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

COALITION FOR GOOD GOVERNANCE, *et al.,*

Plaintiffs,

v.

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

Defendants,

REPUBLICAN NATIONAL COMMITTEE, et al.,

Intervenor-Defendants.

CIVIL ACTION

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

STATE DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

INTRODUCTION

Plaintiffs spend more than 150 pages alleging they can obtain relief on six provisions of SB 202 in 14 separate counts. Plaintiffs claim that SB 202 attacks "three pillars of liberty," "destroys . . . components of the State's regime of separate powers," and "destr[oys] . . . the constitutional order." [Doc. 14, pp. 8, 10-11]. But these staggering allegations do not stand up to scrutiny because Plaintiffs are simply seeking the policy outcome they prefer.[1]

The rules of the road for federal courts when dealing with elections are clear: "States—not federal courts—are in charge of setting those rules." *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1284 (11th Cir. 2020) (*NGP*); *see also Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986). Interpretations of federal law that would "transfer much of the authority to

[1] The lead Plaintiff, Coalition for Good Governance (CGG), regularly litigates its policy disagreements. It has sued unsuccessfully in a variety of cases, including efforts to force Georgia to use hand-marked paper ballots because of its unfounded concerns about hacking of Dominion voting machines, *Curling v. Raffensperger*, 493 F. Supp. 3d 1264, 1313 (N.D. Ga. 2020); to delay elections and alter election procedures in the midst of a pandemic, *Coal. for Good Governance v. Raffensperger*, No. 1:20-cv-1677-TCB, 2020 U.S. Dist. LEXIS 86996, at *2 (N.D. Ga. May 14, 2020); to overturn election results because of its theories about manipulation of Georgia's prior electronic voting machines, *Martin v. Fulton Cty. Bd. of Registration & Elections*, 307 Ga. 193, 195 (2019); and to eliminate electronic voting machines because of its worries about the size of the screens of Dominion equipment, *Coal. for Good Governance v. Gaston*, Case No. 20CV00077(S) (Sumter Cty. Sup. Ct. March 2, 2020).

regulate election procedures from the States to the federal courts" are not favored. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2341 (2021).

Plaintiffs' Amended Complaint should be dismissed. It is an improper shotgun pleading that the federal courts lack the jurisdiction to entertain, and that in any event provides no basis for relief. Despite devoting more than 60 pages to allegations of injury, Plaintiffs also have no standing to bring this case. And even if they did, they have failed to state a claim for relief on any of their allegations. This Court should "follow the law as written and leave the policy decisions for others," *Ga. Ass'n of Latino Elected Officials, Inc. v. Gwinnett Cty. Bd. of Reg. & Elections*, No. 1:20-CV-01587, 2020 U.S. Dist. LEXIS 211736, at *4 (N.D. Ga. Oct. 5, 2020) ("*GALEO*"), and dismiss this case.

FACTUAL BACKGROUND

Plaintiffs ask this Court to enjoin six provisions of Georgia law, as modified by SB 202. But none of these provisions made major changes to existing law and almost all of them were the law *before* SB 202 was enacted.[2]

I. O.C.G.A. § 21-2-33.2: County accountability.

Prior to SB 202, the State Election Board (SEB) had only limited powers to enforce state statutes against counties that failed to follow state law. It could

[2] A copy of the enacted version of SB 202 is attached as Ex. A.

assess civil penalties and request the Attorney General to bring actions in court against violators. O.C.G.A. § 21-2-33.1. But the SEB had few options when dealing with counties that continued to violate state election law. SB 202 provided the ability, after notice and a hearing, to temporarily remove election superintendents after they caused multiple violations of the law over multiple election cycles. O.C.G.A. § 21-2-33.2. The General Assembly explained that it took this step to ensure "there is a mechanism to address local election problems will promote voter confidence and meet the goal of uniformity" because of the lack of accountability under existing law. Ex. A at 5:96-101.

II. O.C.G.A. § 21-2-568.1: Election observation.

Prior to SB 202, it was already a felony to induce an elector "to show how he or she marks or has marked his or her ballot" or to disclose "to anyone who another elector voted, without said elector's consent." O.C.G.A. § 21-2-568(a)(3) and (4). The "enclosed space" of a precinct is also heavily regulated.[3] Additional provisions place limitations on who can be in the enclosed space while voters are voting and limited activities in that space. O.C.G.A. § 21-2-413, -414. Those restrictions include prohibitions on (1) the general public entering unless they

[3] "It is, at least on Election Day, government controlled property set aside for the sole purpose of voting. The space is 'a special enclave, subject to greater restriction.'" *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1886 (2018) (quoting *Int'l Soc. for Krishna Consciousness v. Lee*, 505 U. S. 672, 680 (1992)).

are voting or providing assistance, (2) anyone but law enforcement carrying firearms, and (3) campaigning. *Id.* Only a limited number of authorized poll watchers are allowed inside. *Id.*

Consistent with those existing limitations on activities in the enclosed space and to ensure a secret ballot, SB 202 added a provision making it a felony to engage in the *intentional* observation of an elector casting a ballot "in a manner that would allow such person *to see for whom or what the elector is voting*." Ex. A at 95:2448-2454 (emphasis added). Existing rules require superintendents to arrange each polling place "in such a manner as to provide for the privacy of the elector while voting." Ga. Comp. R. & Regs r. 183-1-12-.11(4). And SB 202 does not prohibit *accidental* observation of a voting-machine screen—only intentional efforts to see a person's votes. Ex. A at 95:2448-2454.

III. O.C.G.A. § 21-2-386(a)(2)(B)(vii): Nondisclosure of information about absentee ballots during early scanning.

Because of the tight margin in the 2020 general election, it look longer than normal to determine which presidential candidate had prevailed in Georgia. To hopefully avoid that in the future, the Legislature decided that "[c]reating processes for early processing and scanning of absentee ballots will promote elector confidence by ensuring that results are reported quickly." Ex. A at 6:123-125. Prior to SB 202 (and the 2020 emergency scanning rules), early

scanning of absentee ballots could only be performed by a sequestered group of individuals beginning at 7:00 AM on Election Day itself and there was no danger of those individuals leaving to report totals or estimates during that process because it took place in a single day. O.G.C.A. § 21-2-386(a)(2) (2019). In order to mitigate the risk that early vote counts would be disclosed during early scanning in the weeks before an election, the legislature had to ensure that any information about potential vote counts would not be tabulated or publicized prior to the close of the polls. Accordingly, SB 202 permits only election officials to handle ballots, requires individuals involved to swear an oath, and places several requirements on observers to avoid even tabulation or disclosure of any information regarding potential vote counts. Plaintiffs seek to enjoin two of these requirements, namely, preventing observers and monitors from attempting to tally or estimate vote totals and communicating information about a vote they might see to anyone other than an election official.[4] Ex. A at 67:1698-1712. Plaintiffs refer to these provisions as the "Estimating Ban" and "Gag Rule," respectively. [Doc. 14, p. 12]. Both of those

