UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

COALITION FOR GOOD GOVERNANCE, et al., *Plaintiffs*, v. Brian KEMP, in his official capacity as Governor of the State of Georgia, et al., *Defendants*, REPUBLICAN NATIONAL COMMITTEE; et al., *Intervenor-Defendants*.	No. 1:21-cv-2070-JPB

INTERVENORS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT

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INTRODUCTION

Counts I-III and XI-XIV of the amended complaint challenge the constitutionality of three parts of SB 202: the removal provisions for county election officials, the voter ID requirement for mail ballots, and the 11-day cutoff for mail-ballot applications. Intervenors agree with the State that these counts should be dismissed under Rule 12(b)(6) and join those parts of its brief. Intervenors take no position, one way or the other, on Plaintiffs' other claims.

Counts I-III and XII-XIV, in particular, have fatal defects. Plaintiffs' due-process claims fail because county officials have no protected interest in their office; and, even if they did, SB 202's removal provisions are generous and reasonable. Plaintiffs' right-to-vote claims fail, too, because the Constitution guarantees only one method of voting and Plaintiffs identify only idiosyncratic burdens on some voters.

These defects are "purely legal." *League of Women Voters of Minn. Educ. Fund v. Simon*, 2021 WL 1175234, at *7 (D. Minn. Mar. 29). While right-to-vote claims "can at times be fact intensive," the notion that they cannot be dismissed at the pleading stage "is meritless." *Comm. to Impose Term Limits (etc.) v. Ohio Ballot Bd.*, 885 F.3d 443, 448 (6th Cir. 2018). This Court should dismiss Counts I-III and XI-XIV with prejudice.

ARGUMENT

Intervenors filed their motion to intervene on June 3, along with a proposed answer to Plaintiffs' original complaint. Docs. 6, 7. Before intervention was granted, Plaintiffs amended their complaint. *Compare* Doc. 14*, with* Order (June 21, 2021). Intervenors have not answered the amended complaint. And the other defendants' deadline to file a motion to dismiss is today (or later). *See* Fed. R. Civ. P. 15(a)(3); Docs. 8-13, 33. Intervenors are thus filing this motion to dismiss the amended complaint today.

Motions to dismiss are governed by the familiar *Twombly-Iqbal* standard. This Court must accept Plaintiffs' factual allegations as true, but not their "'legal conclusions'" or their "'naked assertions devoid of further factual enhancement.'" *Harris ex rel. Davis v. Rockdale Cty. Sch. Dist.*, 2020 WL 5639684, at *3 (N.D. Ga. Aug. 12). This Court can also consider "documents incorporated into the complaint by reference" and matters subject to "judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Based on these materials, Plaintiffs' claims must be "'plausible'"—meaning the Court has a "'reasonable expectation that discovery will reveal evidence'" supporting them. *Harris*, 2020 WL 5639684, at *3. At a minimum, their amended complaint must plausibly allege "'all the material elements'" of a "'viable legal theory.'" *Branch Banking & Tr. Co. v. Lichty Bros. Constr.*, 488 F. App'x 430, 433 (11th Cir. 2012). Errors on a "'dispositive issue of law'" are fatal. *Id.*

Plaintiffs' claims rest on fatal errors of law. Their facial due-process challenges fail to plausibly plead key elements, including a protected interest,

insufficient procedures, and arbitrariness. As for their right-to-vote claims, regulations of absentee voting do not implicate the constitutional right to vote when, as here, a State makes in-person voting available. Nor can Plaintiffs state a constitutional claim by alleging burdens that do not affect most voters. All these claims should be dismissed with prejudice.

I. Plaintiffs' due-process challenges to the process for removing county election officials fail. (Counts I-II)

The Plaintiffs who are members of county election boards contend that SB 202's removal provisions violate both procedural and substantive due process. Am. Compl. ¶¶3-7, 366-91. They violate neither.

