched a formal investigation into Ms. Dufort's responsibly for forwarding to the County Elector a concerned pollwatcher's photo of an unsafe overcrowded polling place. (*See* Declaration of Bruce P. Brown, attached hereto as Exhibit A). The Secretary also is investigating a harmless video Facebook posting by Plaintiff Lang in which he introduced is fellow election board members during last June's primary. (*Id.*). Other Plaintiffs have alleged that they, too, fear retribution for their public criticism of the State officials and legislators. (ECF 23 at 7 n. 2; ECF 14 ¶¶ 324, 429).

Defendants have not stated, in either their Response to the Motion for Preliminary Injunction or in their Motion to Dismiss, that the Secretary or the State will do anything other than vigorously prosecute perceived violations of each of the Challenged Criminal Provisions.[14] *See Driehaus,* 573 U.S. at 165 (holding that plaintiffs faced credible threat because, among other reasons, defendants "have not disavowed enforcement"). By contrast, in *Wollschlaeber,* the Eleventh Circuit found that the plaintiffs faced a "credible threat" even though the defendants' enforcement intentions were far more equivocal. 848 F.3d at 1306.

[14] *See also* https://sos.ga.gov/index.php/elections/raffensperger_sends_more_voting_cases_to_prosecutors.

The only argument that Defendants' advance that touches on the "credible threat" issue is the repeated contention that Plaintiffs do not have standing to challenge the criminal laws because they allege no "non-speculative injury: the alleged fear of prosecution depends on unknown conduct of some unknown third party at some point in the future." (ECF No. 41-1 at 17). Defendants cite *Los Angeles v. Lyons,* 461 U.S. 95 (1983), where a plaintiff who had been placed in a chokehold by police sued for a declaratory judgment that the chokeholds constituted excessive force. *Id.* at 97-98. The Supreme Court held that the plaintiff did not have standing because he failed to establish (1) an imminent threat that he would again be stopped by police, particularly as he expressed no intent to violate any law in the future, or (2) the extensive application of chokeholds by arresting Los Angeles police officers. *Id.* at 105-106.

In this case, however, the allegations – and evidence - are exactly the opposite as in *Lyons*: (1) multiple Plaintiffs have expressed an intent or desire to take the actions that SB202 criminalizes and (2) Defendants have pledged to prosecute every violation of the new laws. *Lyons,* therefore, plainly does not apply. *See Knife Rights, Inc. v. Vance,* 802 F.3d 377, 385 (2nd Cir. 2015) (similarly distinguishing *Lyons*).

B. Count IV: Observation Rule[15] – Right to Vote – States a Claim

[15] In prior briefing, Plaintiffs referred to the "Observation Rule" as the "Elector Observation Felony." In this brief, the Plaintiffs adopt the terminology of the Court in its recent order.

O.C.G.A. § 21-2-568.1 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." In Count IV, Plaintiffs contend that the Observation Rule is unconstitutional because the threat of prosecution for the felony constitutes a severe burden on the right to vote that does not serve any compelling state interest. (ECF 14 at 136-140).

Defendants' entire argument in support of its contention that Count IV does not state a claim is this: the statute does not burden the right to vote at all because a voter may avoid prosecution for the felony by simply not "intentionally attempt[ing] to view the votes of others." (ECF 41-1 at 43). Since not intentionally attempting to view the votes of others is easy to do, Defendants contend, the felony statute imposes no burden on the right to vote. (*Id.*)

There are two fatal problems with the Defendants' argument. First, the argument depends upon a rewriting of the statute - moving the requirement of intentionality from "observing an elector while voting" to "intentionally attempt[ing] to view the votes of others." Second, even accepting Defendants' tortured reading of the statute, Defendants' argument is a fact-bound one that is directly contrary to Plaintiffs' allegations, which must be accepted as true. Defendants contend that it is easy to vote in person without appearing to violate this statute. This conflicts with Plaintiffs' allegation: "Given the large size of the

Dominion BDM touchscreens, and small size of many polling places, it is frequently not possible to vote in person without appearing to commit this felony." (ECF 14 at 136 ¶ 401). Defendants do not contend that Plaintiffs' allegations are conclusory or implausible or insufficiently detailed. Nor could they do so: Plaintiffs, in addition to their written allegations, have included photographs of the polling places with the giant BMD screens showing that it is difficult, if not impossible, for a voter to enter a busy polling place and go to a voting station without doing so in a manner that would allow the voter to see how someone else is voting. (ECF 14 at ¶¶ 324, 429). Since these well plead allegations must be accepted as true, Count IV states a claim for relief under *Burdick.* Plaintiffs also incorporate by reference their prior extensive briefing of this claim. (ECF 15-1 at 10-11; ECF 23 at 13-17).