[4] These provisions closely track the emergency State Election Board rules that were used throughout 2020 for early scanning of ballots. *See, e.g.*, Ga. Comp. R. & Regs. r. 183-1-14-0.7-.15. Other states that allow early scanning also prohibit and/or criminalize disclosure of tallies before the polls are closed. *See, e.g.*, Ariz. Rev. Stat. § 16-551 (felony to release tallies early); N.M. Stat. Ann. § 1-6-14(H); Del. Code Ann. tit. 15, § 5510; C.R.S. 1-7.5-107.5 (Colorado).

provisions were present in the now-expired State Election Board emergency rule that authorized early scanning in the 2020 general election.

IV. O.C.G.A. § 21-2-568.2(2)(B): Penalties for photography.

Prior to SB 202, it was already a violation of the Election Code to take pictures inside of a polling place and specifically to photograph the face of a voting machine with the ballot displayed. O.C.G.A. § 21-2-413(e). But there was no specific penalty, meaning the only possible penalty was the catch-all misdemeanor for violations of the Election Code. O.C.G.A. § 21-2-598. In SB 202, the General Assembly provided a specific misdemeanor penalty for conduct that was already a misdemeanor and further clarified that photographing or recording a voted ballot outside of a polling place (such as an absentee ballot) was also a misdemeanor.[5] Ex. A at 96:2455-2462. It is not hard to imagine a vote-buying scheme that requires a voter to show proof of their vote to the person paying them—something this provision criminalizes.

V. O.C.G.A. § 21-2-381(a)(1)(C)(i): Elimination of signature matching.

As the General Assembly observed, "Many Georgia election processes were challenged in court, including the subjective signature-matching

[5] Other states also prohibit taking photographs of ballots. *See, e.g.*, Ala. Code § 17-9-50.1; 25 Pa. Stat. Ann. § 3530 (prohibiting anyone to see ballot "with the apparent intention of letting it be known how he is about to vote").

requirements, by Georgians on all sides of the political spectrum before and after the 2020 general election." Ex. A at 4:73-75. Based on that litigation and other factors, the legislature replaced the subjective signature-match with an objective number.[6] The SB 202 process also includes safeguards for voters who lack photo identification. Ex. A at 38:949-39:956; 51:1297-52:1305.

VI. O.C.G.A. § 21-2-381(a)(1)(A): Definite period for applying for absentee ballot.

Before SB 202, Georgia voters could request absentee ballots up until the day before the election, O.C.G.A. § 21-2-381(a)(1)(A) (2020), but this often led to problems for voters. As the General Assembly explained, "many absentee ballots issued in the last few days before the election were not successfully voted or were returned late." Ex. A at 5:110-112. The State's policy of setting a deadline for applying for an absentee ballot before the election places Georgia well within the mainstream of other states' laws—at least eight other states have deadlines of 11 days or longer, including Rhode Island's 21-day deadline.[7]

[6] Also, at least six other states utilize identification with absentee-ballot applications or ballots. *See* Code of Ala. § 17-9-30(b); A.C.A. § 7-5-412(a)(2)(B) (Arkansas); K.S.A. § 25-1122(c) (Kansas); Minn. Stat. Ann. § 203B.07(3); Ohio Rev. Code Ann. § 3509.03(B), .04(B); Wis. Stat. § 6.87(1).

[7] Ariz. Rev. Stat. § 16-542(E) (11 days); Idaho Code § 34-1002(7) (11 days); Ind. Code Ann. § 3-11-4-3(a)(4) (12 days); Iowa Code § 53.2(1)(b) (11 days); Mo. Rev. Stat. § 115.279(3) (second Wednesday before election); Neb. Rev. Stat. Ann § 32-941 (second Friday before election); Tex. Elec. Code § 84.007(c) (11 days); R.I. Gen. Laws Section 17-20-2.1(c) (21 days).

Further, during the pandemic, the "lengthy absentee ballot process also led to elector confusion, including electors who were told they had already voted when they arrived to vote in person. Creating a definite period of absentee voting will assist electors in understanding the election process while also ensuring that opportunities to vote are not diminished." Ex. A at 5:107-110. Other states also have shorter timelines to begin requesting an absentee ballot, including Iowa, which returns applications to voters if received more than 70 days before an election. Iowa Code § 53.2(1)(b).

ARGUMENT AND CITATION OF AUTHORITY

Plaintiffs ask this Court to nullify six components of Georgia's new election law on a variety of grounds. *See generally* [Doc. 14, pp. 11-14]. Because Plaintiffs challenge a variety of practices, this brief first considers jurisdiction, explains the legal standards, and then considers the challenged practices.

The pertinent legal standards are clear: Where a motion to dismiss is brought pursuant to Fed. R. Civ. Proc. 12(b)(1), the Court is not limited to the four corners of the Complaint to adequately satisfy itself of jurisdiction over the matter. *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 732 n.9 (11th Cir. 1982). In evaluating a 12(b)(1) motion, "no presumptive truthfulness attaches to plaintiff's allegations." *Id*. And, to survive a motion to dismiss under FRCP 12(b)(6), a complaint must "state a claim to relief that is plausible on its face."

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). The complaint must demonstrate "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal,* 556 U.S. 662, 677 (2009). While this Court must assume the veracity of well-pleaded factual allegations, it is not required to accept legal conclusions "couched as [] factual allegation[s]." *Id.* at 678-79. This Court may consider any matters appropriate for judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Application of these settled standards requires dismissal.

I. Plaintiffs' Amended Complaint is an improper shotgun pleading.

Fed. R. Civ. P. 8(a)(2) requires that a complaint provide a "short and plain statement of the claim showing that the pleader is entitled to relief." This requirement is necessary so that the defendants can "'frame a responsive pleading.'" *Barmapov v. Amuial*, 986 F.3d 1321, 1324 (11th Cir. 2021) (quoting *Weiland v. Palm Beach Cty. Sheriff's Off.*, 792 F.3d 1313, 1320 (11th Cir. 2015)). Plaintiffs' Amended Complaint runs more than 150 pages across 484 paragraphs. [Doc. 14].