A. The removal provisions do not violate procedural due process because they affect no protected interest and provide plenty of process. (Count I)

Asserting "protected property and liberty interests in their tenure as members of the county boards," Plaintiffs claim that SB 202 allows them to be removed without sufficient process. Am. Compl. ¶¶366-74. Importantly, Plaintiffs can challenge the removal provisions only on their face: An as-applied challenge is unavailable because no Plaintiff has been removed from office, let alone exhausted her state remedies. *Doe v. Valencia Coll.*, 903 F.3d 1220, 1234-35 (11th Cir. 2018); *Waldman v. Conway*, 871 F.3d 1283, 1290 (11th Cir. 2017). To prevail on a facial challenge, Plaintiffs must prove that the removal provisions "could never be applied in a constitutional manner." *Zisser v. Fla. Bar*, 747 F. Supp. 2d 1303, 1316 (M.D. Fla. 2010), *aff'd sub nom. Doe v. Fla. Bar*, 630 F.3d 1336 (11th Cir. 2011). Plaintiffs cannot carry that burden because

election officials lack an interest protected by the Due Process Clause and because, even if they had a protected interest, SB 202 gives them all the process that would be due.

The removal provisions do not, on their face, deprive board members of a protected property or liberty interest. The only interest that Plaintiffs allege is an interest in staying in office. But county boards of election are creatures of statute. O.C.G.A. §21-2-40. 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. *Hughes v. Ala. Dep't of Pub. Safety*, 994 F. Supp. 1395, 1404 (M.D. Ala.), *aff'd*, 166 F.3d 353 (11th Cir. 1998); *accord Silva v. Bieluch*, 351 F.3d 1045, 1047-48 (11th Cir. 2003).

Statutes not only create the boards, but they also eliminate the board members' ability to claim a protected interest in their office. In Chatham County, for example, members are elected. Chatham Cty. Code Art. I, §6-102, bit.ly/3xVqMOW. In Athens-Clarke County and Jackson County, members can be removed at will by other county officials. Athens-Clarke Cty., *Boards, Authorities, and Commissions Manual* 9, 11, accgov.com/290/Boards-Authorities; Jackson Cty., *Bylaws of the Board of Elections and Voter Registration*, Art. 7 (Dec. 6, 2019), bit.ly/3BrMT1p. And in Clayton County and Coffee County, members can be removed by other county officials for cause, but nothing constrains the removing official's assessment of "cause." Clayton Cty. Code, Art. III, Div. 1, §2-56, bit.ly/3rqR49p; Coffee Cty. Code, Art. VII, §6, bit.ly/2V0oaRc. Board members in these counties thus have no "cognizable property or liberty

interest" in their office. *Doe*, 630 F.3d at 1342; *see Snowden v. Hughes*, 321 U.S. 1, 7 (1944) (elected officials); *Warren v. Crawford*, 927 F.2d 559, 562 (11th Cir. 1991) (officials removable at will); *id.* at 563 (officials removable under discretionary for-cause standards). Even if other counties existed where board members were more insulated, limitations on removal by *county* officials do not create an entitlement to be free from removal by *state* officials. *See Schwamberger v. Marion Cty. Bd. of Elections*, 988 F.3d 851, 858 (6th Cir. 2021). Because many (if not all) applications of SB 202 thus implicate no protected interest, Plaintiffs' facial challenge necessarily fails.

Even if service on a county board were a protected interest, SB 202 provides more than enough process. A board member cannot be removed unless

- he is accused of recently and repeatedly violating state law without remediation, or recently and repeatedly committing "nonfeasance, malfeasance, or gross negligence," O.C.G.A. §21-2-33.2(c);
- a "performance review board" conducts an "investigation," §21-2-33.2(a);
- the state board, after another "investigation," determines that "sufficient cause" exists, §21-2-33.2(b);
- the board member receives notice and a public hearing, §21-2-33.2(c)-(d);
- a majority of the state board finds that the board member broke the law by a "preponderance of the evidence," or committed nonfeasance, malfeasance, or gross negligence by "clear and convincing evidence," §21-2-33.2(c);

- the board member unsuccessfully "petition[s] for reinstatement"—a process that gives him the right to another notice, hearing, and opportunity to present evidence, §21-2-33.2(f); and
- the board member unsuccessfully challenges his removal in state court, §21-2-33.2(f).

