UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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

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

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REPLY

After joining parts of the State's brief, Intervenors identified several specific defects with Counts I-III and XII-XIV. Namely, Count I fails to allege the protected-interest or insufficient-process elements of a procedural-due-process claim. Count II fails to allege the fundamental-right or arbitrariness elements of a substantive-due-process claim, and instead alleges state-law violations that are barred by the Eleventh Amendment. And Counts XII-XIV fail to implicate the constitutional right to vote because Plaintiffs' allegations focus on absentee voting and idiosyncratic burdens.

These defects are purely legal: No amount of discovery could cure them, and Plaintiffs are not entitled to discovery based on allegations that are legally irrelevant, implausibly speculative, or both. Courts can and do resolve arguments like Intervenors' at the pleading stage. *E.g.*, *Schulze v. Broward Cty. Bd. of Cty. Comm'rs*, 190 F. App'x 772, 774 (11th Cir. 2006) (no protected interest); *AAPS, Inc. v. Brown*, 2018 WL 1535531, at *7 (E.D. Cal. Mar. 29) (facially sufficient process); *Kentner v. City of Sanibel*, 750 F.3d 1274, 1281 (11th Cir. 2014) (substantive due process and rational-basis review); *Fidell v. Bd. of Elections of N.Y.C.*, 343 F. Supp. 913, 915 (E.D.N.Y.) (no right to vote absentee), *aff'd*, 409 U.S. 972 (1972); *League of Women Voters of Minn. Educ. Fund v. Simon*, 2021 WL 1175234, at *7-9 (D. Minn. Mar. 29) (no idiosyncratic burdens).

While some of the cases that Intervenors cited involved trials or summary judgment, *cf.* Opp. (Doc. 45) 50, that difference in procedural posture is

irrelevant here. Intervenors cited those cases because they identify *the governing law*—the same law that "remains constant through the … lawsuit" and "determine[s] what the plaintiff must plausibly allege at the outset." *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020). Every court that granted summary judgment or rendered a verdict, after all, might have incorrectly denied an earlier motion to dismiss. *E.g.*, *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1237, 1269 (11th Cir. 2020) (reviewing a bench trial but holding that "[t]he district court should have dismissed the action"). Here, too, this Court should not allow Counts I-III and XII-XIV to "proceed past the pleading stage" because those claims are "destined to fail later as a matter of law." *Comcast*, 140 S. Ct. at 1014.

I. The process for removing county election officials does not offend due process. (Counts I-II)

Unlike the plaintiffs in the other cases challenging SB 202, Plaintiffs challenge the process for removing county election officials. But this process violates neither procedural nor substantive due process—and it certainly does not violate them *on its face*. Counts I and II of the amended complaint should be dismissed with prejudice.

A. Procedural due process

Plaintiffs concede that Count I is a "facial procedural due process challenge." Opp. 8; *see Cromartie v. Shealy*, 941 F.3d 1244, 1257 (11th Cir. 2019) (litigant who concededly brought "facial" challenge forfeited as-applied challenge). That concession is important. A facial procedural-due-process challenge

fails unless "no set of circumstances exists under which the law would be valid." *J.R. v. Hansen*, 803 F.3d 1315, 1320 (11th Cir. 2015) (cleaned up). In other words, SB 202 must implicate a protected interest and provide insufficient process "'in all its applications.'" *Pietsch v. Ward Cty.*, 446 F. Supp. 3d 513, 538 (D.N.D. 2020) (quoting *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019)), *aff'd*, 991 F.3d 907 (8th Cir. 2021).

Facial challenges are "disfavored," face a "'heavy burden,'" and are "'the most difficult'" challenge to bring. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008); *Vestavia Plaza, LLC v. City of Vestavia Hills*, 2013 WL 4804196, at *14 (N.D. Ala. Sept. 9). For good reasons. Georgia has not yet "implement[ed]" SB 202's removal process, and Georgia's courts have not yet "construe[d] the law in the context of actual disputes" or considered "a limiting construction to avoid constitutional questions." *Wash. State Grange*, 552 U.S. at 450. Facial challenges like Plaintiffs' thus "rest on speculation." *Id.* They "run contrary to the fundamental principle" of constitutional avoidance. *Id.* And they "threaten" the "democratic process" by invalidating laws without giving States the chance to implement them "in a manner consistent with the Constitution." *Id.* at 451. Plaintiffs must be held to the rigorous standard for facial challenges.

Plaintiffs cannot meet that rigorous standard. In fact, they never even try. They instead ask this Court to "speculate about 'hypothetical' or 'imaginary' cases"—something it cannot do. *Id.* at 450.