The Amended Complaint (1) contains fourteen counts, each of which adopts all of the allegations of facts and three of which adopt all prior allegations. [*Id.* at ¶¶ 464, 474, 480]; (2) includes hundreds of paragraphs of

"conclusory, vague, and immaterial facts."[8] It should be dismissed as an improper shotgun pleading. *Barmapov*, 986 F.3d at 1324-25.

II. Plaintiffs do not have standing.

"The 'law of Art. III standing is built on a single basic idea—the idea of separation of powers.'" *Brnovich,* 594 U.S. at ___ slip op. at 7 (quoting *Raines v. Byrd,* 521 U.S. 811, 820 (1997)). "Federal courts are not 'constituted as free-wheeling enforcers of the Constitution and laws.'" *Wood v. Raffensperger,* 981 F.3d 1307, 1313 (11th Cir. 2020) (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006)). This bedrock jurisdictional element ensures "that federal courts exercise their proper function in a limited and separated government." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (cleaned up). "The legitimacy of an unelected, life tenured judiciary in our democratic republic is bolstered by the constitutional limitation of that judiciary's power in Article III to actual 'cases' and 'controversies.'" John G. Roberts, *Article III Limits on Statutory Standing*, 42 DUKE L. J. 1219, 1220 (1993). "To have a case or controversy, a litigant must establish that he has standing." *Jacobson v. Fla. Sec. of State*, 974 F.3d 1236, 1245 (11th Cir. 2020).

[8] Examples include hacking electronic voting machines, [Doc. 14, ¶¶ 78, 126]; the now-expired COVID-19 state of emergency, *id.* at ¶¶ 133-138; the Georgia Open Meetings law, *id.* at ¶¶ 80-84; and repeated statements about potential injuries to Plaintiffs, *see, e.g., id.* at ¶¶ 191-192, 201-202, 208-209, 213-214.

To demonstrate standing at the pleading stage of the litigation, Plaintiffs must allege "(1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision." *Id*. The party invoking federal jurisdiction bears the burden of establishing standing at the beginning and at each phase. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 570 n.5 (1992); *see also Johnson v. Bd. of Regents*, 263 F.3d 1234, 1267 (11th Cir. 2001). Plaintiffs, moreover, must show a concrete and particularized injury. *Wood,* 981 F.3d at 1314 (citing *Trichell v. Midland Credit Mgmt., Inc*., 964 F.3d 990, 996 (11th Cir. 2020)). And there must be either a substantial risk of injury or the alleged injury must be "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013). These principles make clear that none of the Plaintiffs can demonstrate any injury, and this case should be dismissed.

A. Organizational Plaintiffs lack standing.

A plaintiff claiming diversion of resources as an injury must demonstrate that "a defendant's illegal acts impair the organization's ability to engage in its own projects by forcing the organization to divert resources in response." *Arcia v. Sec'y of Fla.,* 772 F.3d 1335, 1341 (11th Cir. 2014). This requires the plaintiff to show not only what the organization is diverting resources to, but

also "what activities [the organization] would divert resources away from in order to spend additional resources on combatting" the impact of the law. *Jacobson*, 974 F.3d at 1250 (emphasis added). As another judge on this court held, this requires more than evidence of an accounting transfer: there must be an "indication" that the organization "would in fact be diverting . . . resources away from their core activities." *GALEO*, 2020 U.S. Dist. LEXIS 211736, at *17. Other circuits similarly have elaborated on this requirement and they track the Eleventh Circuit's rationale.

As the Seventh Circuit recently explained, organizations cannot support a claim of standing "based solely on the baseline work they are already doing." *Common Cause Ind. v. Lawson*, 937 F.3d 944, 955 (7th Cir. 2019). Further, organizations "cannot convert ordinary program costs into an injury in fact. The question is what additional or new burdens are created by the law the organization is challenging. It must show that the disruption is real and its response is warranted." *Id*. (cleaned up). Organizations must demonstrate that the challenged law's effect "goes far beyond 'business as usual'" through evidence of a disruption in their operations or the likelihood of significant changes to their activities. *Id*. Put differently, the key question is "not whether the organization has diverted resources from one priority to another, but whether its activities have been directly impeded by defendant's activities,

thus necessitating the diversion of resources." *Long Term Care Pharm. Alliance v. UnitedHealth Group, Inc.*, 498 F. Supp. 2d 187, 192 (D.D.C. 2007).

In *GALEO*, the organizational plaintiff alleged it had standing because it was forced to divert resources "from getting out the vote and voter education to 'reach out to and educate [limited English proficiency voters] about how to navigate the mail voting process… as well as other aspects of the electoral process." *GALEO*, 2020 U.S. Dist. LEXIS 211736 at *17. But GALEO's mission included "organizing voter education, civic engagement, [and] voter empowerment." *Id.* The district court dismissed the case and found "there is no indication that GALEO would in fact be diverting any resources away from the core activities it already engages in by continuing to educate and inform Latino voters." *Id.* And allegations of ostensibly new or additional efforts were "precisely of the same nature as those that GALEO engaged in before . . .." *Id.*

CGG alleges that its purpose is "to preserve and advance the constitutional liberties and individual civil rights of United States citizens, with an emphasis on preserving and protecting the civil rights of its members that are exercised through their participation in public elections and oversight of government activities." [Doc. 14, ¶ 146]. Its members—both individuals and other organizations alike—utilize CGG's "resources to answer a wide range of questions about voting rights, voting processes, open meetings law, public

records law, recalls, petition processes, election legislation, poll watcher training, and how to navigate election issues and challenge election law violations that they encounter." *Id.* at ¶ 147. CGG claims to have direct organizational standing because SB 202 has "forc[ed] the organization to divert resources in response" to SB 202. *Id.* at ¶ 151. But its allegations are insufficient to plead an Article III injury.

First, based on CGG's own description, its organizational mission has not been hampered at all.[9] Indeed, it is likely buttressed by SB 202, as they are continuing to "answer a wide range of questions about voting rights," from members and the public and teaching them "how to navigate election issues . . .." The Amended Complaint does not adequately allege that its mission has been "directly . . . ***impeded*** by the Defendant," as opposed to CGG simply "divert[ing] resources from one priority to another." *Long Term Care Pharm. Alliance,* 498 F. Supp. at 192 (emphasis added). Instead, it seems apparent from the Amended Complaint that CGG is attempting to "convert ordinary program costs into an injury in fact." *Common Cause Ind.,* 937 F.3d at 955. But

[9] Indeed, given CGG's fundraising from its efforts in this lawsuit, it is entirely possible that CGG has actually benefited financially from the passage of SB 202 and thus has not been injured at all. *See, e.g.*, https://coalitionforgoodgovernance.org/donate/ ("Your donation to Coalition for Good Governance will help defend election transparency and security" and specifically referencing SB 202 and this litigation).

this is not enough to plead organizational standing.

