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**

REPLY BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Unable to mount a substantive defense against Plaintiffs' Motion on the merits of SB202's constitutionality, Defendants devote fully half of their brief to disputing Plaintiffs' standing. As explained in Part II, however, Defendants fail to address, distinguish, or even cite the controlling Eleventh Circuit authority on standing relating to pre-enforcement challenges to unconstitutional criminal laws, which is *Wollschlaeber v. Governor,* 848 F. 3d 1293 (11th Cir. 2017). Defendants' primary argument – that Plaintiffs do not have standing because none of them have stated "that they intend to or ultimately will violate any of the Challenged Provisions," (Doc. 21 at 12) – has been repeatedly rejected by the courts, including by the Supreme Court in a unanimous decision authored by Justice Thomas, *Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 163 (2014) ("Nothing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law.").

To the extent they do address the merits, Defendants are unable to, and do not, defend the provisions of SB202 *as enacted* by the General Assembly. Rather than defending the law as written, Defendants strain to interpret the statutes enacted by SB202 so that, as reimagined, they might stand a chance of passing constitutional muster. *See tables, infra* (comparing actual enacted statutes to

Defendants' "interpretation" of them). But the Defendants' need to rewrite the statutory provisions enacted by SB202 confirms the unconstitutionality of those provisions, which are void for vagueness, plainly violate the First Amendment and Due Process, and are not narrowly tailored to serve a compelling governmental interest. The Motion should be granted.

II. PLAINTIFFS HAVE STANDING

A. Individual Standing - Challenged Criminal Provisions

1. Actual Injury

Defendants devote half of their responsive brief to standing, but ignore the controlling authority, cited by Plaintiffs in their opening Brief, which governs standing determinations in preenforcement challenges to criminal laws and civil regulations. (Doc. 15-1 at 5). In *Wollschlaeber,* the Eleventh Circuit restated the test from *Driehaus,* 573 U.S. at 158-59. Under *Driehaus* and *Wollschlaeber*, whether a plaintiff has an actual injury in preenforcement cases depends upon whether (a) the plaintiffs have "alleged an intention to engage in a course of conduct arguably affected with a constitutional interest" that is "proscribed by statute" and, (b) whether "there exists a credible threat of prosecution."

a) Intention to Engage in a Action Proscribed by Statute

Defendants' lead argument, which they reframe and repeat in multiple ways

throughout their Brief, [1] is that Plaintiffs do not have an actual injury because none of them have stated "that they intend to or ultimately will violate any of the Challenged Provisions." (Doc. 21 at 12). But as Justice Thomas wrote in *Driehaus,* "[n]othing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law." 573 U.S. at 163. Instead, standing exists if the plaintiff alleges the desire to engage in an activity that will place the plaintiff at a "credible threat of prosecution." *Wollschlaeber,* 848 F. 3d at 1304 (internal quotations and citation omitted). Like the plaintiffs in *Wollschlaeger*, the Plaintiffs here "wish to say and do what they believe [the challenged law] prevents them from saying and doing," and according have standing to challenge the law. *Id*.

By *not* engaging in activity because of the Challenged Criminal Laws – i.e., by foregoing voting in person and other constitutionally protected activity – Plaintiffs have incurred the actual Article III injury of engaging in "self-censorship," like the plaintiffs who had standing in *Wollschlaeber*. "'Where the "alleged danger" of legislation is "one of self-censorship," harm "can be realized even without an actual prosecution.'" 848 F.3d at 1305 (citation omitted).

[1] On page 15, Defendants argue without citation to authority that Plaintiffs opting to "change their behavior in light of the Challenged Provisions," "is also not an injury." On page 17, Defendants state, again without citation to any authority: "And while Plaintiffs claim to have altered their behavior, that is not sufficient to create an injury."