C. Count V: Observation Rule– Void for Vagueness

1. The Void for Vagueness Doctrine

In Count V, Counts VIII, and X, Plaintiffs claim that SB202's criminal laws are void for vagueness under the Due Process Clause. The void for vagueness doctrine has two related, but distinct, components. The first is that criminal statute must give fair notice as to what conduct it criminalizes: "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application

violates the first essential of due process of law." *Connally v. Gen. Const. Co.,* 269 U.S. 385, 393 (1926). "The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue." *Id.*

Second, a criminal statute violates the Due Process Clause if it is standardless, that is, if it fails to "establish minimal guidelines to govern law enforcement.'" *Kolander v. Lawson,* 461 U.S. 352, 358 (1983). As Justice O'Connor wrote in *Kolander,* "[w]here the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Id.*

Significantly, the fact that some conduct may unambiguously be a crime under a vague statute does not render the statute constitutional. As Justice Scalia wrote in *Johnson v. United States,* 576 U.S. 591, 602 (2015), the Supreme Court's holdings "squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp."

2. Count V States a Claim for Relief

In Count V, Plaintiffs allege that the Observation Rule violates the Fifth Amendment because it void for vagueness in that it "criminalizes any action in a

polling place, or even mere entry into a polling place, where elector's choices on the oversized Dominion BMD touchscreens are clearly displayed for anyone to see." (ECF 14 at 140, ¶ 412). The Observation Rule violates both distinct aspects of the void for vagueness doctrine because citizens of ordinary intelligence can only "guess at its meaning" and it permits law enforcement a "standardless sweep."

In their Motion to Dismiss, Defendants address Count V only is passing (ECF 41-1 at 32, 35), and make the same argument twice. Defendants state without analysis that what the Rule "as a whole" prohibits is "clear." "How does one avoid the criminal penalties of the observation provisions? By not *intentionally* trying to see how someone else is voting." (ECF 41-1 at 35). As explained above, however, that is not what the law says. And, if the law were so clear, why do Defendants insist on rewriting it before they address its constitutionality?

Defendants ignore the second way that Plaintiffs allege the Observance Rule violates due process: since law enforcement could plausibly charge almost any voter or poll worker with a felony, the Rule "encourage[s] arbitrary and discriminatory enforcement." *Kolander,* 461 U.S. at 357. Every voter entering a polling place cannot avoid appearing to be viewing other voters making their selections on giant BMD screens. The Observation Rule permits a "standardless sweep" in which law enforcement is empowered to select, among those voters,

who to prosecute and imprison for up to ten years. As Justice Scalia wrote in *Johnson:* "The prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'" *Johnson,* 576 U.S. at 602. The Observance Rules "violates the first essential of due process." Count V states a claim for relief.

D. Count VI: Observation Rule – Voter Intimidation

In Count VI, Plaintiffs allege that the Defendants' intended enforcement of SB202's Observation Rule will constitute unlawful voter intimidation in violation of the Section 11(b) of Voting Rights Act, 52 U.S.C. § 10307(b). Defendants argue that (a) this section of the VRA does not create a private cause of action and (b) the risk of intimidation is too remote given the chain of events that must occur before a voter is arrested for violating the Observation Rule. (ECF 41-1 at 33-34; *id.* at 36). Neither argument withstands scrutiny:

1. There is a Private Cause of Action under Section 11

Section 11 of the Voting Rights Act of 1965, 52 U.S.C. § 10307 is entitled "Prohibited Acts" and list a number of such actions. Subsection (b) is entitled "Intimidation, threats, or coercion," and states:

> No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any

> person for urging or aiding a person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any of their powers or duties under section 10302(a), 10305, 10306, or 10308(3) of this title of section 1973d or 1973g of Title 42.