These generous procedures are sufficient to remove *any* public employee from office. *See McKinney v. Pate*, 20 F.3d 1550, 1561 (11th Cir. 1994) (en banc); *Cochran v. Collins*, 253 F. Supp. 2d 1295, 1304 (N.D. Ga. 2003). Contra Plaintiffs, these procedures provide both a "predeprivation notice and hearing" and a "postdeprivation remedy for obtaining reinstatement." Am. Compl. ¶369. And contra Plaintiffs, due process does not require the State to pay for their attorneys. *See, e.g.*, *McKinney*, 20 F.3d at 1555; *Laskar v. Peterson*, 771 F.3d 1291, 1299 (11th Cir. 2014); *Cochran*, 253 F. Supp. 2d at 1307. Notably, though, board members who are reinstated can recover their attorney's fees and costs. O.C.G.A. §21-2-33.2(g). The Constitution does not give election officials who are accused of serious misconduct the right to still more process.

B. The removal provisions do not violate substantive due process because they implicate no fundamental rights and satisfy rational-basis review. (Count II)

Plaintiffs next claim that the removal provisions "violate" provisions of "the Georgia Constitution." Am. Compl. ¶¶387-89. Of course, the Eleventh Amendment bars Plaintiffs from suing Georgia officials in federal court for violations of the Georgia Constitution. *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1358 (N.D. Ga. 2005) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984)). To avoid this sovereign-immunity bar,

Plaintiffs try to recast their alleged violations of the Georgia Constitution as alleged violations of federal substantive due process. Am. Compl. ¶¶376-91.

This tactic doesn't work. Plaintiffs cannot plead around the Eleventh Amendment by slapping a federal label on a claim that turns entirely on state law. *See Waldman*, 871 F.3d at 1290; *Tedder v. Pate*, 2013 WL 5671155, at *4 (N.D. Fla. Oct. 15). Because Plaintiffs "allege violations of due process due to [Defendants] violating state law," Count II is barred by sovereign immunity. *Rudolph v. City of Montgomery*, 2017 WL 956359, at *7 (M.D. Ala. Mar. 10).

The removal provisions do not violate substantive due process anyway. Substantive due process has "two strands": one that bars the "deprivation of fundamental rights" and one that bars "arbitrary legislation." *Hillcrest Prop., LLP v. Pasco Cty.*, 915 F.3d 1292, 1297 (11th Cir. 2019). Plaintiffs cannot satisfy the first strand because "'state-created rights'"—including service on a county election board—are not fundamental rights. *Id.* & n.7. Plaintiffs also cannot satisfy the second strand because the removal provisions are not arbitrary. Arbitrariness is "reviewed under the 'rational basis' standard." *Kentner v. City of Sanibel*, 750 F.3d 1274, 1280 (11th Cir. 2014). The legislature rationally concluded that Georgians needed "a mechanism to address local election problems" and more "accountability" in "counties with dysfunctional election systems." SB 202, §2(7). While Plaintiffs disagree, second-guessing the legislature's judgment "is simply not the test under a rational basis review." *Kentner*, 750 F.3d at 1281.

And again, Plaintiffs are limited to a facial challenge. Litigants bringing substantive-due-process challenges based on arbitrary legislation cannot bring as-applied challenges. *PBT Real Est., LLC v. Town of Palm Beach*, 988 F.3d 1274, 1284 (11th Cir. 2021). Because only the executive branch applies laws, "any as-applied challenge necessarily implicates executive, rather than legislative, action." *Hillcrest*, 915 F.3d at 1302. And "'non-legislative deprivations of state-created rights cannot support a substantive due process claim.'" *PBT*, 988 F.3d at 1284 n.20.