As to whether there is evidence in this case that Plaintiffs have changed or will change their behavior to avoid violating the law, the evidence is overwhelming that every individual Plaintiff is avoiding or will avoid engaging in constitutionally protected conduct because of the Challenged Criminal Provisons. *See* Doc. 15-1 at 5 n.1 (citing to 16 sets of allegations and declarations; *see also* Ex. C, Dufort Decl. at ¶ 8 - 9). Crucially, Defendants concede repeatedly that the evidence shows Plaintiffs are changing "their behavior as a result of their subjective fears of prosecution." (Doc. 21 at 15). Plaintiffs therefore meet the first element of actual injury under *Wollschlaeber*.

b) Credible Threat of Prosecution

As to a credible threat of prosecution, first, Plaintiffs have alleged, and submitted unrebutted declarations, not only stating that they fear prosecution, but explaining the specific and personal reasons for the fear. For example, Plaintiff Rhonda Martin and CGG Executive Director Marilyn Marks explain how they have been singled out in the past for prosecution by the SEB for allegedly violating the so-called "enclosed space" rule by standing too close to BMDs. (Doc. 15-3 at 26). As explained at length in Plaintiffs' Opening Brief, Plaintiff Jeanne Dufort's investigation and advocacy relating to the accuracy of ballot scanning pitted her against the leadership of the Secretary of State's office in a very public dispute. Secretary of State official Gabriel Sterling reportedly called her an "activist with

an ax to grind." (Doc. 15-4 at 4 ¶ 18). But her good work forced the SEB to change the scanners' programming. Given the experience of Marks and Martin and given Dufort's association with CGG, Dufort rationally fears being targeted for prosecution if she conducts similar work in the future. Other Plaintiffs have likewise credibly explained that they, too, fear retribution for their public criticism of State officials and legislators.[2] Even the Defendants' Response Brief goes out of its way to attack CGG's ligitation efforts (not accurately) and the Secretary's office seeks to stoke public hostility toward the organization's members by unnecessarily publicizing their names in press releases.[3]

Second, Defendant SEB has announced that it intends to investigate every alleged violation of election laws and is in the process of referring matters to the Attorney General for prosecution. In their Response, the Defendants do not contend that the Secretary or the State will do anything other than vigorously prosecute perceived violations of each of the Challenged Criminal Provisions. *See Driehaus,* 573 U.S. at 165 (holding that plaintiffs faced credible threat because, among other reasons, defendants "have not disavowed enforcement"). Defendants

[2] Doc.15-3 Marks Decl ¶11, 13; Doc.15-4 Dufort Decl.¶ 14-22; Doc.15-6 Graham Decl. ¶8-11; Doc15-7 Gray Decl. ¶13; Doc 15-8 Martin Decl.¶22-24, 26-27; Doc15-9 Nakamura Decl. ¶6-11; Doc 15-10 Smith Decl. ¶5, 7; Doc15-11 Throop Decl. ¶11-12, 15; Ex. G, Warren Decl. ¶¶ 4-6).

[3] https://sos.ga.gov/index.php/elections/secretary_brad_raffensperger_wins_in_court_primary_election_to_move_forward_on_june_9

will admit that, if Plaintiffs violate the Challenged Criminal Provisions, they will be prosecuted, and prosecuted immediately.[4]

2. **Traceability and Redressability**

As to Defendants' arguments on traceability and redressability, courts have repeatedly held that once a plaintiff making a preenforcement challenge to a criminal statute establishes actual injury, traceability and redressability are not an issue because the actual injury is, by definition, caused by – traced to – the enforcement of the statute and will be redressed by a judicial order precluding its enforcement. "Finding that numerous plaintiffs have suffered cognizable injuries, we are also easily satisfied that the other two requirements of standing are met by each of the plaintiffs noted above. Each injury is directly traceable to the passage of H.B. 87 and would be redressed by enjoining each provision." *Georgia Latino Alliance for Human Rights v. Governor of Georgia,* 691 F.3d 1250, 1260 (11th Cir. 2012). *See also AHIP v. Hudgens,* 915 F. Supp. 2d 1340, 1351 (N.D. Ga. 2012), *aff'd*, 742 F.3d 1314 (11th Cir. 2014) (same).