Plaintiffs do not allege that every application of SB 202 implicates a protected liberty or property interest. As Intervenors explained, state and local laws deprive county officials of a protected interest in their positions. Because those officials are elected, removable at will, or removable under discretionary for-cause standards, they have no cognizable interest in avoiding removal—especially not removal by *state* officials. *See* Mot. (Doc. 42-1) 4-5.

Plaintiffs do not argue otherwise. They never explain how officials in those categories have protected interests, or identify a single official who falls outside of those categories. While Plaintiffs point to Judge Story's opinion involving "school board members," Plaintiffs never compare the law governing school board members with the law governing county election officials. Opp. 9. And Plaintiffs elsewhere admit that the two schemes are "fundamentally different." Opp. 12. Plaintiffs also ignore that Judge Story merely "[a]ssum[ed] that [school board members] ha[d] a property interest at stake," before rejecting the due-process claim on other grounds. *DeKalb Cty. Sch. Dist. v. Ga. State Bd. of Educ.*, Doc. 16 at 8, No. 1:13-cv-544-RWS (N.D. Ga. Mar. 4, 2013).

Intervenors' point is not that officials who *have* protected interests must accept whatever procedures the State imposes—*i.e.*, "take the bitter with the sweet." *Cf.* Opp. 10-11. Intervenors' point is that state law determines *whether* officials have a protected interest in the first place. Nonconstitutional interests do not "attain … constitutional status" unless "they have been initially recognized and protected by state law." *Paul v. Davis*, 424 U.S. 693, 710 (1976). These interests are "created and their dimensions are defined by existing rules

or understandings that stem from an independent source such as state law." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Here, the relevant state and local laws reveal that county election officials have no legal entitlement to their office. *See* Mot. 4-5. SB 202's removal process thus implicates no protected interest.

Even if SB 202 implicated due process, the statute provides more process than would be due. No suspension can occur unless the state board "follow[s] the procedures set forth in [O.C.G.A. §21-2-33.2]." O.C.G.A. §21-2-33.1(f). Those procedures include a "preliminary investigation" and a "preliminary hearing" in all cases, no matter whether the case starts with a "petition" or some other "appropriate action" (like the board's "own motion"). §21-2-33.2(a)-(b). This preliminary investigation and hearing are followed by another "notice and hearing," where "testimony" is heard. §21-2-33.2(c)-(d). If a majority of the state board finds serious misconduct under the relevant standard of proof, all that happens is a suspension "with pay." §21-2-33.2(e)(1); *cf. Everett v. Napper*, 833 F.2d 1507, 1512 (11th Cir. 1987) (explaining that a State can "suspend … *with* pay even before granting an opportunity to be heard or notice"). The suspended party can then petition for "reinstatement," triggering yet another "notice" and "hearing" where "evidence" can be submitted. O.C.G.A. §21-2-33.2(e)(2), (f). And if reinstatement fails, the suspended party can get full "judicial review" (and attorney's fees, if successful). §21-2-33.2(f)-(g); *cf. Marcavage v. Borough of Lansdowne*, 493 F. App'x 301, 307 n.8 (3d Cir. 2012) (rejecting "a facial procedural due process challenge … [b]ecause the text of the

statute explicitly provides for an appeals process"); *Overall v. Watson*, 2018 WL 3475434, at *13 (N.D. Ala. July 19) (rejecting the notion that procedural due process requires the State to cover attorney's fees and costs).

Plaintiffs do not dispute that these generous procedures, on their face, provide due process. Instead, Plaintiffs hypothesize a scenario where these procedures might not be available. SB 202 allows the removal of a "superintendent," Plaintiffs note, and the superintendent can be a multi-member board. Plaintiffs worry that one bad apple on the board can result in the entire board being removed, including members who might have done nothing wrong, with no recourse for the innocent members. *See* Opp. 14-17.

Even if Plaintiffs were right to be concerned, this "hypothetical" application of SB 202 cannot sustain a facial challenge to the entire law. *Wash. State Grange*, 552 U.S. at 450; *see AAPS*, 2018 WL 1535531, at *9. And Plaintiffs are not right to be concerned. Plaintiffs read "superintendent" to mean "the entire board." Opp. 17. But if that's true, then no suspension can occur unless *the entire board* has committed "at least three violations" of state election law or "nonfeasance, malfeasance, or gross negligence." O.C.G.A. § 21-2-33.2(c). Plaintiffs cannot read "superintendent" to mean one thing in one subsection and another thing in a neighboring subsection. Or, more naturally, "superintendent" refers to *each* member of a multi-member board. *Cf., e.g.*, §21-2-33.2(e)(1) ("*Any* superintendent" can petition regarding "*his or her* suspension" (emphases added)). The protections in SB 202 thus fully protect individual members. Either way, "[b]ecause there is no record before the Court as to how these

provisions will apply in practice, it would be premature to address Plaintiff[s'] claim facially rather than through an as applied challenge." *AAPS*, 2018 WL 1535531, at *9. If this Court has "uncertainty as to how these eventualities might play out," then "a facial challenge to the Act is inappropriate" and Count I must be "dismissed." *Id.* at *7 (cleaned up).