Stuck with the standard for facial challenges, Plaintiffs fail to plead a plausible claim. Removal under SB 202 is clearly rational in many applications—election officials who stop showing up for work, election officials who commit criminal fraud, and the like. Count II thus fails as a matter of law.

II. Plaintiffs' right-to-vote claims fail because there is no right to vote absentee. (Counts III & XII-XIV).

Counts III and XII-XIV challenge provisions of SB 202 that affect only absentee voting. Am. Compl. ¶¶392-98, 464-84. But for the bulk of our history, States provided nearly all voters with only one method of voting: in person on election day. *See Brnovich v. DNC*, 141 S. Ct. 2321, 2338-39 (2021). SB 202 does not eliminate that option, or even make it more difficult. Because in-person voting remains fully available, "the right to vote is not 'at stake'" here. *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 404 (5th Cir. 2020) (quoting *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969)).

The Constitution guarantees *one* method of voting; "there is no constitutional right to an absentee ballot." *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020). When States impose a limit on absentee voting, but not in-person voting, "[i]t is … not the right to vote that is at stake … but a claimed right to receive absentee ballots"—which is not a constitutional right. *McDonald*, 394 U.S. at 807. As the Fifth Circuit has explained, the Constitution is not violated "unless … the state has 'in fact absolutely prohibited' the plaintiff from voting." *Tex. Democratic Party*, 961 F.3d at 404. And "permit[ting] the plaintiffs to vote in person" on election day, as Georgia does, "is the exact opposite of 'absolutely prohibit[ing]' them from doing so." *Id.*; *accord Tully v. Okeson*, 977 F.3d 608, 611 (7th Cir. 2020) ("[U]nless a state's actions make it harder to cast a ballot at all, the right to vote is not at stake.").

The Supreme Court announced this rule "unambiguously" in *McDonald*. *New Ga. Proj. v. Raffensperger*, 976 F.3d 1278, 1288 (11th Cir. 2020) (Lagoa, J., concurring). There, Illinois law allowed some classes of voters to cast absentee ballots, but excluded people in jail. 394 U.S. at 803-04. When inmates who couldn't post bail challenged the law, the Supreme Court unanimously held that "the right to vote" was not "at stake." *Id.* at 807. There is no "right to receive absentee ballots." *Id.* Illinois' rules on absentee voting "d[id] not themselves deny … the exercise of the franchise" because they only "ma[d]e voting *more* available to some groups." *Id.* at 807-08 (emphasis added). And Illinois' election code "as a whole" did not "deny … the exercise of the franchise" either. *Id.* Illinois had not "precluded [the inmates] from voting" because the inmates

had potential options to vote in person. *Id.* at 808 & n.6. In other words, the inmates' constitutional claims failed because they were not "absolutely prohibited from voting by the State." *Id.* at 808 n.7.

When Intervenors raised this same point in *New Georgia Project*, the Eleventh Circuit agreed. *Compare* Amicus Br. of RNC & GAGOP, 2020 WL 5757920, at *4 (11th Cir. Sept. 23) ("Georgia's Election Day deadline does not implicate the right to vote at all."), *with* 976 F.3d at 1281 ("Georgia's Election Day deadline does not implicate the right to vote at all."). In that case, the Eleventh Circuit stayed a preliminary injunction against Georgia's deadline for returning mail ballots. That deadline, the Eleventh Circuit explained, "does not implicate the right to vote at all" because "Georgia has provided numerous avenues" to vote other than mail, including "in person on Election Day." 976 F.3d at 1281. So too here.