In support of their argument that a private cause of action does not exist under Section 11(b), Defendants rely on the *dissenting* opinion of Judge Branch in *Alabama State Conference of the NAACP v. Alabama,* 949 F.3d 647, 656-57 (11th Cir. 2020), vacated as moot, 2 021 WL 1951778 (U.S. 2021). In Judge Branch's view, the Voting Rights Act did not abrogate state sovereign immunity. The majority, however, disagreed, holding, "like every circuit to decide this question," that the VRA abrogated state sovereign immunity. 949 F.3d at 649.[16]

In no case found has a court held that private citizens do not have a cause of action under Section 11(b). In case after case, courts have either assumed[17] (as the Supreme Court has repeatedly done in Section 2 cases[18]), or expressly recognized a

[16] Defendants also cite three opinions that do not address the issue: In *Alexander v. Sandoval,* 532 U.S. 275 (2001), the Court held that there was no private cause of action to enforce disparate-impact regulations under Title VI of the Civil Rights Act of 1965. The opinion recognized, however, that Congressional intent to allow private causes of action may be inferred even if not expressly granted. *Id.* at 289. In *Brnovich v. DNC,* 141 S. Ct. 141 S. Ct. 2321, 2350 (2021), Justice Gorsuch noted in his concurring opinion: "Our cases have assumed—without deciding—that the Voting Rights Act of 1965 furnishes an implied cause of action under § 2." *Bellitto v. Snipes,* 935 F.3d 1192 (11th Cir. 2019), involved the Help America Vote Act, not the Voting Rights Act of 1965.

[17] *E.g., Council on American Islamic Relations v. Atlanta Aegis, LLC,* 497 F. Supp. 3d 371, 379 (D. Minn. 2020) (holding that the "Voter Organizations have shown a likelihood of success on the merits in their intimidation claim under Section 11(b)).

[18] *See Brnovich,* 141 S. Ct. at 2350 (Gorsuch, J., concurring).

private cause of action. *National Coal. On Black Civic Participation v. Wohl,* 512 F. Supp. 3d 500 (S.D.N.Y. 2021) (citing numerous cases).

2. The intimidation is real and immediate

Defendants next contend that Count VI should be dismissed because "the allegations claim intimidation under a law under which they may or may not be prosecuted – and by many others beyond those they named as Defendants." (ECF 41-1 at 34). This argument is without merit for a number of reasons. First, the issue on Defendants' Motion to Dismiss is not whether Plaintiffs have proven that they are intimidated by the law, but whether they have *alleged* a proper claim for relief. Next, the fact that Plaintiffs may also be intimidated by non-parties does not allow these Defendants to escape liability for enforcing and threatening to enforce this law that, by making it a felony to enter a polling place and intentionally see other voters voting on gigantic BMD screens, which is impossible not to do, intimidates voters attempting to vote "under color of law." 52 U.S.C. § 10307(b). Count VI states a claim for relief.

E. Count VII: Disclosure[19] Rule – First Amendment

The Communications Rule, O.C.G.A. § 21–2–386(a)(2)(B)(vii), prohibits "monitors" and "observers," from "[c]ommunicating any information that they see while monitoring the processing and scanning of the absentee ballots, whether

[19] Plaintiffs previously referred to the "Disclosure Rule" as the "Gag Rule."

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." In Count VII, Plaintiffs allege that the Communications Rule violates the freedom of speech. (ECF 14 at 143).

Defendants devote a page to why Count VII does not state a claim and make three frivolous arguments. (ECF 41-1 at 37-38). First, citing *Minnesota Voters Alliance v. Mansky,* 138 S. Ct. 1876 (2018), Defendants argue that the Communications Rule is a reasonable restriction on speech in a non-public forum. But the Communications Rule has no territorial limit whatsoever. It is as if, in *Mansky,* Minnesota's ban on political buttons extended beyond polling places to the entire state. And, in *Mansky,* the Supreme Court held that even though Minnesota's ban was limited to inside the polling place, it violated the First Amendment. 138 S. Ct. at 1882.