GAPPAC's allegations suffer from the same defects. While it claims it educates and assists voters, [Doc. 14, ¶ 221-222], its supposed injuries stem from merely pursuing that purpose, as was the case with the *GALEO* plaintiff. GAPPAC alleges it will continue creating materials and educating voters as a result of SB 202—exactly its organizational mission. *Id*. at ¶ 225-226.

Second, CGG's numerous allegations stating they will spend a great deal of resources to fund this lawsuit are entirely irrelevant to the organizational standing inquiry and will not be sufficient to establish injury. CGG claims its resources "have been deferred or curtailed immediately to undertake this action" and to otherwise "address the harmful impacts of S.B. 202." [Doc. 14, ¶¶ 152–153]. They also claim to have postponed projects "to undertake this legal action." *Id.* at ¶ 154. GAPPAC likewise claims a diversion because of this litigation. *Id.* at ¶ 227. But these actions, even if they require Plaintiffs to do more than move resources "from one priority to another," which they do not, the payment of legal fees related to a lawsuit cannot qualify as an injury for Article III purposes. *See, e.g., La Asociacion De Trabajadores De Lake v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010).

Finally, the organizational Plaintiffs' claims, like the claims of all the other Plaintiffs, are far too speculative to plead an injury because they rely on

the subjective fears of members or the public. "Plaintiffs must demonstrate a 'personal stake in the outcome' in order 'to assure that concrete adverseness which sharpens the presentation of issues' necessary." *Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

In *Lyons*, an individual sued to stop the use of police chokeholds because of his fear he might be placed in a chokehold again. *Id.* at 98. The Supreme Court explained that this type of "[a]bstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury . . .." *Id.* at 101–02. This same analysis prevents CGG from showing any non-speculative injury: the alleged fear of prosecution depends on the unknown conduct of some unknown third party at some point in the future. A long chain of events encompassing the actions of third parties not before the Court must occur before Plaintiffs' fears could even get close to becoming reality. This "attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, requires far too many unknown and uncertain events to occur. For the foregoing reasons, the organizational Plaintiffs do not have direct organizational standing to bring this action.

B. The Board Member Plaintiffs lack standing.

Five of the individual Plaintiffs in this action members of county boards of elections in the state of Georgia. The Amended Complaint uses Plaintiff

Shirley as the baseline county board member plaintiff, describing his allegations in detail, and repeats the purported injuries of the other four county board member plaintiffs to those alleged by Shirley. Because Plaintiffs' allegations for each of these individual plaintiffs are essentially identical for standing purposes, this brief considers them together.

Much of the Board Member Plaintiffs' standing problems stem from the speculative nature of the alleged harm. *Clapper*, 568 U.S. at 410. Plaintiff Shirley, along with the other County Board member plaintiffs, claims a property interest in her seat. [Doc. 14, ¶¶ 163]. Thus, Plaintiffs claim, Shirley is "facing the real threat of removal by the SEB" in the event the SEB finds he violated the law. *Id*. at ¶¶ 166, 177, 186, 197, 208. This initial admission gives the game away. Board Member Plaintiffs are *worried* they will be removed by the SEB but they do not allege that will imminently occur or is substantially likely to occur. Instead, for example, Plaintiff Shirley simply claims investigations "***expose*** the Athens-Clarke County Board to immediate suspension or removal by the SEB ***at any time*** on the SEB's own motion." *Id*. at ¶ 166. But an exposure to a potential injury is not an imminent threat of injury nor is it certainly impending. *See generally Tsao v. Captiva MVP Rest. Partners, LLC*, 986 F. 3d 1332 (11th Cir. 2021). And the admission by Plaintiffs that this subject fear of exposure is a contingent on the SEB suspending or

removing them "at any time" reveals a lack of both immediacy and concreteness in Plaintiffs' claims. [Doc. 14, ¶¶ 65, 176, 196, 207, 216].

Plaintiffs then recite a laundry list of purported injuries to Shirley and, by extension, the other Board Member Plaintiffs in an effort to acquire Article III standing. [Doc. 14, ¶ 167]. But by Plaintiffs' own admission, these injuries are contingent upon a purely hypothetical scenario: "***If*** the SEB ***follows through*** on its ***expressed intention*** to suspend or remove superintendents with existing violations… Plaintiff Shirley ***will be*** injured . . .." *Id.* (emphases added). This is hardly the type of concrete and certainly impending harm that the law requires.

The Board Member Plaintiffs' First Amendment claims also do not allege an adequate injury. Once again, Plaintiff Shirley alleges that at some future point he "will be injured" by what he characterizes as prior restraints on his free speech rights and right to petition the government. *Id.* at ¶ 168. Not only is this alleged harm, like all others in this case, purely hypothetical and contingent upon a variety of possible future actions by both Plaintiff Shirley and unidentifiable third parties, Plaintiff Shirley never actually alleges how these injuries will occur. Instead, he simply states the "Gag Rule" violates his First Amendment rights. These are erroneous legal conclusions, not factual allegations. *Iqbal*, 556 U.S. at 678. Thus, they do not support Article III injury.

The Board Member Plaintiffs also allege they "intend[] to vote" in all upcoming elections, but fails to allege *how they will vote*, instead alleging a threatened future injury "in the event [Plaintiff Shirley] votes in person during upcoming elections." [Doc. 14, ¶ 170]. This is not an allegation of concrete and imminent injury, it's a hypothetical worst-case scenario. Further, Plaintiffs' allegation that "each time [Shirley] enters the polling place [for his Board duties], he will see others voting on giant BMD screens, which will expose Plaintiff Shirley to felony prosecution," *id.*, is rank speculation of both his own conduct and the conduct of third-party election officials, coupled with a misreading of the law. It is not a constitutional injury-in-fact.