Plaintiffs cannot argue that in-person voting is impossible in Georgia due to COVID-19. For starters, Plaintiffs failed to plausibly plead this in their amended complaint. Plaintiffs do not allege that they, their members, or any Georgians are too afraid to vote in person due to COVID-19. Nor do they plausibly allege that such a fear would be reasonable—for example, because Plaintiffs have unique medical conditions, because Georgia's safety precautions for in-person voting are insufficient, or for any other reason. While Plaintiffs point to Georgia's emergency orders and quarantine rules, *see* Am. Compl. ¶¶134-37, those orders and rules are no longer in force. Georgia's state of emergency ended on July 1 because "coronavirus cases, hospitalizations, and deaths" are

"at all time lows" and "vaccinations" are "on the rise." *Gov. Kemp Signs COVID-19 Economic Recovery, State Rule Suspension Executive Orders*, Ga. Off. of Gov'r (June 30, 2021), bit.ly/36M6J9C. And Georgia's current quarantine "guidance" states that most vaccinated people need not quarantine, and that most unvaccinated people can safely quarantine for less than 14 days. *See Quarantine Guidance: What to Do If You Were Exposed to Someone with the Novel Coronavirus (COVID-19)*, Ga. Dep't of Public Health (archived July 20, 2021), bit.ly/3roNWKZ.

Even if Plaintiffs had made plausible allegations about COVID-19, that argument would be unpersuasive. Even during the height of the pandemic, courts rejected the notion that in-person voting is unavailable. *See, e.g.*, *New Ga. Proj.*, 976 F.3d at 1281, 1284; *DNC v. Bostelmann*, 977 F.3d 639, 642-43 (7th Cir. 2020); *Tex. Democratic Party*, 961 F.3d at 404-05. For good reason. While some voters might subjectively fear voting in person, courts "cannot hold private citizens' decisions to stay home for their own safety against the State." *Thompson v. Dewine*, 959 F.3d 804, 810 (6th Cir. 2020). And Georgia's officials have decided that in-person voting is safe. Federal courts lack the expertise, competence, accountability, or authority to override that decision. *See DNC v. Wis. State Legislature*, 141 S. Ct. 28, 32 (2020) (Kavanaugh, J., concurring). The mere possibility that someone cannot make it to the polling place on election day is exists in every election and creates no right to vote absentee. *See McDonald*, 394 U.S. at 809-810 & n.8.

Equally unpersuasive is Plaintiffs' suggestion that in-person voting is unavailable because they fear they will violate Georgia's ballot-secrecy rules. *E.g.*, Am. Compl. ¶¶121-28, 467. If Plaintiffs have that fear, then their fear is objectively unreasonable. "[A]ll 50 States" require "a secret ballot secured in part by a restricted zone around the voting compartments," yet in-person voting is ubiquitous. *Burson v. Freeman*, 504 U.S. 191, 206 (1992); *see also The Secret Ballot at Risk: Recommendations for Protecting Democracy* 6 (Aug. 18, 2016), bit.ly/3eLptdJ (noting that "violations of ballot secrecy are criminalized" in "Delaware, Maine, Michigan, Nevada, and New Jersey"). Georgia's law, moreover, bans voters only from "intentionally" observing another person's vote. O.C.G.A. §21-2-568.1(a). No Plaintiff alleges an *intent* to break the law, and courts must "assume" that Georgians "'will conduct their activities within the law.'" *Eubank v. Leslie*, 210 F. App'x 837, 843 (11th Cir. 2006) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974)).

In short, the "fundamental right to vote" is "the ability to cast *a* ballot"—"not the right to do so in a voter's preferred manner." *Tully*, 977 F.3d at 613 (emphasis added). The availability of in-person voting makes SB 202's regulations of absentee voting irrelevant, constitutionally speaking. Intervenors raised this point during the preliminary-injunction briefing, and Plaintiffs offered no response. *Compare* PI Opp. (Doc. 22) 7-10, *with* PI Reply (Doc. 23) 21-24. No valid response exists. To the extent that Plaintiffs challenge SB 202's regulations of absentee voting, their claims fail as a matter of law.