B. Substantive due process

As for Count II, Plaintiffs concede that their substantive-due-process claim turns entirely on alleged violations of the Georgia Constitution. "The issue presented by Count II," they openly admit, is "whether [SB 202] complies with the Georgia Constitution." Opp. 22 n.12; *see also* Opp. 17 (describing "Count II" as an alleged "Violation of State Law Separation of Powers"). Plaintiffs do not deny that the Eleventh Amendment bars litigants from suing States in federal court for violations of the state constitution. *See* Mot. 6-7. Nor do Plaintiffs claim that all violations of the Georgia Constitution *are* violations of federal substantive due process. The law is the opposite: "'[S]ubstantive due process cannot be used to vindicate rights that are creatures of state law,'" including rights that are "protected by the Georgia State Constitution." *Long v. Fulton Cty. Sch. Dist.*, 807 F. Supp. 2d 1274, 1288-89 (N.D. Ga. 2011).

Plaintiffs' analogy to *Duncan v. Poythress* is unpersuasive. *Cf.* Opp. 21-22. *Duncan* holds that, when state law requires a vacant office to be filled by election, the State cannot cancel the election and appoint the officer instead. *See* 657 F.2d 691, 704 (5th Cir. 1981). *Duncan* actually reiterates that most violations of state law do *not* violate the federal Due Process Clause. *See id.* at

769, 701-02. But intentionally cancelling an election, *Duncan* explains, is one of the "rare" counterexamples: Such a "fundamental breakdown of the democratic system" violates not just state law, but also the federal "constitutionally protected right to vote." *Id.* at 769, 704-05. The Eleventh Circuit later stressed, though, that situations where state-law violations amount to due-process violations are "extraordinary" and "considerably narrower than plaintiffs depict," requiring a kind of "'patent and fundamental unfairness'" that undermines "'the very integrity of the electoral process.'" *Curry v. Baker*, 802 F.2d 1302, 1314-16 (11th Cir. 1986) (distinguishing *Duncan*).

Plaintiffs allege nothing like that here. They challenge not the election but the *removal* of county officials—many of whom were never elected to begin with. *See* Mot. 4. And Count II alleges violations of state law in a vacuum, whether or not those alleged violations also violate the federal constitutional right to vote. Nor is the removal of a county election official, using SB 202's generous procedures, the kind of "fundamental breakdown of the democratic system" that implicates due process. *Duncan*, 657 F.2d at 704. It is certainly not a fundamental breakdown in *all* instances, which is what Plaintiffs must plead to bring a facial substantive-due-process challenge. *See* Mot. 8 (explaining that substantive-due-process claims cannot be as applied); *Coltharp v. Herrera*, 2014 WL 12558842, at *10 (C.D. Cal. Dec. 10) (explaining that *Duncan* does not apply when the plaintiff's rights are not "clearly establish[ed]" and "there is no evidence that [the defendant] intended to violate the law"), *aff'd*, 637 F. App'x 387 (9th Cir. 2016). Count II thus irreparably fails to state a claim.

II. Neither the removal process nor the deadline for submitting mail-ballot applications violates the constitutional right to vote. (Counts III, XII-XIV)

Intervenors don't have much to add about the right-to-vote claims because—consistent with Plaintiffs' prior practice, *see* Mot. 12—Plaintiffs mostly ignore Intervenors' arguments. This Court "has no duty to formulate arguments that Plaintiff[s] might have made in response to [Intervenors'] motion[] to dismiss." *Lindsay v. Bank of Am. Home Loans*, 2016 WL 4546654, at *2 n.3 (N.D. Ga. Feb. 1). Under the Local Rules, a party's "failure to respond to any portion … [of] a motion indicates such portion … is unopposed." *Kramer v. Gwinnett Cty.*, 306 F. Supp. 2d 1219, 1221 (N.D. Ga.) (citing LR 7.1(B)), *aff'd*, 116 F. App'x 253 (11th Cir. 2004). This Court should hold that, because Plaintiffs' allegations turn on absentee voting and noncategorical burdens, they do not implicate the constitutional right to vote as a matter of law.