Finally, Plaintiff Shirley also alleges that his ballot and right to vote "will be stolen from him by someone in possession of his driver license and date of birth, since these two pieces of personal information are allegedly in circulation as a result of lapses of security by the Georgia Secretary of State." *Id.* at ¶ 172. This reference to an alleged data breach at the offices of the Secretary of State does not, without more, constitute injury in fact. Indeed, it falls squarely within *two* recent Eleventh Circuit cases rejecting an identical theory of injury. *See Tsao,* 986 F.3d at 1339 (11th Cir. 2021); *Muransky v. Godiva Chocolatier, Inc.,* 979 F.3d 917, 931 (11th Cir. 2020) (en banc). These cases further undermine Shirley's allegation that "[s]hould he choose to vote absentee by mail, without

a truly secure transmission method for applications first being implemented . . . [he] will be compelled 'to consent to the possibility of a profound invasion of privacy when exercising the fundamental right to vote' in violation of substantive due process." [Doc. 14, ¶¶ 310, 333].

Once again, this is nothing more than unfounded fears and speculative allegations, categorically rejected by Eleventh Circuit. We are left to guess at whether the Board Member Plaintiffs will ultimately vote absentee by mail. Based on their allegations, not even they know whether they will. And it is not the role of this Court to fix or assume facts not in the pleadings. Further, the claim that "without a truly secure transmission method" for voting, they "***will be*** compelled to consent to the ***possibility***" of an invasion of privacy is completely foreclosed by *Tsao* and *Muranksy*. [Doc. 14, ¶¶ 171, 180, 189, 200, 211, 238, 250, 264, 276, 330, 341, 350, 364]. And like the other Plaintiffs in this action, these claims fail to establish standing.

C. Jackson County Democratic Committee lacks standing.

The Jackson County Democratic Committee is an organizational Plaintiff in this action that "has the right under Georgia law to appoint two members of the Jackson County Board." [Doc. 14, ¶ 215]. Like the individual board member plaintiffs already discussed, they are concerned that the "SEB has conducted multiple investigations involving allegations of violations of the

Georgia Election Code" by the county elections board. *Id.* at ¶ 216. These investigations, they allege, "expose the Jackson County Board to the risk of immediate suspension or removal by the SEB at any time on the SEB's own motion." *Id.* This is essentially a restatement of the injury alleged by the Board Member Plaintiffs. And it is just as speculative as their allegations. Exposure to a "risk" of suspension or removal is no injury at all. This is especially so where, as here, such risk depends on actions of third parties that may never occur. "***If*** the SEB ***follows through*** on its ***expressed intent…"*** *Id.* at ¶ 217.

D. Plaintiff Graham lacks an injury.

Plaintiff Graham is the Chair of the Libertarian Party of Georgia. *Id.* at ¶ 228. He claims to be injured because "experienced poll watchers and mail ballot observers whom he has appointed in the past to observe election activities are expressing hesitancy to act as such observers" *Id.* at ¶ 229. Not only is this not an injury to Plaintiff Graham, it is not even an injury to the unnamed persons he is referring to who are "expressing hesitancy." *Id.* The hesitancy expressed by the unnamed potential monitors is based on a fear of a highly speculative chain of events occurring. *Clapper*, 568 U.S. at 410. While they may feel those concerns sincerely, it does not afford then standing and it certainly doesn't afford Plaintiff Graham standing on their behalf. *Id.* This is particularly true where, as here, the alleged fear of prosecution or accusation

depends on the unknown conduct of some unknown third party at some point in the future. A long chain of events encompassing the actions of third parties not before the Court must occur before the unnamed third parties' fears could even get close to becoming reality. Simply put, he has not been injured by his poll watchers' purported hesitancy. The remaining allegations of injury by Plaintiff Graham are discussed further in the portion of this brief addressing the various Plaintiffs' general failure to state a claim for relief.

E. Plaintiffs Martin, Dufort, Nakamura, and Throop lack standing.

The Amended Complaint and declarations submitted by the individual Plaintiffs Martin, Dufort, Nakamura, and Throop trod familiar ground already discussed in other areas of this Response. They pull from injuries alleged by the Board Member Defendants and other individual plaintiffs, as well as some injuries alleged by the organizations. Moreover, they rely on their subjective fears of prosecution under the Challenged Provisions (or difficulty complying with them), as well as concerns about merely being accused of violating such laws. While they may feel those concerns sincerely, a long chain of events encompassing the actions of third parties not before the Court must occur before Plaintiffs' fears could even get close to becoming reality. This "attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, means Plaintiffs

could only be injured if they change their mind regarding going to polling places and other areas where the Challenged Provisions are in effect and if they commit some violation of the Challenged Provisions—which none have expressed an intent to do—and then a third party observes and reports such violation and then another third party refers that violation to the SEB, the Secretary, or some criminal enforcement arm (like a district attorney or the Attorney General). And that's not all—that criminal enforcement arm will then have to independently decide to prosecute Plaintiffs and then actually commence such prosecution. Only then would Plaintiffs suffer any injury whatsoever. This hypothetical chain of events demonstrates the abstract and conjectural nature of Plaintiffs' purported injury. And courts are "reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Clapper*, 568 U.S. at 414.

Plaintiffs' declarations also claim that they have opted to change their behavior in light of the Challenged Provisions. That is, they are choosing not to go to polling places out of a fear of violating the law. This, they may claim, is an actual injury that has already occurred, thereby satisfying the injury-in-fact requirement for purposes of standing. But this is also not an injury. "[I]f the hypothetical harm is not 'certainly impending,' or there is not a substantial risk of the harm, a plaintiff cannot conjure standing by inflicting some direct

harm on itself to mitigate a perceived risk." *Tsao*, 986 F. 3d at 1339 (quoting *Clapper*, 568 U.S. at 416). Plaintiffs' respective decisions to curb their conduct or altogether change their behavior as a result of their subjective fears of prosecution are exactly the kind of self-inflicted harms the courts have declined to recognize as an injury for purposes of Article III standing.

Thus, the injuries claimed by these individual Plaintiffs are not sufficient to afford them standing.

F. Non-Plaintiff CGG Members lack standing.

As with the members of CGG who are Plaintiffs to this action, none of these allegations about its non-members are persuasive. First, they allege the non-Plaintiff members of CGG are "threatened with injury in their form of the deprivation of their right to attend and participate in public meetings" for Fulton and Dekalb County election boards. [Doc. 14, ¶ 307]. They assert that *if* the SEB removes local board members, which by no means is substantially likely to occur, then the whole board would likely shut down entirely and they will be injured. But nothing suggests this hypothetical scenario will pan out in the way Plaintiffs imagine. The law provides for immediate replacement of any election superintendents that are removed. *See* O.C.G.A. 21-2-33.2(e). Thus, the alleged injury is too speculative to afford standing. *Clapper*, 568 U.S. at 410. The remaining allegations of injury that mirror the individual Plaintiffs

and, for the same reasons, they do not constitute Article III injury. [Doc. 14, ¶¶ 308–313]. The speculation that permeates Plaintiffs' Amended Complaint for all of the individual Plaintiffs has equal force with respect to the allegations made relating to CGG's non-Plaintiff members. *Id*. at ¶¶ 315–325.