III. Plaintiffs' right-to-vote claims fail because they rely on idiosyncratic burdens on some voters. (Counts III & XII-XIV)

Plaintiffs' constitutional claims fail for another basic reason. Right-to-vote claims are assessed under *Anderson-Burdick*—the balancing test derived from the Supreme Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). The *Anderson-Burdick* test "requires [courts] to weigh the burden imposed by the law against the state interests justifying the law." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1261 (11th Cir. 2020) (citing *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009)). But as the Eleventh Circuit recently explained—quoting Justice Scalia's concurrence in *Crawford*—courts "'have to identify a burden before [they] can weigh it.'" *Id.* (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring in the judgment)). The only burdens that Plaintiffs assert are legally "irrelevant" because they are "special burden[s] on some voters," not categorical burdens on all voters. *Crawford*, 553 U.S. at 204 (Scalia, J., concurring in the judgment) (cleaned up).

When plaintiffs challenge "generally applicable, nondiscriminatory voting regulation[s]," the burdens arising from "the peculiar circumstances of individual voters" are legally "irrelevant." *Id.* at 204-06. The *Anderson-Burdick* test is concerned only with burdens that affect voters "categorically." *Id.* at 206. This categorical approach follows from several Supreme Court precedents:

- In holding that Hawaii's ban on write-in voting "impose[d] only a limited burden on voters' rights," *Burdick* looked at the ban's effect on voters generally, rather than on the plaintiff specifically. 504 U.S. at 436-39. (Indeed, it was *the dissent* in *Burdick*

that focused on the law's impact on "some individual voters." *Id.* at 448 (Kennedy, J., dissenting).)

- In rejecting voters' challenge to Oklahoma's primary election, *Clingman v. Beaver* emphasized that "Oklahoma's semiclosed primary system does not severely burden the associational rights of the state's citizenry" generally—irrespective of its specific effect on the individual plaintiffs. 544 U.S. 581, 593 (2005).

- *Storer v. Brown* likewise held that the "sever[ity]" of California's ballot-access requirements must be assessed based on "the nature, extent, and *likely* impact" of those requirements—not the known impact on the specific candidates who were plaintiffs. 415 U.S. 724, 738 (1974) (emphasis added).

See also Crawford, 553 U.S. at 206-07 (Scalia, J., concurring in the judgment) (analyzing other precedents).

The categorical approach makes good sense. Given inevitable differences in voters' circumstances, every voting requirement "affects different voters differently." *Id.* at 205. But those different effects are not different "burdens" imposed by a generally applicable law; they "are no more than the different *impacts* of the single burden that the law uniformly imposes on all voters." *Id.* The Constitution does not prohibit mere disparate impacts. *Id.* at 207 (citing *Washington v. Davis*, 426 U.S. 229, 248 (1976)). Holding otherwise would imply that every voting requirement in every State is subject to invalidation whenever any voter's personal, idiosyncratic circumstances make that requirement particularly difficult. The Constitution does not tell courts to inject case-by-case hardship waivers into every election law. It entrusts state legislatures with making these policy decisions. *See* U.S. Const., art. I, §4; art. II, §1; amend. X. This constitutional design militates against the "sort of detailed

judicial supervision" that a "voter-by-voter examination of the burdens of voting regulations" would require. *Crawford*, 553 U.S. at 208 (Scalia, J., concurring in the judgment); *accord Luft v. Evers*, 963 F.3d 665, 671 (7th Cir. 2020).

Though Justice Scalia was writing only for himself and two others in *Crawford*, his concurrence accurately describes the governing law. As he explained, the categorical approach comes from several Supreme Court precedents—all good law, all binding. *See Crawford*, 553 U.S. at 206-07 (Scalia, J., concurring in the judgment). The lead opinion in *Crawford*, moreover, "neither reject[ed] nor embrace[d]" the categorical approach. *Id.* at 208. It didn't need to because the plaintiff there failed to "provide any concrete evidence of the burden" that the law imposed "on any class of voters." *Id.* at 201-02 (op. of Stevens, J.). Several lower courts have thus followed Justice Scalia's concurrence as an accurate statement of the law. *See, e.g.*, *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 236 (5th Cir. 2020); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 663 (6th Cir. 2016) (Keith, J., concurring in part, dissenting in part) ("The Majority relies in part on Justice Scalia's concurrence in *Crawford*"). The Eleventh Circuit has also relied on it. *See, e.g.*, *Jacobson*, 974 F.3d at 1261; *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 992 F.3d 1299, 1327 (11th Cir. 2021).