Second, Defendants argue that Plaintiffs "appear to be claiming a First Amendment right to disclose election results before the election is over." (ECF 41-1 at 38). This is flat wrong. Plaintiffs state in Count VII: "Plaintiffs do not challenge restrictions on the disclosure of information about tallies of contests, including vote tally estimates and trends that a monitor or observer obtains observing the processing of absentee ballot before the close of the polls. SB202, however, criminalizes far more, and includes *any* information about absentee ballot

processing or scanning." (ECF 14 at 144, ¶ 428). Third, Defendants contend that the Communications Rule should be evaluated as a burden on the right to vote under *Anderson/Burdick* and, since it is not a burden on the right to vote, it passes constitutional muster. This argument is nonsensical. Just because the Communications Rule does not *also* violate the fundamental right to vote does not mean that it is not a violation of free speech. To state a claim for relief, Plaintiffs do not need to show that the Rule violates every provision of the Constitution or the Bill of Rights, just the First Amendment.

In any event, as set forth in Plaintiffs' Brief and Reply Brief in Support of Motion for Preliminary Injunction (ECF 15-1 at 13-17; ECF 23 at 17-19), and as eloquently articulated by the Georgia First Amendment Foundation ("GFAF" in its amicus brief (ECF 29 at 5 – 7), the Communications Rule is a presumptively unconstitutional content-based restriction on speech. By criminalizing speech that is vital to the preservation of election integrity, the Communications Rule defeats the stated governmental interest in election transparency and integrity. In addition, since the restriction is not limited in time or place, it is not "narrowly tailored to serve compelling state interests." *Wollschlaeger,* 848 F.3d at 1331. Count VII states a claim for relief.

F. Count VIII: Tally Rule[20] – First Amendment

The Tally Rule makes it a misdemeanor for "monitors and observers" to, among other things, tally, tabulate, estimate, or attempt 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)(A) & (B).

In Count VIII, Plaintiffs allege that the Tally Rule is void for vagueness because it criminalizes the act of thinking about a tally,[21] does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited, and encourages arbitrary and discriminatory enforcement. (ECF 14 at 146, ¶¶ 437-439). *See Kolander,* 461 U.S. at 358.

In their Motion, Defendants devote a paragraph to Count VIII. (ECF 41-1 at 36-37). Defendants contend that the Tally Rule is not vague because "in context, the statute clearly refers to an observer trying to make a count of ballots to inform others about a particular candidate's status before the polls close." (*Id.* at 37).

[20] The "Tally Rule," which is referred to as the "Estimating Bans" by the Plaintiffs in prior briefing, is broader than its label "tally" would indicate. *See* Amended Complaint (ECF 14 at ¶ 106) and prior briefing. (ECF 15-1 at 18-21; ECF 23 at 19 – 20).

[21] As the GFAF writes:

> The notion of criminalizing a mental process is starkly at odds with First Amendment principles. *See, e.g., Palko v. Connecticut,* 302 U.S. 319, 327 (1937) ("freedom of thought, and speech ….is the matrix, the indispensable condition, of nearly every other form of freedom").

(ECF 29-1 at 7).

Obviously, this is not what the Rule says. The Rule says nothing about informing others of anything: the crime is complete when the monitor or observer attempts the mental act of tallying. The Tally Rule does not mention "a particular candidate's status" or anything close to it. The Tally Rule is not limited to speech occurring "before the polls close," but bans estimating and tallying anything about ballots or vote quantities forever.

Defendants are understandably unable to defend the Tally Rule as enacted because it is utterly incomprehensible. "The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue." *Connally,* 269 U.S. at 393. The Tally Rule violates this "'first essential of due process.'" *Johnson,* 576 U.S. at 595. Count VIII states a claim for relief.[22]

G. Count IX: Photography Rule – First Amendment

The Photography Rule, O.C.G.A. §21-2-568.2 (2)(B), contains two bans. What Plaintiffs call "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."[23] Photo Ban B makes

[22] For additional discussion of Count VIII, Plaintiffs refer the Court to their Brief and Reply Brief in Support of Motion for Preliminary Injunction (ECF 15 at 18-19; ECF 23 at 19-20), and the GFAF's Amicus Brief (ECF No 29 at 7).

[23] At the hearing on Plaintiffs' Motion for Preliminary Injunction, Plaintiffs indicated that their primary concern is with Ban B. As to Ban A, though the statute could be more precise and state

it a misdemeanor to "[p]hotograph or record a voted ballot." In Count IX, Plaintiffs allege that Photography Ban violates the First Amendment because it criminalizes constitutionally protected speech. (ECF 14 at 147 - 148).