G. Brad Friedman lacks standing.

Plaintiff Friedman's claim of standing suffers from the same deficiencies already discussed at length. His harm is speculative and requires numerous actions by independent parties before his fears become a reality. He also lacks standing. [Doc. 14, ¶¶ 293–301].

H. CGG, JCDC, and GAPPAC lack associational standing.

For the same reasons, CGG's Plaintiff members and non-Plaintiff members' alleged hypothetical future injuries are not sufficient to afford CGG associational standing. Nor are the alleged injuries in the Amended Complaint relating JCDC and GAPPAC members sufficient to afford CGG associational standing. [Doc. 14, ¶¶ 329–361].

III. Plaintiffs fail to state a claim on which relief can be granted.

Even if Plaintiffs have standing, all 14 counts of their Amended Complaint fail to state claims for relief in federal court.

A. Plaintiffs' procedural due process claims in Count I fail.

Board Member Plaintiffs bring procedural due process claims in Count

I. [Doc. 14, ¶¶ 366-374]. Procedural due process prevents the state from depriving a person of life, liberty, or property without providing "appropriate procedural safeguards." *Daniels v. Williams*, 474 U.S. 327 (1986). Such a claim "requires proof of three elements: a deprivation of a constitutionally-protected liberty or property interest; state action; and constitutionally inadequate process." *Doe v. Fla. Bar*, 630 F.3d 1336, 1342 (11th Cir. 2011) (quoting *Cryder v. Oxendine*, 24 F.3d 175, 177 (11th Cir. 1994)).

Even assuming the Board Member Plaintiffs' liberty interests in their service on their boards is a sufficient liberty or property interest, Plaintiffs cannot plausibly allege the remaining two elements. First, they do not sufficiently allege that any government action has been taken against them—only that SB 202 "allows" the SEB to remove superintendents. [Doc. 14, ¶ 370]. While they may fear action will be taken against them, no such action has been taken yet. But they also are unable to sufficiently allege that the process provided by SB 202 is constitutionally inadequate.

The provisions of SB 202 to temporarily replace *appointed* county election superintendents, O.C.G.A. § 21-2-33.2 closely mirrors the provisions that allow the takeover of the *elected* members of school boards in O.C.G.A. § 20-2-73. Both allow notice and a hearing prior to any suspension. *Id.* Both require cause before the process can be initiated. *Id.* Both provide for post-

suspension reinstatement. *Id.* Both provide for judicial review. *Id.* And the SB 202 provisions provide for even more process than the school board provisions because they require a longer period before a preliminary hearing and only allow a suspension for nine months. O.C.G.A. §§ 21-2-33.2(b), (e)(2)-(4).

When faced with a similar challenge to the school board removal provisions, the Georgia Supreme Court concluded that the notice and opportunity to be heard given by O.C.G.A. § 20-2-73 sufficed, as a matter of due process, to remove elected school board members. *DeKalb Cty. Sch. Dist. v. Ga. State Bd. of Educ.*, 294 Ga. 349, 369 (2013). The provision of the opportunity for reinstatement and judicial review, which is also provided by SB 202, "adequately protects the procedural due process rights of a member who is temporarily suspended and subject to permanent removal." *Id.* at 371. Similarly, in *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), the Supreme Court made clear that for the most part, procedural due process does not require a pre-termination hearing under the circumstances. Thus, as a matter of law, the provisions for temporary suspension of board members provides sufficient due process.

Plaintiffs' other allegations in Count I do not stand up to scrutiny. They claim that there was no notice and opportunity to be heard prior to removal. [Doc. 14, ¶ 369]. Yet, "notice and a hearing" *are* required before any suspension.

O.C.G.A. § 21-2-33.2(c). Plaintiffs say there is no opportunity for "obtaining reinstatement to office after a removal," [Doc. 14, ¶ 369], but a superintendent "may petition the State Election Board for reinstatement." O.C.G.A. § 21-2-33.2(e)(2), (f). These are incorrect legal conclusions. *Iqbal*, 556 U.S. at 678.

Thus, even if the Board Member Plaintiffs' generalized fears of being suspended were sufficient, their claims that the provisions of O.C.G.A. § 21-2-33.2 violate their procedural due process rights fail because they have not shown any action taken against them and they have not shown that the process is constitutionally inadequate, especially in the face of binding precedent.

B. Plaintiffs' state-law claims under Count II are barred by the Eleventh Amendment.

While styled as a substantive due process claim, Count II of Plaintiffs' Amended Complaint claims that the provisions authorizing the State Board of Elections to temporarily replace an underperforming election superintendent violate the Georgia Constitution. [Doc. 14, ¶¶ 377-391]. But these claims are not cognizable in federal court because they do not allege "an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. PSC*, 535 U.S. 635, 645 (2002) (cleaned up).

While Plaintiffs briefly mention the Fourteenth Amendment, [Doc. 14, ¶¶ 376, 387], almost all of Count II focuses on alleged state-law violations. And

"it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). Thus, Count II falls outside the *Ex Parte Young*, 209 U.S. 123 (1908), exception to the Eleventh Amendment because it alleges violations of only state law.

In the alternative, this Court should certify questions of state law to the Georgia Supreme Court. As the United States Supreme Court has noted, "[w]arnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Arizonans for Official English v. Arizona,* 520 U.S. 43, 79 (1997); *see also Forgione v. Dennis Pirtle Agency, Inc.*, 93 F.3d 758, 761 (11th Cir. 1996).

C. Legal standards for remaining claims.

1. Fundamental right to vote claims (Counts III, IV, XI, XII, XIII, and XIV).

Plaintiffs challenge the provisions authorizing takeover of local boards (Count III), the observation provisions (Count IV), the absentee ID provisions (Count XI), and the changes to the windows for requesting an absentee ballot (Counts XII, XIII, and XIV) as facially unconstitutional and as applied. But

facial challenges to election practices are disfavored because "the proper [judicial] remedy—even assuming [the law imposes] an unjustified burden on some voters—[is not] to invalidate the entire statute." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203 (2008) (controlling opinion) (cleaned up). Such challenges "must fail where the statute has a plainly legitimate sweep." *Washington State Grange v. Washington State Republican* Party, 552 U.S. 442, 449 (2008). Challenges to election provisions are analyzed under the *Anderson/Burdick* test: "Regulations imposing severe burdens on the plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a state's 'important regulatory interests' will usually be enough to justify 'reasonable nondiscriminatory restrictions.'" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)); *see also Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Courts distinguish severe burdens from non-severe ones, and ordinary burdens (such as photo identification laws) that "aris[e] from life's vagaries," fall into the latter category. *Crawford*, 553 U.S. at 191, 197-98 (controlling opinion). Significantly, lesser burdens impose no burden of proof or evidentiary showing on states. *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009), *see also Munro*, 479 U.S. at 195.