Defendants' "traceability" and "redressability" arguments are identical: they claim that the injury is not traceable to the Defendants because the Defendants are

[4] 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. "On this record the individual plaintiffs, who are looking down the barrel of the Board's disciplinary gun, are not required to guess whether the chamber is loaded." 848 F.ed at 1306.

not responsible for the enforcement of Challenged Criminal Provisions and, for the same reason, equitable relief against these Defendants will not redress any injury. (Doc. 21 at 17-20). "[A]lthough they may have authority with respect to *civil* enforcement proceedings," Defendants claim, "neither the Secretary nor the SEB are responsible for the *criminal* enforcement of election laws." (Doc. 21 at 18) (emphasis in original). This argument is meritless for multiple reasons.

Most obviously, the named Defendants include not only the Secretary and the SEB, but the Governor, who 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 (1982), and has the final authority to direct the Attorney General to "institute and prosecute" on behalf of the State. *Id.* § 45–15–35. Defendants acknowledge that Governor Kemp is a party, (Doc. 21 at 1 and *id.*, n. 1), but then incorrectly state, "Plaintiffs have only sued the Secretary of State and SEB." (Doc. 21 at 18). The Attorney General, who signed the Response Brief, might also be a proper defendant, along with district attorneys from across the state. But Defendants do not argue that the Attorney General, who signed the brief and is representing the Defendants, will go rogue and attempt to enforce the Challenged Criminal Provisions if this Court enjoins the Governor, the Secretary of State, and the SEB from doing so, or that joinder of every prosecutor across the state is necessary.

In addition, even if the Governor were not a defendant, Plaintiffs would have standing because their injuries can be traced to the civil administrative enforcement power of the Secretary and the SEB. As Plaintiffs have alleged, and as Defendants acknowledge, the SEB and the Secretary have 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 Justice Thomas stated for a unanimous Supreme Court in *Driehaus*: "We take the threatened Commission proceedings into account because 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")).

The individual Plaintiffs accordingly have standing.

B. Right to Vote Claims – Individual Plaintiff Standing

With respect to the right-to-vote challenge relating to the Elector Observance Felony, numerous Plaintiffs have alleged, and supported with declarations, that the threat of prosecution for the crime constitutes a severe burden on their right to vote. These are specific, not generalized, grievances; the injury is concrete and particularlized because the threat is personal to each individual voter.

As to the Eleven Day Rule, Plaintiff Aileen Nakamura and Plaintiff CGG member Priscilla Smith have established actual injury traceable to the Eleven Day Rule because it will force them to submit sensitive private information to apply for absentee ballots before the runoff has been declared. For Ms. Nakamura to vote in person constitutes an actual and very concrete injury because Ms. Nakamura's medical condition at times renders voting in person dangerous (Doc. 15-9 Nakamura Decl. ¶¶ 14-15). Smith is a candidate in the HD34 runoff election scheduled for July 13, 2021 and voters have not been informed of the new 11-day deadline. (Ex. D. Smith Decl. ¶¶ 5- 6).

Here, the voter Plaintiffs have alleged "concrete, particularized, non-hypothetical injury" in the form of burdens on the individual right to vote that are more than sufficient to establish standing. *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir.2005).

C. Associational Standing – All Claims

Defendants do not address the Plaintiff organizations' associational standing, explained in the opening Brief and supported with substantial evidence detailing how non-party members of each of the three organizations, like the individual Plaintiffs, have standing to sue in their own right. (*See* 15-5 n. 3 (citing allegations and declarations establishing associational standing for the three Plaintiff organizations)). Instead of addressing or attempting to refute the evidence of

associational standing, Defendants argue that the organizations' members do not have an actual injury because none of them have stated "that they intend to or ultimately will violate any of the Challenged Provisions." (Doc. 21 at 12). This is not the law, as explained above. *Driehaus,* 573 U.S. at 163. Each of the three Plaintiff organizations accordingly have made an essentially undisputed factual showing of associational standing.

D. Organizational Standing – All Claims

Defendants respond to Plaintiffs' showing of organizational standing with only two comments. First, Defendants argue that because the organizations do not plan to violate the law, they will not be diverting funds as a result of the Challenged Provisions. (Doc. 21 at 12). This argument makes little sense and is factually incorrect. Each organization has established that it is diverting resources to challenge SB202, educate its voters, and advocate for change – all diversions that establish standing without regard to whether any of the organizations or their members will actually violate the law or be prosecuted.