Photo Ban B, as enacted, prohibits the recording of a voted ballot at any time, during or after an election, an extremely broad restriction on speech that has no governmental justification and, as explained in prior briefing, directly conflicts with Georgia's Open Records Act. (ECF 23 at 22). *See also* GFAF Amicus Brief, ECF 29-1, at 8.

In response to Plaintiffs' Motion for Preliminary Injunction, Defendants claimed that Photo Ban B lasts only during the election. (ECF 15-1 at 25). In their Motion to Dismiss, Defendants have, finally, abandoned that fiction and all but concede that Photo Ban B is unconstitutional to the extent that it prohibits photography after an election. (ECF 41-1 at 39). On this basis alone, the Motion to Dismiss Count IX must be denied.

Photo Ban B also is unconstitutional to the extent that it criminalizes such photography during the election. The only governmental interest that Defendants identify for Photo Ban B, during the election, is to deter a "vote-buying scheme

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specifically that it bans only the recording of a voter's actual votes, given the size of the BMD screens, photographing the "face of an electronic ballot marker while a ballot is being voted" is likely to be photographing a voter's votes. Plaintiffs' position is that photography of another's voted ballot must be prohibited if that ballot can be connected to the voter. For this reason, this Brief focuses on Photo Ban B.

that requires a voter to show proof of their vote the person paying them." (ECF 41-1 at 7). An existing statute, however, already makes this a crime. O.C.G.A § 21-2-579(1). Moreover, since voted ballots do not disclose the identity of the voter, photographs 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, onestated purpose of SB202. Photo Ban B, which criminalizes them, is unconstitutional. *See also* GFAF Amicus Brief, ECF 29 at 8 – 10.

H. Count X: Photography Rule – Void for Vagueness

To the extent that Defendants continue to maintain that the Photography Rule means something other than what it says – for example, that it prohibits photography only during elections – it violates the Due Process Clause because, as enacted, it does not define the crime with sufficient clarity.

V. Count XI: Relaxed Voter ID Rule – Right to Vote

A. The Voter Plaintiffs Have Standing For Count XI

The Voter Plaintiffs have standing to pursue Count XI challenging the Relaxed Voter ID Rule as an unjustified burden on the right to vote. (ECF 14, at 151–52, ¶¶ 457–63.) The Relaxed Voter ID Rule requires that a voter's absentee ballot must be issued to the person who presents an application bearing that voter's

[24] *See* ECF 15-2 at 2-3.

name, date of birth, and Georgia driver's license or identification number—without any need for the voter's unique signature. The newly required information can be provided by anyone posing as the voter. When that inevitably happens, the actual voter either will be wholly disenfranchised, since he or she will thereafter appear to have "already voted," or else will be subject to prosecution because he or she will appear to have tried to vote more than once. (ECF 14, at 54–55, ¶¶ 110–13.)

These injuries are not speculative because there is a "realistic probability" that they will occur. *Arcia*, 772 F.3d at 134.1 The individual Voter Plaintiffs' data has been repeatedly accessed by unknown, unauthorized actors.[25] Given this, the only thing that the Voter Plaintiffs can do to preempt the threatened injury of ballot theft is to undergo the inconveniences of voting absentee by mail, and to do so on the earliest possible date when absentee applications are accepted, so that their legitimate absentee ballot application will be processed prior to any impostor's application in their name. The burdens suffered to avoid disenfranchisement are themselves injuries-in-fact that suffice for standing. *See Billups*, 554 F.3d at 1351 (inconveniences were sufficient injury to show standing).

Defendants argue that the potential for ballot theft, and resulting deprivation of the fundamental right to vote, is analogous to the "elevated risk of identity theft"

[25] (See ECF 14, at 60–61, ¶¶ 129–32; see also, e.g., ECF 14, at 74, ¶¶ 171–72 (Shirley); at 96, ¶¶ 250–51 (Martin); at 99, ¶¶ 264–65 (Dufort); at 102, ¶¶ 276–77 (Nakamura); at 106, ¶¶ 289–90 (Throop); at 112, ¶ 310 (Coalition members).)