2. Void for vagueness (Counts V, VIII, and X).

Plaintiffs challenge the observation provisions (Count V), the provisions on disclosure of early-scanning results (Count VIII), and the prohibition on taking pictures of voted ballots (Count X) as void for vagueness. A law is not void for vagueness when "it is clear what the [provisions] as a whole prohibit[]," *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). As long as the provisions are "clearly defined," *id.* at 107, they are not unconstitutionally vague.

3. First Amendment claims (Count VII and IX).

Plaintiffs also challenge the provisions prohibiting disclosure of early-voting totals (Count VII) and the ban on photographing voted ballots (Count IX) as violations of the First Amendment. Issues involving the First Amendment are unique in the context of elections. First, some types of speech in elections are based on the forum because elections are generally held on government property for a particular purpose. *Minn. Voters All. v. Mansky,* 138 S. Ct. 1876, 1886 (2018) (quoting *Int'l Soc. for Krishna Consciousness v. Lee*, 505 U. S. 672, 680 (1992)). Further, ballots, like draft cards, are also government property. *See U.S. v. O'Brien*, 391 U.S. 367, 387-88 (1968).

In addition, Plaintiffs cannot plausibly allege that disclosing early-vote totals or photographing ballots is content-based speech. It is not like a restriction on certain types of signs, *Reed v. Town of Gilbert*, 576 U.S. 155, 163

(2015)—rather, even if it regulates expressive activity in some way, it should be evaluated as a regulation of elections under *Anderson/Burdick*. *See, e.g., Lichtenstein v. Hargett*, 489 F. Supp. 3d 742, 777 (M.D. Tenn. 2020).

4. Voter intimidation claim (Count VI).

Finally, Plaintiffs claim that the observation provisions are illegal voter intimidation in violation of 52 U.S.C. § 10307. But that section of the Voting Rights Act (VRA) provides no private right of action—and "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). And "[w]here Congress has not created a private right of action, courts may not do so." *Bellitto v. Snipes*, 935 F.3d 1192, 1202 (11th Cir. 2019) (finding no private right of action under the Help America Vote Act); *see also Brnovich*, 141 S. Ct. at 2350 (Gorsuch, J, concurring) (questioning whether implied right of action exists under VRA); *Ala. State Conference of the NAACP v. Alabama*, 949 F.3d 647, 656-57 (11th Cir. 2020) (Branch, J., dissenting) (arguing that VRA has not abrogated state sovereign immunity), *vacated as moot by Ala. v. Ala. State Conference of NAACP*, 2021 WL 1951778, *1 (U.S. 2021). Even if a private right of action exists, Plaintiffs' claims that the observation provisions "criminalize mere entry into a polling place" do not meet the requirement of alleging "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at

678. Indeed, the allegations claim intimidation from a law under which they may or may not be prosecuted—and by many others beyond those they named as Defendants in their Amended Complaint. [Doc. 14, ¶¶ 420].

D. Application to specific practices.

1. Takeover provisions (Count III).

As noted previously, Plaintiffs' challenge to the takeover provisions fails under Counts I and II because they have failed to state a claim. They likewise cannot succeed on their fundamental-right-to-vote claim. Plaintiffs never identify the burden on the right to vote from the option of the SEB to exercise its discretion under these provisions. At best, Plaintiffs claim that the SEB will remove some yet-to-be-named registrar and fail to replace him, her, or it, and thus will prevent voters from registering to vote. [Doc. 14, ¶ 394]. But the General Assembly adopted the takeover provisions specifically to provide remedies for "counties with dysfunctional election systems." Ex. A at 5:97. Even if the burden on the right to vote from some possible, speculative future action[10] was anything more than minor (which must be a facial challenge because it has never been used), the government interests in uniformity and a

[10] The speculative nature of the harm (plaintiffs are only injured if a county registrar fails to do its job over multiple cycles, the SEB decides to take action, and county officials do not appoint a replacement) renders the injury too attenuated to be cognizable here. *Clapper*, 568 U.S. at 409.

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.

2. Observation provisions (Counts IV, V, and VI).

Plaintiffs next seek to enjoin the Election Observation provisions and changes to runoff timelines as facially unconstitutional burdens on the right to vote. [Doc. 14] (Counts IV). But facial challenges to election practices are disfavored because "the proper [judicial] remedy—even assuming [the law imposes] an unjustified burden on some voters—[is not] to invalidate the entire statute." *Crawford*, 553 U.S. at 203 (cleaned up). The provisions regarding intentionally observing voters' choices on the ballot imposes no burden whatsoever on the right to vote because the "intentionally" in the statutory language modifies the entire statute, not just the observation component. Plaintiffs claim that merely voting in person places them at risk, [Doc. 14, ¶ 401], but Plaintiffs face no such harm if they do not *intentionally* attempt to view the votes of others—just as was true prior to SB 202. O.C.G.A. § 21-2-568(a)(3) and (4). Even if there was a burden, the use of the word "intentionally" addresses any burden because it is well within the regulatory interest of the state to protect the right to a secret ballot through penalties for intentional observation. *See, e.g.*, Ga. Const. Art. II, Sec. I, Par. I.

Similarly, Plaintiffs' facial vagueness challenge to the observation fails because "it is clear what the [provisions] as a whole prohibit[]," *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S. Ct. 2294, 2300 (1972). How does one avoid the criminal penalties of the observation provisions? By not *intentionally* trying to see how someone else is voting.

Finally, even if there is a private right of action under the Voting Rights Act, Plaintiffs have not stated a claim because they rely on a speculative chain of possibilities for any potential injury. Only if they attempt to intentionally observe someone's votes, are reported, and some other entity decides to prosecute them could they possibly be injured.