Defendants' claim that CGG is not diverting its resources and "cannot claim standing 'based solely on the baseline work they are already doing.'" (Doc. 21 at 16) (citation omitted). But the evidence – which Defendants' ignore – establishes that the resources CGG is diverting are being directed to work that is only being done because of the passage of the Challenged Provisions. (*See* Marks Decl., Doc.

15-3 at ¶ 13, 28). Further, the core mission work of CGG, which involves facilitating citizen oversight of elections, is being severely curtailed because of the threatened criminalization of such activities by the Elector Observation Felony, the Estimating Ban, and the Gag Rule, (Ex. B hereto, Dufort Decl. ¶¶ 8 to 9; Doc. 15-3 Marks Decl. at ¶¶19-20, 25, 36, 37). These harms clearly injure the organization's ability to carry out its mission.

III. SUCCESS ON THE MERITS

A. O.C.G.A. § 21-2-568.1 (the "Elector Observation Felony")

Plaintiffs have challenged the Elector Observation Felony as a violation of the right to vote and as being void for vagueness. In this Section, Plaintiffs will address Defendants' overlapping arguments on both counts.

As to the right to vote claim, Defendants argue that the requirement that the crime be committed intentionally saves the statute from being a severe burden on the right to vote. (Doc. 21 at 21). In a related argument, Defendants (curiously) contend that the new statute criminalizes the same conduct as prior (existing) Georgia law. The argument does not withstand scrutiny. The following table shows the actual language of the crime (under SB202), the Defendants' misreading of it, and the prior (existing) law:

Actual Crime (SB202)	Defendants' Version	Prior (Existing) Law
"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	"intentionally attempt to view the votes of others" (Doc. 21 at 21).	It is a felony to go "into the voting compartment or voting machine booth while another is voting, interfere "with any elector marking his or her ballot," or disclose "to anyone how another elector voted." O.C.G.A. § 21-2-568(a)

Focusing first on the difference between the actual crime and Defendant's version of it: Defendants are describing an entirely different crime. The actual crime has three elements: (1) the intentional observation of a voter; (2) while the voter is casting a ballot; and (3) the observation is in a manner that would allow the observer to see for whom or what the elector is voting. The intent that the actual crime requires is with respect to the observation of an elector while the elector is voting. Unlike Defendants' version, the enacted statute does not require the State to also prove that the accused observer was "intentionally attempting to view the votes of others," only that he was intentionally observing a *voter* in a manner that would allow the observer, even accidentally, to see the votes as marked. Defendants then do not address, or defend, the actual crime set out in this provision of SB202.

Defendants next argument is that the Elector Observation Felony does not further burden the right to vote because it criminalizes the same conduct as the

prior (existing) law. But a comparison of the laws – *see* table above – shows that they bear no resemblance whatsoever. It is very easy for an ordinary voter to not violate the pre-SB202 law: it is not difficult to avoid entering another elector's voting booth, or to *not* interfere "with any elector marking his or her ballot," or to *not* disclose "to anyone how another elector voted." O.C.G.A. § 21-2-568. It is orders of magnitude more difficult to vote in person and not intentionally observe another person also doing so and, since the BMD touchscreens are so large and bright, such observation *will* be in a manner that would allow "such person to see for whom or what the elector is voting." The new statute imposes a severe burden that Defendants, pretending not even to recognize it, do not attempt to defend. The Defendants cannot say that the new law adds nothing to existing law and also say that the change serves a compelling state interest.