arising from data breaches in the commercial context, which the Eleventh Circuit rejected as an injury in *Tsao, supra,* and *Muransky v. Godiva Chocolatier*, 979 F.3d 917, 933 (11th Cir. 2020). Defendants' reliance on these cases fails for four reasons. First, the allegations here are substantively different. In *Tsao*, the plaintiffs failed to allege that "social security numbers, birth dates, or driver's license numbers were compromised," and the information that *was* alleged to be compromised "generally cannot be used alone to open unauthorized new accounts." 986 F.3d at 1343. In *Muransky*, the alleged injury-in-fact was the conclusory "elevated risk of identity theft," without anything more. 979 F.3d at 933. Here, by contrast, the Voter Plaintiffs have alleged repeated compromises of voters' birth dates and driver license numbers, and have alleged a realistic explanation of how that the stolen information is substantially likely to be used to steal ballots under the lowered standards of the Relaxed Voter ID Rule. The holdings of *Tsao* and *Muransky* are consistent with finding standing here.

Second, Defendant's analogy to *Tsao* and *Muransky* fails because the injuries being challenged arise from the lowered identification standard imposed by the Relaxed Voter ID Rule, not from the data breach itself. The compromises of the Secretary's election databases are not the injury, but are merely factual background that illustrates why the Relaxed Voter ID Rule burdens the right to

vote. Conflating the data breach with the newly lowered standard for voter identification mistakes the actual injury that gives Plaintiffs standing.

Third, Defendants' reliance on *Tsao* and *Muransky* overlooks the inconveniences and burdens that Voter Plaintiffs must endure in order to *avoid* ballot theft if the rule is enforced. Such inconveniences, suffered to avoid being disenfranchised by official conduct, are themselves injuries-in-fact that confer standing. *Billups*, 554 F.3d at 1351.

Defendants also argue—wrongly—that the injury depends on whether a voter chooses to vote absentee by mail. Nor true: Injury from the Relaxed Voter ID Rule occurs because the new rule permits an *impostor* to obtain the voter's absentee ballot; it has nothing to do with how the *real* voter may choose to vote. The Voter Plaintiffs have standing to bring Count XI.

B. Defendants and the RNC do not address whether Count XI States a Claim for Relief

As explained above in detail, in Count IX, Plaintiffs allege that this Relaxed Voter ID Rule violates the fundamental right to vote because it massively increases the risk that the Voter Plaintiffs will be disenfranchised. (ECF 14 at 151, ¶¶ 459-460). In their Motion to Dismiss, apart from arguing standing, the Defendants do not explain why this Count fails to state a claim for relief. Defendants cite to "Count IX," but misread it as claiming that the Relaxed Voter ID Rule is too burdensome on voters – not unlike the oft-challenged photo ID laws. (ECF 41-1 at

39). Defendants argue that "the Eleventh Circuit and Supreme Court have already determined that requiring photo identification presents no unconstitutional burden on the right to vote." (*Id.*). This statement has nothing to do with Count XI or, for that matter, SB202, which requires no photo ID for mail ballots. Nowhere do Defendants address the actual allegations of Count XI. For its part, the RNC includes in its Motion to Dismiss "Count XI," but omits any discussion of Count XI in its Brief, which is devoted exclusively to Counts I-III and Counts XII-XIV. (*See* subheadings at ECF 42-1 at 5, 10, 13).

Since neither the Defendants nor the RNC have addressed the allegations of Count XI, much less explained why they fail to state a claim for relief, dismissal should be denied. Nor should any new arguments in a reply brief be allowed.

VI. Counts XII, XIII, XIV: Absentee Ballot Application Deadline

A. The Voter Plaintiffs Have Standing For Counts XII – XIV

Defendants do not appear to dispute the Voter Plaintiffs' standing in Counts XII, XIII, and XIV, which are all brought to challenge the constitutionality of a shortened period of time within which voters may apply for absentee-by-mail ballots. Nor could Defendants properly challenge standing on these three Counts, for all three elements of standing have plainly been alleged by the Voter Plaintiffs with respect to the new absentee application deadline. First, Voter Plaintiffs will suffer an obvious injury-in-fact because they will be unable to apply for an

absentee ballot any later than eleven days prior to any upcoming election. Whether this new deadline violates the Constitution is a merits question, not a standing question; for purposes of standing, the application deadline plainly constitutes an injury-in-fact. Second, the restriction will of course be caused by Defendants' enforcement of the new deadline. Third, an injunction against enforcement of the new deadline will provide relief from the injury-in-fact. Standing exists.