3. Disclosure of early scanning provisions (Counts VII and VIII).

Plaintiffs next claim that the prohibitions on the disclosure of early scanning totals are unconstitutionally vague and violate the First Amendment. [Doc. 14, ¶¶ 426-442]. But again, "it is clear what the [provisions] as a whole prohibit[]," *Grayned*, 408 U.S. at 110. How does one avoid the penalties for disclosure of information about the votes of individuals during the early scanning process? By not making those disclosures.

Plaintiffs' claim that what they call the "Estimating Bans" "criminalizes the act of thinking about or attempting to think about a tally or tabulation,"

[Doc. 14, ¶ 437], is nonsensical—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. Ex. A at 66:1671-1675, 67:1698-1712. This type of information, if shared, can give a candidate an advantage during the counting process, which is exactly why disclosure was already prohibited when scanning took place only on Election Day and under the emergency rule that allowed early scanning in 2020.[11] Far from being unclear, the prohibitions in the statutory provisions—which track those used throughout 2020 in the emergency rule—are "clearly defined," *Grayned*, 408 U.S. at 107, and thus are not unconstitutionally vague.

The provisions also do not violate the First Amendment. First, they apply to a specific location—where the scanning of absentee ballots is taking place—meaning the First Amendment claim must be evaluated based on the forum. *Mansky*, 138 S. Ct. at 1885; *Int'l Soc. for Krishna Consciousness*, 505 U. S. at 678. During early scanning, that location is similar to a precinct—in other words, "a government-controlled property set aside for the sole purpose of voting." *Mansky*, 138 S. Ct. at 1886. Moreover, ballots, like draft cards, are also government property. *See O'Brien*, 391 U.S. at 387-88. Plaintiffs, in effect,

[11] The SEB has not yet adopted rules on the "secrecy of election results prior to the closing of the polls" as required by SB 202. Ex. A at 67:1713-1717.

appear to be claiming a First Amendment right to disclose election results before the election is over—indeed, while counting is ongoing. However, there is a significant government interest in upholding the secrecy of the ballot and the integrity of elections.

Further, the speech in question is also not content-based—it is not like a restriction on certain types of signs, *Reed*, 576 U.S. at 163—rather, even if it regulates expressive activity in some way, it should be evaluated as a regulation of elections under *Anderson/Burdick*. *Lichtenstein*, 489 F. Supp. 3d at 777. Under that standard, preventing Plaintiffs from disclosing election results before the election is over does not burden the right to vote; and, even if it does, the regulatory interests in protecting ballot secrecy, orderly election administration, and voter confidence amply justify so slight a burden. *Common Cause/Georgia*, 554 F.3d at 1354; *Gwinnett Cty. NAACP v. Gwinnett Cty. Bd. of Registration & Elections*, 446 F. Supp. 3d 1111, 1124 (N.D. Ga. 2020).

4. Photography provisions (Counts IX and X).

Plaintiffs also challenge the photography provisions as vague and as violations of the First Amendment. [Doc. 14, ¶¶ 443-456]. First, there is no question what the statutes prohibit. While Plaintiffs attempt to manufacture scenarios where a ballot might accidentally be captured on a camera, *id.* at ¶ 453, this does not support their facial challenge.

Second, the provision does not prohibit photographing voters "in the act of voting." *Id.* at ¶ 445. O.C.G.A. § 21-2-568.2(2)(B) prohibits recording a voter's *actual votes* in order to avoid vote-payment schemes and because it serves a compelling state interest—the secrecy of the ballot. Whether scanned images are public records *after* an election is a completely different inquiry from whether a State may ban the publication of pictures of voters' ballots taken *during* an election. *See* [Doc. 15-1, p. 23]. Plainly, a State may do the latter.

5. Absentee application requirements (Count XI).

Plaintiffs take issue with voters providing identification numbers on ballots, based on fears of identity theft. [Doc. 14, p. 13]. Initially, there is no injury for a mere "elevated risk of identity theft." *Tsao*, 986 F.3d at 1343 (quoting *Muransky*, 979 F.3d at 933). But even if there were, Plaintiffs cannot demonstrate that a process used by at least six other states imposes a severe burden on the right to vote.

The SB 202 process is objective and includes safeguards for voters who lack identification. Ex. A at 38:949-39:956; 51:1297-52:1305. Further, the Eleventh Circuit and Supreme Court have already determined that requiring photo identification presents no unconstitutional burden on the right to vote. *Crawford*, 553 U.S. at 181; *GBM*, 992 F.3d at 1320. Thus, even if there is a slight burden, it is more than justified by the state's regulatory interests. SB

202's verification requirement closely matches the voter-identification requirements of federal law when registering to vote by mail, which Plaintiffs do not challenge. *See* 52 U.S.C. § 21083(b)(2). Further, there is no right to vote in any particular manner. *Burdick*, 504 U.S. at 433. Since Georgia has made changes to existing absentee processes, while maintaining other accessible options to vote, SB 202 does not unconstitutionally burden voters.

6. Narrowing of absentee ballot application timeline (Counts XII, XIII, and XIV).

Plaintiffs raise challenges to the absentee-ballot window under several provisions of the Fourteenth Amendment, but "we must evaluate laws that burden voting rights using the approach of *Anderson* and *Burdick*." *Jacobson*, 974 F.3d at 1261. Even if other grounds are proposed, the same analysis of fundamental right to vote is employed. *New Ga. Project*, 976 F.3d at 1282; *Common Cause/Georgia*, 554 F.3d at 1352.

The burden imposed on voters by a narrower window is extremely light. Many other states have similar timelines. Further, the state's interest in avoiding elector confusion, Ex. A at 5:107-110, and providing opportunities for voters to cast ballots that are received in time far outweighs any burden on the right to vote. In addition, deadlines involving absentee ballots "do[] not implicate the right to vote at all" because Georgia provides "numerous avenues

to mitigate chances that voters will be unable to cast their ballots." *NGP*, 976 F.3d at 1281. The deadlines are "reasonable nondiscriminatory restrictions" and therefore the state's "important regulatory interests" are more than enough to justify them—especially when they are similar to those in many other states—ending all of Plaintiffs' constitutional claims.[12] *Timmons*, 520 U.S. at 358; *Burdick*, 504 U.S. at 434.

CONCLUSION

Plaintiffs do not have standing and have not stated a claim on the basis of which relief may be granted. This Court, accordingly, should dismiss Plaintiffs' Amended Complaint with prejudice.

Respectfully submitted this 26th day of July, 2021.

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[12] Absentee voters and in-person voters are not similarly situated, and the State can use different procedures for each group of voters. *See Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 830-31 (S.D. Ind. 2006) (noting lack of authority otherwise).

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing STATE DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

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