Defendants' only other defense of the Elector Observation Felony is to point to the Secretary's efforts to protect ballot secrecy by instructing counties to do so and by circulating guidance for counties about how to arrange the BMDs to purportedly do so. (Doc. 21 at 5). Initially, the Secretary's guidance has been singularly ineffective, as shown by the photographs,[5] and the eye-witness

[5] The Secretary's guidance and instructions were issued February 13,2020 (Doc. 21-2 at 6). The photographs of polling places in Cartersville and of State Farm Arena in Plaintiffs' Brief, Doc. 15-1 at 9, were taken during the November 5, 2019 and the November 3, 2020 elections respectively. *See also infra* note 3.

accounts,[6] of polling places *after* the Secretary's suggestions were implemented. More importantly, the fact that the Secretary may have atempted to mitigate secrecy violations is categorically irrelevant: the burden on the right to vote is caused by actual conditions in real polling places, not on how slight the Secretary wishes the burden to be. And on the relevant issue – the actual burden in real life – Defendants offer no evidence to counter the overwhelming evidence submitted. Multiple photographs[7] and credible, eye-witness accounts[8] show that, given the visibility of voter choices on the BMDs, the ordinary voter walking through a polling place cannot avoid the credible accusation that the voter is guilty of "intentionally observ[ing] 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.

---

[6] *See* Ex. C, Kurish Decl. ¶ ¶ 8-12; Ex. H, Martin Decl., ¶¶ 3-16; Ex. B, Dufort Decl., ¶¶ 4-6; Ex. F, Marks Decl. ¶¶ 7-9; Ex. G, Warren Decl. ¶ 6.

[7] For additional photographs of polling places showing BMDs, *see* Marks Decl., Doc. 15-3 at 17-19; Graham Decl., Doc. 15-6 at 8; Brief, Doc. 15-1 at 9; Amended Complaint, Doc. 14 at 36, 137 and 138.

[8] *See* Marks Decl., Doc. 15-3, at ¶ 7, 9, 12; Dufort Decl., Doc. 15-4, at ¶ 16; Friedman Decl., Doc. 15-6 at ¶¶ 9-11; Gray Decl., Doc. 15-7 at ¶¶ 6, 12, 13; Martin Decl., Doc. 15-8, at ¶¶ 19-20, 22, 24-27; Nakamura Decl., Doc. 15-9 at ¶ 7; Throop Decl., Doc. 15-11 at ¶¶ 5-8, 12-13.

The Elector Observation Felony is unconstitutional because constitutes a severe burden on the right to vote that is not "'narrowly drawn to advance a state interest of compelling importance.'" *Burdick v. Takushi,* 504 U.S. 428, 438 (1992) (citation omitted).

The law is also void for vagueness. In addition to the arguments set forth in the initial Brief, Doc. 15-1 at 11-12, Defendants' Response confirms the void-for-vagueness claim. The range of potential interpretations for the meaning of the statute – shown in the table above – shows that the law fails to give fair notice to citizens of what conduct is proscribed and permits "'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender v. Lawson,* 461 U.S. 352, 358 (1983) (citation omitted).

B. O.C.G.A. § 21–2–386(a)(2)(B)(vii) (the "Gag Rule")

Defendants completely misstate the Gag Rule:

	Actual Statute (21-2-386(a)(2)(B)(vii))	**Defendants' Version**
Conduct Prohibited	Prohibits "monitors" and "observers," which include members of the press and public, from "communicating any information that they see while monitoring the processing and scanning of the absentee ballots" "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."	Prohibition is limited to "disclosure of vote counts." (Doc. 21 at 6, 22).

Forum - Where Prohibited Speech May not Occur	No limitation: speech is prohibited without respect to where speech might occur.	Limited to speech "where the scanning of absentee ballots is taking place," and therefore a "government-controlled" forum. (Doc. 21 at 23).
Duration of Prohibition	Perpetual – no limit on how long prohibition in effect.	Until "the close of the polls," and "while counting is ongoing." (Doc. 21 at 6, 23, 24).

This is not a situation in which the Defendants are offering a good-faith interpretation of the statute or a nuanced interpretation of its meaning given its context. Defendants' reading bears absolutely no resemblance to the actual statute as to the most crucial elements of the crime: The conduct that is prohibited is not only the disclosure of the vote counts prior to polls closing, which Plaintiffs agree is imperative, but the disclosure of "any information," for which Defendants offer no justification. As to the forum, under the statute, it is a crime to disclose information – to speak – anywhere. Under the Defendants' "reading" of the statute, the only speech that is restricted is speech occurring on government-controlled property. This finds no support in the language of the statute. Defendants say the statute does not criminalize speech occurring after the close of the polls, but that is pure fiction: there is no such limitation in the statute itself.