B. Counts XII – XIV State a Claim for Relief

The final three counts of the Amended Complaint target SB202's application deadline for absentee ballots of 11 days prior to election day. O.C.G.A. § 21–2–381(a)(1)(A); (ECF 14 at ¶ 147-157). Prior to SB202, there was no stated deadline for applying for an absentee ballot. Officials, however, were not (and are not) permitted to issue absentee ballots on Election Day or the day prior. O.C.G.A. § 21-2-384(a)(2). SB202's drastically shortened period for applications for absentee mail ballots burdens the right to vote in multiple ways plausibly alleged in the Amended Complaint. Most significantly, since Georgia does not have a process for obtaining an absentee ballot on an emergency basis, eligible voters who encounter unforeseen emergencies within 11 days of Election Day that prevent in-person voting will be disenfranchised. The kinds of voters who will be affected include anyone with serious accidents or illnesses, anyone quarantined or bereaved, and anyone called for National Guard duty, emergency medical work, or

unanticipated jury duty. There is no compelling justification for this change to Georgia law burdening a fundamental right. *Burdick,* 504 U.S. at 433.

Scattered in various places in their Briefs, Defendants and the RNC make several meritless arguments. The RNC attacks the voters who would miss the deadline, saying they are not burdened by the deadline, but by their own failure to take timely steps to apply. (ECF 42-1 at 18). To the contrary: citizens who plan to vote in person but who are unexpectedly called for National Guard duty, or who fall ill and must quarantine, are not at fault. Defendant Kemp was quarantined shortly before election day and could not vote in person but, under the prior law, he was able to apply for an obtain an absentee ballot. (ECF 14 at 62). No longer.

Defendants claim that SB202's deadline puts Georgia into the mainstream of States. To the contrary: as Plaintiffs has explained (ECF 23 at 24-25), Georgia is the only State with runoffs in the country that does not allow ballots to be issued on an emergency basis and that has a deadline of 11 days or shorter. (*Id.*).

The RNC relies heavily on *New Georgia Project v. Raffensperger,* 976 F3d 1278 (11th Cir. 2020). In that case, the Court held that Georgia's "decades-old" law requiring that absentee ballot be received by election day (as opposed to being post-marked by election day) was *not* a severe burden on the right to vote because "Georgia has provided numerous avenues to mitigate chances that voters will be unable to cast their ballots." These included allowing voters to request absentee

ballots "as early as 180 days before the election" and returning their ballots through "the mail, hand-delivery, or a drop box." 976 F.3d at 1281.

SB202 radically curtails the very mitigations that justified *New Georgia Project*'s holding. As Plaintiffs have plausibly alleged in the Amended Complaint and supported with evidence with the Motion for Preliminary Injunction, the new law foreseeably discriminates against those who are physically unable to vote in person, including those whose medical condition makes in-person voting dangerous, particularly during a pandemic. SB202 also severely burdens those who choose to vote absentee to avoid the risk of being accused of the Elector Observation Felony, to protect their personal identifying information, or to ensure they can vote a secret ballot. (ECF 15-1 at 24-25).

Finally, Defendants and RNC ignore the procedural posture of this case. The Court is not considering the merits, but only the sufficiency of the pleadings. The key cases cited by Defendants and the RNC were appeals from a bench trial, *Jacobson v. Florida Secretary of State,* 974 F.3d 1237 (11th Cir. 2020), and from summary judgment decisions. *E.g. Crawford v. Marion Cty. Election Bd.,* 553 U.S. 181 (2008); *Greater Birmingham Ministries v. Secretary of State,* 992 F.3d 1299, 1304 (11th Cir. 2021). Those cases involved merits analyses that are not proper to examine under Rule 12. Plaintiffs have stated claims for relief.

For the foregoing reasons, the Motions should be denied.

Respectfully submitted this 9th day of August, 2021.

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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 9th day of August, 2021.

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EXHIBIT A

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

COALITION FOR GOOD GOVERNANCE, et al., **Plaintiffs,** **v.** **BRAD RAFFENSPERGER, et al.,** **Defendants.**	**Civil Action No. 21-cv-02070 JPB**

DECLARATION OF BRUCE P. BROWN

I, BRUCE P. BROWN, hereby declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am over the age of 18 and have personal knowledge of all facts stated in this declaration and, if called to testify, I could and would testify competently thereto.