A. No right to vote absentee

Restrictions on absentee voting do not implicate the constitutional right to vote. As Intervenors explained, the Supreme Court rejected the "claimed right" to vote absentee in *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 807 (1969). So long as the State provides one way to vote, the constitutional right to vote is not "at stake." *Id.*; *see* Mot. 8-10.

In response, Plaintiffs do not discuss *McDonald*, cite contrary cases, or argue that absentee voting is a constitutional right. They reassert—in the most conclusory terms possible—that in-person voting is impossible due to COVID-

19 and the fear of criminal liability. Opp. 50. Yet they never respond to Intervenors' many arguments rebutting this implausible assertion. *See* Mot. 10-12.

Plaintiffs theorize that, unless mail ballots can be requested within 11 days of the election, some people will be unable to vote at all—for example, voters "called for National Guard duty, emergency medical work, or unanticipated jury duty." Opp. 48-49. But *McDonald* recognized that in-person voting might be "practically impossible" for "those serving on juries," "servicemen," and "doctors … called on to do emergency work"; yet it still denied that the Constitution requires absentee voting. 394 U.S. at 810 & n.8. Otherwise, virtually every jurisdiction in the country would have been violating the Constitution for nearly a century, when absentee voting was not the norm. *See* Mot. 8. And today, Georgia gives voters not only the traditional option of voting in-person on election day, but also a generous period of mail voting and a generous period of early voting. Plaintiffs do not meaningfully argue that SB 202 makes *all* these options effectively unavailable. The challenged provisions thus "do[] not implicate the right to vote at all." *New Ga. Proj. v. Raffensperger*, 976 F.3d 1278, 1281 (11th Cir. 2020).

B. No noncategorical burdens

Separately, SB 202 does not implicate the constitutional right to vote because Plaintiffs allege, at most, idiosyncratic burdens that affect only some voters. As Intervenors explained, *Anderson-Burdick* is concerned with burdens that affect voters categorically. Three Justices endorsed this categorical approach in *Crawford*, the lead opinion in *Crawford* did not disagree, several

lower courts have adopted the categorical approach, and that approach best honors binding Supreme Court precedent and first principles. *See* Mot. 13-16.

Again, Plaintiffs offer nothing in response. They do not provide an alternative interpretation of *Anderson-Burdick*. They do not cite contrary authority. And they never explain how idiosyncratic burdens are somehow relevant.

Instead, Plaintiffs *concede* that their claims allege idiosyncratic burdens. They claim that the removal provisions, for example, burden hypothetical voters who live in counties with separate boards of registration where the entire board is removed and not replaced. Opp. 23. And they claim that the deadline for mail-ballot applications burdens hypothetical voters who cannot vote on election day, cannot vote early, and cannot vote absentee because they missed the 11-day cutoff. Opp. 48-50. While Plaintiffs' preliminary-injunction motion also argued that the deadline makes it impossible to vote by mail in runoffs, Plaintiffs abandon that argument now. *Compare* Mot. 16 (explaining why this argument misreads the statutes), *with* Opp. 48-50 (raising no developed argument about runoffs and offering no response to Intervenors). Because Plaintiffs' allegations thus concern "burdens tied to the peculiar circumstances of individual voters," their right-to-vote claims are "not plausible" and should be dismissed. *League of Women Voters of Minn.*, 2021 WL 1175234, at *8-9.

* * *

For all these reasons and the relevant parts of the State's briefs (which Intervenors join), the Court should dismiss Counts I-III and XI-XIV of the amended complaint with prejudice.

Respectfully submitted,

Dated: August 16, 2021

/s/ Tyler R. Green

John E. Hall, Jr.
Georgia Bar No. 319090
William Bradley Carver, Sr.
Georgia Bar No. 115529
W. Dowdy White
Georgia Bar No. 320879
HALL BOOTH SMITH, P.C.
191 Peachtree St. NE, Ste. 2900
Atlanta, GA 30303
(404) 954-6967

Tyler R. Green (*pro hac vice*)
Cameron T. Norris (*pro hac vice*)
Steven C. Begakis (*pro hac vice*)
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
tyler@consovoymccarthy.com
cam@consovoymccarthy.com
steven@consovoymccarthy.com

Counsel for the RNC, NRSC, NRCC, and GAGOP

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 August 16, 2021, I e-filed this document via ECF, which will serve everyone requiring service.

/s/ *Tyler R. Green*