By defending a law that does not exist, and not defending the actual law, Defendants implicitly concede that the statute as enacted cannot be defended under the First Amendment or the Due Process Clause.

Unwilling and unable to muster a defense under the First Amendment, Defendants argue that SB202's content-based restriction on speech should not be tested under the First Amendment (a test it certainly fails), but as a right to vote claim under *Burdick.* This argument is frivolous. Plaintiffs do not claim that the Gag Rule burdens the right to vote, any more than they claim that the Gag Rule violates the Just Compensation Clause. The fact that the Gag Rule does not violate every constitutional right does not mean it complies with the First Amendment.

C. O.C.G.A. § 21-2-386(a)(2)(A) and (B) (vi) (the "Estimating Bans") are Void for Vagueness

Rather than attempting to explain how the Estimating Bans, *as enacted*, comply with the constitutional requirement that the statute "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited," *Kolender,* 461 U.S. at 358, Defendants again badly misstate what the law actually says. Plaintiffs agree that it is imperative that early disclosure of vote tallies be prohibited. However, there is absolutely nothing in the text of the statute challenged here that suggests either Estimating Ban is limited to, or even applies to, *disclosures* of the estimating or tallying:

	Actual Statute (O.C.G.A. § 21-2-386(a)(2)(A) & (B)(vii))	**Defendants' "Reading"**
Prohibited Conduct	Misdemeanor for "monitors and observers" to tally, tabulate, estimate or attempt to tally, tabulate, or estimate the number of *votes* on the ballots, O.C.G.A. § 21-2-386(a)(2)(B)(vii)) *or* estimate the absentee ballots cast. O.C.G.A. § 21-2-386(a)(2)(A).	*Disclosure of* tallies, etc., to "others." (Doc. 21 at 7; *see also id.* at n. 5 (comparing law to laws in other states that prohibit disclosure of tallies before the polls close); *id.* at 22).
Duration of Prohibition	Subsection A Estimating Ban: "until the time for closing of the polls." Subsection B Estimating Ban: in perpetuity – no duration.	For both Bans: Disclosure prohibited only until the polls close. (Doc. 21 at 22).

Without any statutory argument, Defendants state that "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." (Doc. 21 at 22). In support of this argument about the "context" of the criminal statute, Defendants cite to 14 lines of the law itself, without further discussion. Further, Defendants, without even a suggestion of supporting "context," would graft the time limitation (the close of the polls) from Photo Ban A onto Estimating Ban B, where any limitation on the duration of the prohibition is conspicuously absent.

Plaintiffs' argument that the Estimating Bans are void for vagueness not only is unrebutted, it is fortified by Defendants' complete inability to decipher or defend the criminal statute as it was actually enacted.

D. O.C.G.A. § 21-2-568.2 (2)(B) (the "Photography Ban") Violates the First Amendment

Plaintiffs contend that the Photography Ban violates the First Amendment. Again, Defendants cannot defend the statute as enacted, so they try to justify a law that was never written. (For clarity, Plaintiffs will refer separately to the two photography bans as Photo Ban A and Photo Ban B):

	Actual Statute – O.C.G.A. § 21-2-568.2(a)	**Defendants' Version**
Prohibited Conduct	Photo Ban A: "Photograph 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 marker." Photo Ban B: "Photograph or record a voted ballot."	Does *not* prohibit photographing "individuals *in the act of voting*." (Doc. 21 at 24). Instead: "The provision prohibits recording a voters' *actual votes* wherever those might be taking place." (Doc. 21 at 25).
Duration of Prohibition	For both bans, in perpetuity. No duration.	Both prohibitions last only "*during* an election." (*Id.*)

As enacted, the Photo Ban A criminalizes photographing the face of a BMD whether or not the photograph would record a voters' actual vote.[9] If the government has a compelling interest in prohibiting the recording of a voter's "actual vote," then the statute as enacted is unconstitutional because it is not so limited; it plainly is not narrowly tailored to serve any governmental interest.

[9] Plaintiffs do not seek and do not support photography of any electronic or paper ballot that can be connected to the voter.