2. I am counsel to the Plaintiffs in this case.

3. Attached hereto as Exhibit 1 is a true and correct copy of an email that I received from Plaintiff Antwan Lang.

4. Attached hereto as Exhibit 2 is a true and correct copy of a July 14, 2021 letter, with enclosures, that I received from Plaintiff Jeanne Dufort.

Executed this 9th day of August, 2021.

Bruce P. Brown

EXHIBIT

1

Subject: Fwd: June 9, 2020 Election
Date: Monday, August 9, 2021 at 3:45:02 PM Eastern Daylight Time
From: Antwan Lang
To: Bruce Brown
Attachments: image001.jpg

---------- Forwarded message ---------
From: **Archie, Glenn** <garchie@sos.ga.gov>
Date: Mon, Jul 26, 2021 at 2:48 PM
Subject: June 9, 2020 Election
To: antwan.lang@gmail.com <antwan.lang@gmail.com>

Hi Mr. Lang:

I need to talk with you about what occurred on the night of the June 9, 2020 Election. It has been reported you walked in to the area where they were processing absentee ballots and live streamed it on Facebook. You can reach me by phone or by email. Thanks, Glenn

Glenn Archie

Investigations Division

Georgia Secretary of State

Main: 470-240-5072

Cell: 478-319-7298

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message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any retention, dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by return email. Thank you.

EXHIBIT 2

The Office of Secretary of State

Brad Raffensperger
SECRETARY OF STATE

2 Martin Luther King Jr., Drive
802 West Tower
Atlanta, Georgia 30334

Frances Watson
CHIEF INVESTIGATOR

July 14, 2021

VIA CERTIFIED MAIL
RETURN-RECEIPT REQUESTED
Jeanne Dufort
Morgan County Democratic Party
168 S. Main St.
Madison, GA 30650

RE: SEB Case No. 2020-000066

Dear Jeanne Dufort:

You are listed as a respondent in the above-referenced election case. Please be aware and take note that this case is currently on the agenda for the State Election Board meeting scheduled for Wednesday, August 18, 2021, beginning at 9:00 a.m. in Room 341 at the State Capitol Building, 206 Washington Street SW, Atlanta, Georgia 30334.

This means that the State Election Board (SEB) will review the case facts to determine whether you may have violated the Georgia Election Code and/or SEB rules. Enclosed is the case summary with preliminary conclusions to be presented to the State Election Board. At this time, the case is listed on the meeting agenda as a "consent case" with a recommendation to the SEB to close the case with **no violation**. However, please note that the SEB will make final decisions on the results of all investigations.

Your attendance is not mandatory, but should you attend, the SEB will provide you with an opportunity to address them about your case. The SEB may ask you questions about your case, and your statements to the SEB will be recorded. You may bring legal counsel with you if you desire. The SEB has also notified the complainant in your case about this meeting, and should the complainant choose to appear, the SEB will provide him or her with an opportunity to speak as well.

If you have any questions, please feel free to contact me at (470)-312-2774.

Sincerely,

Frances Watson

Frances Watson
Chief Investigator

Enclosures

INVESTIGATIONS DIVISION

SUMMARY OF INVESTIGATION

CASE NAME: Morgan County – Illegal Photo in Polling Place

SEB CASE #: SEB2020-066

INVESTIGATOR: Gilbert C. Humes

DATE OF REPORT: March 30, 2021

COMPLAINT:

This investigation was opened after the Georgia Secretary of State's Office received a complaint from Jennifer Doran, Elections Supervisor, Morgan County Board of Elections alleging that Poll Watcher Jeanne Dufort was responsible for taking a photo inside of a polling location and submitted a copy of the photo reportedly taken by Dufort, a potential violation of O.C.G.A. §21-2-413(e) - Conduct of voters, campaigners, and others at polling places generally.

MUNICIPALITY AND ELECTION INVOLVED:

Morgan County, Georgia / General Primary Election, June 2020

JURISDICTION/VENUE:

Jurisdiction will be with the State Election Board, Atlanta, Fulton County, Georgia. Venue on any criminal prosecution will lie in Morgan County, Georgia.

ELECTION STAFF:

Jennifer B. Doran, Elections Supervisor, Morgan County Board of Elections