The correct, categorical approach to *Anderson-Burdick* is fatal to Plaintiffs' claims. Nothing in the amended complaint alleges in "non-conclusory" terms that SB 202 imposes meaningful burdens on "voters generally." *League of Women Voters of Minn.*, 2021 WL 1175234, at *9. Plaintiffs explicitly allege

burdens on certain subclasses of voters. *E.g.*, Am. Compl. ¶¶476; 481; 466-70; 394. This "[z]eroing in on the abnormal burden experienced by a small group of voters is problematic at best, and prohibited at worst." *Ne. Ohio Coal.*, 837 F.3d at 631. The better view is that it's prohibited.

In fact, even the abnormal burdens that Plaintiffs identify are not real burdens. The 11-day deadline for submitting a mail-ballot application, for example, "do[es] not 'disenfranchise' anyone under any legitimate understanding of that term." *Wis. State Legislature*, 141 S. Ct. at 35 (Kavanaugh, J., concurring). Voters who fail to apply "prior to the cutoff date" are not burdened by the deadline, but by their "own failure to take timely steps to [apply]." *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973).

Plaintiffs assume that the 11-day deadline makes it impossible to vote by mail in runoff elections, *see* Am. Compl. ¶¶115-20, 469-70, but Plaintiffs misread Georgia law. Runoffs occur 28 days after the general election, no matter what; the date is not tied to when the Secretary of State certifies the general-election results. *See* O.C.G.A. §21-2-501(a)(1). Georgians can thus apply for a mail ballot starting "78 days … prior to the date of the … runoff." O.C.G.A. §21-2-381(2). Plaintiffs seem to understand this elsewhere. *See* Pltfs.' Notice of Upcoming Elections (Doc. 40) 2 (stating that runoffs for elections in September and November "are scheduled for October 19" and "November 30," respectively).

Plaintiffs also assume that, in counties with separate boards of registrars, SB 202 forbids a removed registrar from being replaced. Am. Compl.

¶¶90, 92, 193, 313, 386, 389, 394-95. Registrars are not "superintendents," Plaintiffs note, and SB 202 allows the State to replace only a removed "superintendent." ¶90 (citing O.C.G.A. §21-2-33.2(e)(1)).

Plaintiffs' reading of SB 202 proves too much. If registrars are not "superintendents," then they cannot be removed in the first place. SB 202 authorizes only the removal of "superintendents." O.C.G.A. §§21-2-33.1(f); 21-2-33.2(c)(1), (c)(2), (f), (g). True, SB 202 mentions "registrars" in a few places. *E.g.*, §§21-2-33.2(e)(1)-(2). But that's because the "superintendent" in some counties is a "board of elections and registration"—an entity that includes the "board of registrars." §§21-2-240(b); 21-2-45(b); 21-2-2(35)(A). Nothing in SB 202 authorizes the removal of registrars in counties where the board of registrars has not been combined with the board of elections.

Even if a separate board of registrars could be removed, nothing in SB 202 *forbids* removed registrars from being replaced. In the unlikely event that a majority of registrars were removed, Plaintiffs offer no reason why the registrars could not be replaced by the county officials who normally make these appointments. *E.g.*, Chatham Cty., *Board of Registrars* (archived July 22, 2021), bit.ly/3eIn1EH ("The Senior Judge of Superior Court of Chatham County appoints the Board of Registrars ...."). No reason exists in Georgia law.

CONCLUSION

This Court should dismiss Counts I-III and XI-XIV of the amended complaint with prejudice.

Respectfully submitted,

Dated: July 26, 2020

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with Local Rule 5.1(B) because it uses 13-point Century Schoolbook font.

/s/ *Tyler R. Green*

CERTIFICATE OF SERVICE

On July 26, 2021, I e-filed this document via ECF, which will serve everyone requiring service.

/s/ *Tyler R. Green*