As to Photo Ban B, Defendants' attempted rewrite of the enacted statute again exposes its unconstitutionality. Photo Ban B, as enacted, prohibits the recording of a voted ballot at any time, during or after the election. As Plaintiffs explained in their opening Brief, Photo Ban B plainly conflicts with Georgia's Open Records Act. (*See* Doc. 15-1 at 23). Defendants agree, (Doc. 21 at 25), but claim, without any authority whatsoever, that Photo Ban B lasts only during the election. Defendants do not articulate any governmental interest in prohibiting the photography of voted ballots after the election, such as during post-election day processing or a recount or audit. Photo Ban B, therefore, as enacted, is unconstitutional because it is not narrowly tailored to serve any legitimate governmental interest.

The only governmental interest that Defendants identify for Photo Ban B, during the election, is to deter a "vote-buying scheme that requires a voter to show proof of their vote the person paying them." (Doc. 21 at 8; *id.* at 25). An existing statute, however, already criminalizes the showing one's ballot with the "apparent intention of letting it be known for a fraudulent purposes how he or she is about to vote." O.C.G.A § 21-2-579(1). Moreover, since voted ballots may not properly disclose the identity of the voter, photographs of them are commonplace and an essential part of transparent elections. As the historic photos attached as Exhibit A to Plaintiffs' Brief vividly display, photographs of voted ballots are essential to

preserving election integrity, the stated purpose of SB 202. Photo Ban B, which criminalizes them, is unconstitutional.

E. Runoff Absentee Voting Statute

In their Opening Brief, Plaintiffs explained the Eleven Day Rule, O.C.G.A. § 21-2-381(a)(1)(A), constitutes an unjustified burden on the right to vote. (Doc. 15-1 at 4). The deadline for the Secretary's certification of an election (which will determine whether there is a runoff and who will be in it) is 11 days prior to the date of the runoff itself. If the Secretary waits until the deadline to certify the election, it will be too late to apply for an absentee ballot when the runoff is officially determined. (Doc. 15-1 at 24).

In Response, Defendants and Intervenors argue that the Eleven Day Rule does not constitute a burden on the right to vote because voters may apply for a ballot for a runoff election *before* certification. (Doc. 21 at 9). But it is clearly unreasonable to expect voters to know to apply for an absentee ballot before anyone knows officially if there will be a runoff election or its Contestants.

Defendants and Intervenors justify the Eleven Day Rule by pointing to other states that have purportedly similar deadlines. Yet, when examined, with SB202, Georgia clearly became an extreme outlier when compared to other states' deadline requirements, particularly for runoff elections. *None* of the states referenced by

Defendants have runoffs[10], making the data inapplicable for the runoff application deadline controversy. Runoffs exacerbate the application deadline problem. The few states with runoffs tend to have more generous runoff application periods[11] than SB202 requires. All states referenced by Defendants other than Nebraska and Georgia have emergency provisions for a variety of circumstances, some permitting applications as late as election day. [12] In fact, all states but Georgia, Nebraska and Missouri allow such ballots to issued on an emergency basis[13]. SB202 removed such emergency flexibility. An 11 day period is an outlier among states, but without emergency provisions, only Nebraska is as restrictive as Georgia, and Nebraska has no runoffs. Georgia has the most burdensome runoff deadlines.

Against this unreasonable burden, the only argument the Defendants and Intervenors make is that an early deadline is good for voters because it reduces the

[10] https://www.ncsl.org/research/elections-and-campaigns/primary-runoffs.aspx

[11] Alabama has a 9 week runoff. Texas has 6 week runoff. Alaska permits email balloting and requests on election day; Oklahoma primaries occur in June, with runoffs in August. Data source: https://www.ncsl.org/research/elections-and-campaigns/primary-runoffs.aspx

[12] AZ (Election Day deadline for medical emergency ARS §16-549; ID (4 days prior to Election Day if unable to come to polls. Idaho code §34-1002; IN emergency ballot provisions for health issues, military, first responders §§3-11-4-1 and 3-11-8-25.7; Iowa permits emergency balloting for hospitalized voters Iowa Code § 53.22(2); MO voters may apply in-person through the day prior to election MO Code §115.279.3; TX medical or bereavement emergencies ballot applications through election day. TX Code §§102.001 and 103.001; RI applications accepted through Election Day if voter cannot attend polls RI Gen. Laws §§17-20-2 and 17-20-2.2

[13] https://www.ncsl.org/research/elections-and-campaigns/absentee-voting-in-case-of-a-personal-emergency.aspx

chances that voters will wait too long to apply. (Doc. 22 at 5). But voters' circumstances and local mail conditions vary so greatly that more voters are likely to obtain ballots if voters and county ballot clerks have flexibility to conduct rapid turnarounds and plan based on local circumstances. (Ex. A, Adams Decl. ¶¶ 3 to 4).

The other reason the Defendants and Respondents offer for not enjoining the Eleven Day Rule is it will cause voter confusion. (Doc. 22 at 20). To the contrary: there is no evidence that voters know of the new rule (Ex. D, Smith Decl. ¶¶ 5 to 6); consequently, it is enforcing the new rule that will undoubtedly *cause* voter confusion. Additionally, the Secretary of State's online absentee ballot application portal that many voters have relied on has been quietly discontinued. Voters anticipating online applications will suddenly learn that option is unavailable, and will have to submit applications by mail or hand delivery. The Secretary has not established the secure online transmission system mandated by O.C.G.A. § 21-2-381(a)(1)(C)(i) (2021)). (Ex. A, Adams Decl. ¶ 9)

At a bare minimum, Defendants should be preliminarily enjoined from enforcing the Eleven Day Rule through at least December 31, 2021 and unless and until they have taken reasonable action to inform voters and county election officials of the rule change *and* provided the mandated secure online transmission

method (O.C.G.A. § 21-2-381(a)(1)(C)(i) (2021)) to permit rapid turnaround of mail ballot applications.

Plaintiffs are therefore likely to succeed on each of their claims.[14]

IV. THE EQUITIES

Even if Plaintiffs were not as likely to succeed on the claims as they are, an injunction would be warranted because the equities tip so strongly in their direction. As to the Challenged Criminal Provisions, Defendants have articulated no public detriment in being unable to enforce them prior to trial, since the only conduct they argue these new felonies were enacted to prevent is conduct that is already proscribed by pre-SB202 criminal laws. On the other side of the scales, the loss of First Amendment rights, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976). As to the Eleven Day Rule, a preliminary injunction will merely return

[14] Unable to defend the Challenged Provisions on the merits, Defendants resort to denigrating the work and accomplishments of Plaintiff CGG, listing a number of cases in which, Defendants suggest, CGG was unsuccessful in pursuing its "policy disagreements about election administration through the courts." Although unrelated to the merits of this Motion, this suggestion is highly misleading. In the very cases listed by Defendants, and others, CGG has repeatedly succeeded in obtaining injunctions against the Secretary of State in election cases in Federal Court: *Curling v. Raffensperger,* USDC N.D. Ga., No. 17-cv-2989-AT, Doc. 964 at 147 (order granting in part CGG's motion for preliminary injunction on "BMDs, Scanners, and Tabulators"); *id.,* Doc. 918 (order granting CGG's motion for preliminary injunction on paper pollbook backups); *id.* at Doc. 579 (order granting, in part, CGG's motion to enjoin Secretary from using DRE election devices). In addition, Plaintiff Rhonda Martin obtained an injunction, and an award of attorney's fees, in the suit brought by her and CGG against the Secretary and the Gwinnett County Board of Registrations and Elections relating to absentee ballot signature matching. *Martin v. Raffensperger,* USDC N.D. Ga., No. 18-cv-4776-LMM, Docs. 23, 101.

the law to the pre-March 25, 2021 status quo, thereby eliminating the manifest voter and administrative confusion caused by SB202's abrupt, ill-considered, and unconstitutional burden on the right to vote.

For the foregoing reasons, the Motion should be granted.

Respectfully submitted this 28th day of June, 2021.

/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 Times New Roman 14 font. I electronically filed this using CM/ECF, thus electronically serving all counsel of record.

This 28th day of June, 2021.

/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